

Farmers' Guide to USDA Discrimination Financial Assistance Program

Third Edition

Farmers' Legal Action Group, Inc. (FLAG)

September 28, 2023

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Farmers' Guide to USDA Discrimination Financial Assistance Program

September 28, 2023

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Chapter One - Introduction

On July 7, 2023, the United States Department of Agriculture (USDA) announced that the USDA Discrimination Financial Assistance Program was open. The Program, which was created by Section 22007 of the Inflation Reduction Act (IRA), makes 2.2 billion dollars available for “discrimination financial assistance” for farmers who can show that they “experienced discrimination” in USDA Farm Loan Programs.³

This Farmers' Guide to the USDA Discrimination Financial Assistance Program explains the details of the Program.

The rest of Chapter One includes a brief summary of the Guide and describes some of the most important basics of the Program.

I. Third Edition of This Guide

This is the Third Edition of the Farmers' Guide to USDA Discrimination Financial Assistance Program. The first edition was published on August 27, 2023. The Second Edition was published on September 8, 2023.

One reason for a Third Edition is that on September 22, 2023, USDA announced that it was changing two important deadlines.⁴ First, USDA extended the Program Application deadline from October 31, 2023, to January 13, 2024. Second, USDA extended the deadline for farmers to ask for documents that USDA might have about the farmer from September 29, 2023, to November 3, 2023. This Third Edition of the Guide is updated to include those deadline changes.

The Third Edition also includes significant changes in Chapter Two to the discussion of how the application process works and how decisions on Applications are made. In addition, the Third Edition includes some changes to the Chapter Six discussion of possible examples of discrimination. Both of these changes reflect information now found in USDA's website discussion of the Discrimination Financial Assistance Program.

II. Important Points to Remember

Several important points about the Program are worth noting before moving on to a detailed discussion. Each point mentioned below is discussed in more detail later in the Guide.

³ The official title of the Inflation Reduction 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 is at Title I, Subtitle C, Part 2, section 22007. For the whole Act, see <https://www.congress.gov/bill/117thcongress/house-bill/5376/text>.

⁴ USDA Press Release No. 0196.23, USDA Extends Application Deadline for Discrimination Financial Assistance Program to January 13 (September 22, 2023), available at <https://www.usda.gov/media/press-releases/2023/09/22/usda-extends-application-deadline-discrimination-financial>.

A. Farmers Need to Apply

Everyone who plans to take part in the Program must apply by filling out an Application.

B. USDA Farm Loan Program Discrimination Before January 1, 2021

On the Application, farmers will be asked to describe discrimination by USDA in USDA farm lending programs. The discrimination must have occurred before January 1, 2021. There is no starting date for discrimination that can be raised by farmers on their Applications.

C. New Deadline: January 13, 2024

The deadline to apply for this Program is now January 13, 2024.⁵ Because the Application is long, and requires details from the farmer and documents, farmers should start preparing for the application right away.

D. A Program, Not A Lawsuit

The Discrimination Financial Assistance Program is not a part of a lawsuit. The payments are not, therefore, damages or compensation for past discrimination. They are, instead, payments that are part of a program created by Congress. While farmers are free to hire a lawyer to help them, it is not required.

E. USDA Provides Standards and Oversight

Congress required USDA to hire non-governmental vendors to administer the Program. USDA sets standards for the Program and provides oversight.⁶

F. Payments of 2.2 Billion Dollars: NOT a First-Come, First-Served Program

As noted above, Congress made 2.2 billion dollars available for the Discrimination Financial Assistance Program.⁷

The USDA says that money will be divided between all farmers who are determined to have experienced discrimination. As a result, this is NOT a first-come, first-served Program.⁸

⁵ The deadline had been October 31, 2023.

⁶ Specifically, § 22007 if the IRA states that the Discrimination Financial Assistance Program “shall be administered through 1 or more qualified nongovernmental entities selected by the Secretary subject to standards set and enforced by the Secretary.” IRA § 22007 (Aug. 16, 2022).

⁷ Under the IRA, 2.2 billion dollars are made available for “discrimination financial assistance.” IRA § 22007 (Aug. 16, 2022).

⁸ See USDA, Application for Financial Assistance, Inflation Reduction Act Section 22007, USDA Discrimination Financial Assistance Program, Frequently Asked Questions, page v (updated Sept. 21, 2023), available for download in English or Spanish at <https://www.22007apply.gov/resources.html#supporting-docs>.

G. Asking for USDA Documents: Deadline is November 3, 2023

Farmers may wish to use documents that USDA has on file as they fill out their applications. USDA has created an email system to request these documents. Requests for USDA documents can be sent to info@22007apply.gov.

The deadline for asking for documents is November 3, 2023. This is an extension of previous, earlier deadlines.⁹

H. No Cost to Apply: Beware of Scams

There is no cost to apply for this Program. Beware of anyone who says there is a cost to apply or anyone that says they can guarantee a farmer will receive financial assistance under the Program. A lawyer's signature is not required for the Application. While farmers are free to hire a lawyer to help them if they wish, it is not required. Farmers also are not required to join any organization to take part in the Program.

I. Help is Available for the Application

Help is available for farmers as they work to fill out applications. This can come from farm organizations and from vendors that have been hired by USDA to assist farmers.

J. Immigration Status Requirements

To be eligible to get a USDA farm lending loan, and therefore to be eligible for this Program, all applicants must meet certain immigration status requirements. In general, farmers must fall within one of three immigration status categories. The farmer must be either: (1) a U.S. citizen; (2) a Qualified Alien; or (3) a U.S. Non-Citizen National. The status of Qualified Alien and of U.S. Non-Citizen National has a very specific, legal meaning, which is discussed in detail in Chapter Four.

K. No Appeals

There are no appeals from a decision in this Program.¹⁰ It is therefore important to get all of the details into an Application that is submitted by the Program deadline of January 13, 2024.¹¹

L. No Changes to Application—Must Submit Whole New Application

Farmers who realize they made an error in the Application or left something out of the Application can submit the Application again, and the stronger of the two will be considered.

M. Details Matter

In an Application process in which there are no appeals it is crucial for the farmer to include in the Application significant details of the farming operation and of the

⁹ Discrimination Financial Assistance Program, FAQ, page vii (Updated Sept. 21, 2023). The original deadline was September 6, 2023. USDA earlier extended that deadline to September 29, 2023.

¹⁰ Discrimination Financial Assistance Program, FAQ, page ix (Updated Sept. 21, 2023).

¹¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, page ix.

discrimination. In addition, documents that are not officially required are likely to be very important for many applicants.

Those evaluating applications and making determinations will rely almost solely on the Application. These decision-makers will be concerned to identify claims that might be fraudulently mass produced or simply made up on a case-by-case basis. Details of the operation help fill in the story of the farmer, the discrimination, and the harm done by the discrimination.

III. Sources for This Guide

This Guide to the USDA Discrimination Financial Assistance Program uses several sources for the information included. In footnotes we describe where we got the information we used.

A. Federal Statute

Whenever it applies, we cite the original Inflation Reduction Act, which created the legal authority for this Program.¹²

B. Application for the Program—Available in English and Spanish

There is an official Application for the Discrimination Financial Assistance Program. Much important information can be found in the Application, so it is often cited in this Guide.¹³ The Application is available in both English and Spanish. USDA says that Applications can be filled out in Spanish as well.¹⁴

C. USDA Frequently Asked Questions (FAQ)

USDA has answered some questions about the Program in a frequently asked questions (FAQ) document that is posted on the USDA website. This Guide often refers to the FAQ and cites to the page and question number for the relevant FAQ.¹⁵ If we cite to an FAQ we also note the date on which USDA last updated the document. This document is available in both English and Spanish.

¹² The official title of the Inflation Reduction 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 is at Title I, Subtitle C, Part 2, section 22007. For the whole Act, see <https://www.congress.gov/bill/117thcongress/house-bill/5376/text>.

¹³ A downloadable version of the application—in both English and Spanish—can be found on the Discrimination Financial Assistance Program website, at <https://www.22007apply.gov/resources.html#supporting-docs>.

¹⁴ USDA email confirmation.

¹⁵ USDA, Application for Financial Assistance, Inflation Reduction Act Section 22007, USDA Discrimination Financial Assistance Program, Frequently Asked Questions (Updated Sept. 21, 2023), available for download in English or Spanish at <https://22007apply.gov/resources.html#downloadable-application>.

D. 22007 Website

The 22007 website has important information on the Program.¹⁶ We use that information and in footnotes indicate the date when we found the information on the website.

E. Broader Legal Principles

In a few sections we look to broader legal rules and principles. This includes, for example, legal resources on credit discrimination law. In these instances, we refer in footnotes to the materials we have used in reaching our conclusions.¹⁷

F. USDA Rules and Regulations

In some instances, this Guide cites USDA rules and regulations. Regulations are generally in the United States Code of Federal Regulations (C.F.R.). Other rules are usually found in internal USDA Handbooks that USDA employees use to carry out USDA programs. The ones cited in this Guide are available online.

G. Communication with USDA

In a few cases, we rely on email or verbal communications from USDA officials. That occurs when: (1) we asked USDA a question by email and USDA responded; (2) a USDA official spoke to us about how USDA intends to carry out the Program; or (3) USDA spoke to the general public about implementing the Program and we hear the remarks. In every case we have asked USDA to confirm our understanding of the original USDA communication.

We have every reason to believe that USDA will follow through on email or verbal communications about the implementation of this Program. It is true, however, that widely publicized and accessible information that is reduced to writing, such as in the Application, is probably more binding on USDA than are emails to individuals or verbal comments. In addition, verbal comments are likely more open to misinterpretation and confusion than widely distributed and available written information.

As a result, wherever possible, we refer to widely available and public written materials and only refer to other communications, such as emails and verbal messages, when there is no other authority for the point made in the Guide.

¹⁶ The main website for the Program is at <https://www.22007apply.gov/> (Sept. 8, 2023).

¹⁷ For example, we use other sources in describing credit discrimination law, such as National Consumer Law Center publications. We also use materials published by Farmers' Action Group, Inc. (FLAG) in describing some USDA farm lending programs.

IV. A Shorter Farmers' Guide Also Exists

An earlier, shorter, Brief Guide to the USDA Discrimination Financial Assistance Program was published on July 7, 2023, and updated on September 29, 2023.¹⁸ That Brief Guide is available in Spanish as well.¹⁹

V. Guide is a Group Effort

This Farmers' Guide, and the earlier Brief Guide, are collaborative efforts between Farmers' Legal Action Group, Inc. (FLAG), the Rural Coalition, Land Loss Prevention Project, the Federation of Southern Cooperatives Land Assistance Fund, and the Intertribal Agriculture Council (IAC)²⁰ Also commenting on a draft of this Guide, and assisting in identifying farmer questions and concerns about the Program, are the Farmer Veteran Coalition and the National Young Farmers Coalition. Assisting in identifying important issues to address in this Guide are the Rural Advancement Fund International, USA (RAFI), Farm Aid, and the National Family Farm Coalition. USDA provided comments on a draft of this Guide.

VI. Current as of September 22, 2023

This Guide is current as of September 22, 2023.

VII. An Outline for This Guide

This section briefly describes the contents of the Chapters in this Guide.

Chapter One, this introductory chapter, describes what is included in the Guide and also describes some of the basics of the USDA Discrimination Financial Assistance Program. This includes the need to complete the Application, deadlines, the taxation of payments, and other important parts of the Program.

Chapter Two provides an overview of the Discrimination Financial Assistance Program process.

Chapter Three describes deadlines and other important dates for the Program.

Chapter Four describes who is eligible for the Program. The focus of eligibility for the Program is discrimination by USDA in its farm lending programs, so Chapter Three looks at what farmers can be eligible. This includes farmers, ranchers and forest landowners. It also includes farmers who were USDA farm loan program borrowers, as well as those who attempted to become

¹⁸ FLAG, Brief Farmers' Guide to USDA Discrimination Financial Assistance Program, 3rd Edition (September 29, 2023), at <http://www.flaginc.org/2023/09/brief-farmers-guide-to-usda-discrimination-financial-assistance-program-third-edition/>.

¹⁹ Thanks to translation provided by Rural Coalition, the Brief Guide is available in Spanish. See FLAG, Brief Farmers' Guide to USDA Discrimination Financial Assistance Program (July 7, 2023), at [Breve guí a para agricultores sobre el Programa de Asistencia Financiera por Discriminació n del USDA.docx \(flaginc.org\)](https://www.flaginc.org/wp-content/uploads/2023/07/Breve-gu%C3%ADa-para-agricultores-sobre-el-Programa-de-Asistencia-Financiera-por-Discriminaci%C3%B3n-del-USDA.docx).

²⁰ FLAG is at <http://www.flaginc.org/>. Rural Coalition is at <https://www.ruralco.org/>. Land Loss Prevention Project is at <https://www.landloss.org/>. Federation of Southern Cooperatives is at <https://www.federation.coop/>. Intertribal Agriculture Council is at <https://www.indianag.org/>.

borrowers. Finally, this Chapter discusses the eligibility rules that allow individuals to apply even if they never were able to farm.

Chapter Five looks at the specific types of USDA farm loan programs that create eligibility for this Program. It also looks at the types of programs and loans that do not create eligibility for this Program. In addition, Chapter Four provides details on the eligibility of both direct and guaranteed farm loans.

Chapter Six looks at the rules in the Program that define discrimination and discusses how a farmer can go about showing that they experienced discrimination.

Chapter Seven discusses the standard of evidence that farmers will need in order to demonstrate that they experienced discrimination.

Chapter Eight provides details on how to think about the losses that a farmer suffered because of USDA discrimination and how to describe those losses in the Application.

Chapter Nine discusses the documents that farmers will need to have for the Application. It also addresses how a farmer can get documents from USDA that relate to their history with USDA farm lending programs.

Chapter Ten works through the Application. It begins with the organization of the Guide, and it then explains some of the things that are asked about in the Application and makes suggestions regarding filling out the Application.

Chapter Two - Overview of Discrimination Financial Assistance Program Process

I. Introduction

The USDA Discrimination Financial Assistance Program can be confusing. In part, this is because it is a new, unique Program that needed to be created from scratch. Further, the point of the Program, the identification of past discrimination in USDA farm lending programs, and the effort to understand the economic harms caused by the discrimination, can be difficult. Finally, congressional statute requires USDA to hire non-governmental vendors to administer parts of the Program, so it can be hard to understand how the various pieces of the puzzle fit together.²¹ All of these factors make it inevitable that parts of the Program will not be simple and straightforward.

This short chapter is designed to give a quick overview what it is we know about the process and mentions some things that remain somewhat unclear.

II. The Various Actors

This Program involves many organizations that have different roles, from outreach and technical assistance, to the administration of the Program.

A. Cooperators

USDA is working with several organizations, called cooperators, who are assisting with Program outreach, education, and technical assistance. Some cooperators are helping farmers fill out Program Applications and answering questions about the Program. As of this writing, these cooperator organizations are: AgrAbility, the Farmer Veteran Coalition, Farmers' Legal Action Group, Federation of Southern Cooperatives, Intertribal Agriculture Council, Land Loss Prevention Project, National Young Farmers Coalition, and Rural Coalition.²²

Cooperators are not associated with the vendors or administrators that USDA has hired to administer the Program. Cooperators play no role in the decision making for Applications.

B. Regional Hub Vendors

USDA has also hired two vendors to provide regional support for the Program. These vendors—Analytic Acquisitions and Windsor Group, LLC—oversee Regional Hubs that have opened up local offices in order to provide outreach about the Program, assistance with the application process, and manage Program call centers.²³ Windsor Group, LLC, is

²¹ Specifically, Section 22007 of the IRA states that the Discrimination Financial Assistance Program “shall be administered through 1 or more qualified nongovernmental entities selected by the Secretary subject to standards set and enforced by the Secretary.” IRA § 22007 (Aug. 16, 2022).

²² For links to the websites for each of these cooperators, visit Discrimination Financial Assistance Program, Get Help With Your Application, Community Groups, at <https://22007apply.gov/local-assistance.html#mailing-addresses> (Sept. 26, 2023).

²³ For links to additional information on Analytic Acquisitions and Windsor Group, LLC, visit Discrimination Financial Assistance Program, Program Overview, Program Administration, at

managing the Regional Hubs located to the east of the Mississippi River. Analytic Acquisitions is managing the Regional Hubs located west of the Mississippi River.

The Regional Hub Vendors manage what are called Application Processing Centers. Paper applications must be mailed to these locations.²⁴ People hired by the Regional Hub vendors will transcribe paper applications and submit them electronically. Those who work at the Regional Hubs may also help people fill out Program Applications. If that happens, USDA says the person who helps an applicant fill out an Application will not be the same person who determines the eligibility or scoring of the Application during the Regional Hub review of Applications.²⁵ The review of Applications is discussed below in this Chapter.

C. National Administrator Vendor

USDA has hired one vendor, The Midtown Group, to be the National Administrator for the Program. According to USDA, the National Administrator's job is to "oversee the program."²⁶ The National Administrator will be reviewing Program Applications and make the ultimate decisions as to whether an Application will receive Program financial assistance.

D. USDA

Although the statute that governs this Program states that USDA is not to administer the Program, USDA sets the standards for the Program and enforces those standards.²⁷ It is not completely clear how this division of labor works in practice.

If a farmer requests documents by November 3, 2023, USDA has pledged to "make every effort" to respond to those farmer requests in time for the farmer to use a document in the application.²⁸ The deadline for making this request was recently extended.²⁹

III. Program Process Overview

The sections below describe what we know about the steps that will take place when a farmer submits an Application.

<https://22007apply.gov/program-overview.html#program-administration> (Sept. 26, 2023). The local offices set up by the Regional Hub vendors are staffed by the vendors and not USDA employees. For a list of these offices, visit Discrimination Financial Assistance Program, Get Help With Your Application, Local Offices, at <https://22007apply.gov/local-assistance.html#local-office-locations> (Sept. 26, 2023).

²⁴ For a list of the Application Processing Centers, visit Discrimination Financial Assistance Program, Get Help With Your Application, Mailing Addresses for Application Submissions, at <https://22007apply.gov/local-assistance.html#mailing-addresses> (Sept. 26, 2023).

²⁵ Confirmed by USDA by email.

²⁶ See Discrimination Financial Assistance Program, Program Administration, National Administrator, at <https://22007apply.gov/program-overview.html#national-administration> (Sept. 26, 2023)

²⁷ IRA § 22007 (Aug. 16, 2022).

²⁸ Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

²⁹ USDA Press Release No. 0196.23, USDA Extends Application Deadline for Discrimination Financial Assistance Program to January 13 (September 22, 2023). The previous deadline for requesting records was September 6, 2023.

A. Applications Submitted by January 13, 2024

Farmers must submit their Program Application—either electronically, by mail, or in person—by January 13, 2024.³⁰

Farmers should receive a Confirmation ID once they submit their Application. USDA says farmers will receive Confirmation ID by email.³¹

B. Application Review Process

USDA says the Application review process will begin after Applications start to be filed and will likely continue for several months.³²

The Program website includes an Application Flow chart that outlines the Application review process.³³ The chart describes how eligibility decisions are made and seems to describe aspects of the decision-making process for how much financial assistance will be paid to applicants who are eligible for the Program.

Information from this Application Flow chart was not included in the Second Edition of this Guide. Much of the information found in the next few paragraphs, therefore, is new to the Third Edition of this Guide.

The process of reviewing Applications involves several different organizations: (1) Regional Hubs; (2) the National Administrator; and (3) USDA. Together they make decisions about: (1) applicant eligibility; and (2) if the applicant is eligible, the amount of the financial assistance payment to be made to the applicant. The way these decisions are made can be complicated. The following sections summarize what we know about how Applications are reviewed.

1. Regional Hub Makes Eligibility Decisions and Scores Eligible Applications

According to the Application Flow chart, Regional Hubs make the first eligibility decisions for an Application.³⁴ The Regional Hub will look at three eligibility questions for each Application. First, did the applicant farm or ranch or try to farm or ranch? Second, did the applicant participate in USDA farm lending or try to participate in USDA farm lending? Third, did the applicant experience discrimination by USDA before 2021? In order to be found eligible for the Program, the answer to all three questions must be yes.

³⁰ USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

³¹ Confirmed by USDA by email.

³² Discrimination Financial Assistance Program, How Do I Apply?, Timeline and Program Deadlines, at <https://22007apply.gov/how-do-i-apply.html#timeline-and-program-deadline> (Sept. 26, 2023).

³³ To download a copy of the Application Flow chart, visit Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

³⁴ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

a. If Regional Hub Decides Applicant Not Eligible

In some cases, after reviewing the eligibility questions described above, the Regional Hub will find the applicant is not eligible for the Program.³⁵ If this happens, the National Administrator then reviews the Regional Hub decision that the applicant is not eligible.

b. If Regional Hub Decides Applicant is Eligible—Application is Scored

If the Regional Hub decides the applicant is eligible, the Regional Hub will “score” the application.³⁶ In doing so, the Regional Hub will use a USDA-approved “rubric.” Rubric, in this use, likely means a set of rules or instructions that USDA writes and that the Regional Hub will use to score each Application. Scoring likely means a decision on whether the applicant experienced discrimination and, if so, the economic losses from the discrimination. Scoring might also mean looking at other factors that could affect the level of financial assistance to be paid to the applicant under the Program.

As of now, no written rubric or scoring system used to review Applications and score them is publicly available. We have no firm information as to how these decisions will be made by the Regional Hubs.

If the Regional Hub decides the applicant is eligible, the Regional Hub sends the Application to the National Administrator for review.

2. National Administrator Makes Eligibility Decisions and Scores Eligible Applications

After the Regional Hub completes a review of an Application, the National Administrator reviews the Application.³⁷ The National Administrator will make its own, independent review of each Application. The National Administrator also resolves differences between the review by the Regional Hub and the National Administrator.

The National Administrator makes an eligibility decision for the Application based on the same three eligibility questions that are described above and that are used by the Regional Hub. They are, first, did the applicant farm or ranch or try to farm or ranch? Second, did the applicant participate in USDA farm lending or try to participate in USDA farm lending? Third, did the applicant experience

³⁵ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

³⁶ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

³⁷ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

discrimination by USDA before 2021? In order to be found eligible for the Program, the answer to all three questions must be yes.

a. If National Administrator Decides Applicant Not Eligible

In some cases, after reviewing the three questions described above, the National Administrator will find the applicant is not eligible for the Program. If so, several results are possible. The differences in potential results will, in part, be due to similarities or differences between the decisions by the Regional Hub and the National Administrator.

i. If Regional Hub and National Administrator Both Think Applicant Not Eligible

What happens when the Regional Hub and the National Administrator agree that the applicant is not eligible is not directly spelled out in the rules for the Program.³⁸ In such a case, however, it looks as if the applicant will be ruled not eligible for the Program and that this decision will be final. It does not appear that USDA reviews cases where both the Regional Hub and the National Administrator think the applicant is not eligible.

ii. If National Administrator Decides Applicant is Not Eligible, and Regional Hub Decides Applicant is Eligible

If the National Administrator and Regional Hub do not agree on applicant eligibility, certain rules apply. This includes when the National Administrator decides that applicant is not eligible, and the Regional Hub decides the applicant is eligible.

In general, according to the rules of the program found in the Application Flow chart, if the Regional Hub and the National Administrator do not agree on whether the applicant is eligible for the Program, the National Administrator “will resolve differences” between the two decisions.³⁹ In doing so, the National Administrator will “defer[] to Regional review.” This likely means that if the Regional Hub and National Administrator disagree on whether the applicant should be eligible for the Program, the opinion of the Regional Hub will be the decision at this stage.

This appears to mean that if the National Administrator decides that the applicant is not eligible, and the Regional Hub believes the applicant is eligible, the National Administrator will defer to the decision of the Regional Hub and likely will now hold that the applicant is not eligible.

³⁸ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

³⁹ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

If the applicant is found eligible after review by the National Administrator, the National Administrator will refer the Application to USDA for payment.

**b. If National Administrator Decides Applicant is Eligible—
Application is Scored**

If, after reviewing the three questions described above, the National Administrator decides the applicant is eligible, the National Administrator will also “score” the application.⁴⁰ In doing so, the National Administrator uses a USDA-approved “rubric.” As explained above, rubric, in this use, likely means a set of rules or instructions that USDA writes and that the National Administrator will use to score the application. Scoring likely means a decision on whether the applicant experienced discrimination and if so the economic losses from the discrimination. Scoring might also include other factors that could affect the amount of financial assistance that will be paid to the applicant.

As noted above, no written rubric or scoring system used to review Applications and score them is publicly available. We have no firm information as to how the scoring decisions will be made by the National Administrator.

Since both eligibility of Applications and the scoring of eligible Applications are done by both the Regional Hub and the National Administrator, there could be differences between the two. How these differences are likely to be resolved is described in the sections that follow.

**i. If Regional Hub and National Administrator Agree the
Applicant is Eligible**

If the Regional Hub and National Administrator agree that the applicant is eligible, the National Administrator will refer the application to USDA for payment.⁴¹

Since the scoring of eligible applicants is done by both the Regional Hub and the National Administrator, there could be scoring differences between the two. As noted above, the National Administrator will resolve any differences between the reviews carried out by the Regional Hub and by the National Administrator. While the Application Flow chart does not say so directly, it appears that the National Administrator will also resolve differences in the scoring by the Regional Hub and the National Administrator. If so, the National Administrator will “defer” to

⁴⁰ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴¹ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

the Regional Hub when it comes to scoring the Application.⁴² When the National Administrator sends the application on to USDA, therefore, it appears that the National Administrator will include a decision on eligibility and will also include a score for the Application.

ii. If National Administrator Decides Applicant is Eligible, and Regional Hub Decides Applicant is Not Eligible

If the National Administrator and Regional Hub do not agree on applicant eligibility, certain rules apply. This includes when the National Administrator decides that applicant is eligible and the Regional Hub decides the applicant is not eligible.

In general, according to the rules of the Program found in the Application Flow chart, if the Regional Hub and the National Administrator do not agree on whether the applicant is eligible for the Program, the National Administrator “will resolve differences” between the two decisions.⁴³ In doing so, the National Administrator will “defer[] to Regional review.” This likely means that if the Regional Hub and National Administrator disagree on whether the applicant should be eligible for the Program, the opinion of the Regional Hub will be the decision at this stage.

This likely means that if the National Administrator decides that the applicant is eligible, and the Regional Hub believes the applicant is not eligible, the National Administrator will defer to the decision of the Regional Hub and will now hold that the applicant is not eligible for the Program.

In many cases, a conclusion by the National Administrator that the applicant is not eligible will be a final decision and the applicant will not be eligible for the Program. In at least some cases, it seems possible that USDA will review the ultimate eligibility decision. This will occur if USDA sees “large differences” between the original decisions by the Regional Hub and the National Administrator.⁴⁴ The meaning of a “large difference” is not public knowledge.

3. National Administrator Refers Applications to USDA—For Approval of Payment or Oversight

Once the National Administrator completes its review of an Application, it will then refer the Application to USDA. The Application Flow chart suggests this referral will take one of two forms—either a referral to USDA of eligible applications for payment,

⁴² Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴³ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴⁴ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

or a referral to USDA of applications that need additional oversight and the resolution of differences.

a. Referral of Applications to USDA for Approval of Payment

According to the Application Flow chart, the National Administrator will refer all eligible Applications to USDA for approval of payment.⁴⁵ This referral will also likely include the results of the scoring of the eligible Applications.

This process suggests that USDA could, if it chose to, review individual Applications or could review certain types of Applications or Applications that share certain similarities. We do not know the extent of the review USDA will undertake before it approves payments or the particular type of things that will be of concern to USDA before the payments are approved.

b. Referral of Applications to USDA for Oversight

According to the Application Flow chart, the National Administrator will refer any “large differences in eligibility determination[s] to USDA for oversight.”⁴⁶ This likely means differences in the conclusions of the Regional Hub and the National Administrator.

As noted above, the National Administrator’s ultimate conclusion will likely defer to the eligibility decision made by the Regional Hub when the eligibility decision between the Regional Hub and the National Administrator are different. And, although it is not mentioned in the Application Flow chart directly, it may be that the referral of large differences could also include situations where there are differences in the scoring of eligible Applications between the Regional Hub and the National Administrator.

4. National Administrator Makes Payments to Eligible Applicants

Once USDA approves an Application for payment, it is the National Administrator that will make the actual payment.⁴⁷

C. Applicants Notified After a Decision Has Been Made

USDA says that farmers will be notified after a decision has been made on their Application.⁴⁸ USDA has verbally stated that farmers will not be given a reason as to why an Applications are approved or denied.

⁴⁵ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴⁶ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴⁷ Discrimination Financial Assistance Program, Program Overview, About the Application, Application Flow, at <https://22007apply.gov/media/22007-flowchart.pdf> (Sept. 26, 2023).

⁴⁸ Discrimination Financial Assistance Program, How Do I Apply?, Timeline and Program Deadlines, at <https://22007apply.gov/how-do-i-apply.html#timeline-and-program-deadline> (Sept. 26, 2023).

USDA says that farmers who filed electronically can check the status of their Application online at forms.22007apply.gov.⁴⁹ Farmers will need to have their Confirmation ID in order to get a status update on their Application.

D. Payments Mailed

USDA says that payments for approved Applications will be sent in the form of a check by U.S. mail.⁵⁰ USDA says that it will make determinations on all Applications at the same time. It expects this to take several months after the Application deadline.

Given that the Program deadline was recently extended to January 13, 2024, it is possible that decisions on Program payments might not be made until sometime in the spring of 2024. USDA has not said how long it will take for the payments to be mailed.

E. No Appeals

There are no appeals from a decision in this Program.⁵¹ It is therefore important to get all of the details into an Application that is submitted by the Program deadline of January 13, 2024.⁵²

IV. Retaliation and Reprisals for Participating in the Program is Illegal

Some farmers are concerned that applying for the Program will lead to retaliation by USDA. Concern is focused on local FSA offices and the retaliation that is possible as farmers seek loans, have current loans serviced, or seek other USDA services. These concerns are understandable.

USDA has attempted to address the concerns of retaliation in two ways.

First, USDA says FSA offices will not make any decision on Applications.

Second, in red print on the very first page of the Program FAQ, is the following:

Important: Retaliation and reprisals against applicants to or participants in this program are strictly prohibited by USDA. If you believe that you are experiencing such retaliation or reprisal, contact the Office of Assistant Secretary for Civil Rights (OASCR) at (866) 632-9992 (toll free) or by emailing CR-INFO@usda.gov. Si prefiere que lo atiendan en español, llame al (800) 845-6136. Individuals who use sign language to communicate may contact OASCR through the Federal Relay Service on 711.⁵³

⁴⁹ Discrimination Financial Assistance Program, How Do I Apply?, Timeline and Program Deadlines, at <https://22007apply.gov/how-do-i-apply.html#timeline-and-program-deadline> (Sept. 26, 2023).

⁵⁰ Discrimination Financial Assistance Program, How Do I Apply?, Timeline and Program Deadlines, at <https://22007apply.gov/how-do-i-apply.html#timeline-and-program-deadline> (Sept. 26, 2023).

⁵¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, page ix; Discrimination Financial Assistance Program, FAQ, page ix (Updated Sept. 21, 2023).

⁵² Farmers can submit an entirely new Application before the deadline if they feel the first version could be improved. Farmers cannot, however, amend an existing Application that was submitted.

⁵³ Discrimination Financial Assistance Program, FAQ, page i (Updated Sept. 21, 2023).

In other words, USDA says that retaliation against anyone who applies for this Program is prohibited and gives a place where retaliation can be reported. Farmers can also report retaliation to any of the Program Cooperators.⁵⁴

Retaliation by a lender for civil rights activity is illegal and is itself a form of discrimination under the Equal Credit Opportunity Act (ECOA).⁵⁵

All that said, there is no guarantee that a farmer will not experience some form of retaliation or reprisal for participating in this Program.

⁵⁴ For links to the websites for each of these cooperators, visit Discrimination Financial Assistance Program, Get Help With Your Application, Community Groups, at <https://22007apply.gov/local-assistance.html#mailing-addresses> (Sept. 26, 2023).

⁵⁵ For a summary of current law regarding retaliation for the good faith exercise of creditor rights, see Battle, Credit Discrimination § 3.4.4, at pages 55-56. Whether retaliation for filing an Application under this Program itself would constitute discrimination under ECOA is unclear.

Chapter Three - Deadlines and Important Dates

This short Chapter lists the important deadlines in the USDA Discrimination Financial Assistance Program. It also notes other important dates for the process.

I. Discrimination Must Have Taken Place Before January 1, 2021

For this Program, the discrimination that the farmer experienced must have taken place before January 1, 2021.⁵⁶

There is no beginning date cut-off for discrimination in the Program. So, discrimination that took place many years ago can be eligible.

If the farmer experienced discrimination on January 1, 2021, or after, there are other actions—besides applying for the Financial Discrimination Assistance Program—that the farmer can take. The farmer could file a discrimination complaint with USDA, or the farmer could file a lawsuit against USDA.⁵⁷ The USDA discrimination complaint process is completely different from this Program and the discrimination complaint process has its own set of rules and timelines.⁵⁸ More about discrimination complaints and how they come in to play for the Discrimination Financial Assistance Program are discussed in Chapter Ten.

II. Deadline to File Application: January 13, 2024

The deadline to file an Application for this Program is January 13, 2024.⁵⁹

A. If Application Filed Late—No Financial Assistance

USDA says that if the Application is turned in late it will not be reviewed.⁶⁰ This means the farmer will not receive assistance under the Program.

As described below, there are several ways to file an Application—online, by mail, or in person—and how the Application deadline is determined can differ depending on how the farmer chooses to file the Application.⁶¹

B. If Application Incomplete—No Extensions to Add Missing Information

If an Application is submitted, but somehow part of it was left out or is otherwise incomplete, it is not possible to add the missing information after the deadline.⁶² That means the Application will be looked at by decision makers with the information that was turned in and will not take into account anything turned in after the deadline.

⁵⁶ IRA § 22007 (Aug. 16, 2022); Discrimination Financial Assistance Program, Eligibility, at <https://22007apply.gov/eligibility.html> (Sept. 26, 2023).

⁵⁷ Discrimination Financial Assistance Program, FAQ, No. 4, page iii (Updated Sept. 21, 2023).

⁵⁸ Additional information about the USDA discrimination complaint process can be found at USDA, Filing a Program Discrimination Complaint as a USDA Customer, at <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer> (Sept. 26, 2023).

⁵⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, page 1.

⁶⁰ USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

⁶¹ USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

⁶² USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

C. Can Resubmit Entire Application Before Deadline

It is possible for a farmer to resubmit the entire Application before the deadline. So, if the farmer realizes that important information was left out of the Application, the Application can be submitted again with the new information included. The whole application must be resubmitted.

D. Deadlines for Different Ways to Submit Application

There are several ways to turn in an Application, and the deadlines work slightly differently for each method.⁶³

1. Submit Online

The Application may be filed online.⁶⁴ USDA “strongly encourages” farmers to submit their application online.⁶⁵ If this is done, the Application must be submitted by 11:59 p.m., Pacific Daylight Time (PDT), on January 13, 2024.

2. Mail of Overnight Mail Service

A farmer may submit an Application by mailing a paper copy of the Application to the appropriate regional office.⁶⁶ If the Application is sent in using the United States Postal Service or another mail service, the package that includes the Application must be postmarked by January 13, 2024.⁶⁷ If a farmer submits a paper Application, they must follow specific rules, such as using blue or black ink. These rules are explained in detail on the Program website as well as in the FAQ for the Program.⁶⁸

3. Submitted in Person

The Application can be submitted in person at one of the local offices that have been created by vendors hired by USDA.⁶⁹ If the farmer submits an Application in this way, it must be delivered by 8:00 p.m. local time on January 13, 2024.

⁶³ Discrimination Financial Assistance Program, How Do I Apply?, at <https://22007apply.gov/how-do-i-apply.html> (Sept. 26, 2023); USDA, Discrimination Financial Assistance Program, FAQ, page i (Updated Sept. 21, 2023).

⁶⁴ USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

⁶⁵ USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

⁶⁶ For a list of the Regional Offices and which states they cover, see Discrimination Financial Assistance Program, How Do I Apply? Mail a Paper Copy, at <https://www.22007apply.gov/how-do-i-apply.html#mail> (Sept. 26, 2023); see also USDA, Discrimination Financial Assistance Program, FAQ, pages xi-xii (Updated Sept. 21, 2023).

⁶⁷ USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix (Updated Sept. 21, 2023).

⁶⁸ Discrimination Financial Assistance Program, How Do I Apply? Mail a Paper Copy, at <https://www.22007apply.gov/how-do-i-apply.html#mail> (Sept. 8, 2023); USDA, Discrimination Financial Assistance Program, FAQ, pages xi-xii (Updated Sept. 21, 2023).

⁶⁹ For a list of the Local Offices, and which states they cover, see Discrimination Financial Assistance Program, How Do I Apply? Submit your Application In-Person at a Local Office, at <https://22007apply.gov/how-do-i-apply.html#in-person> (Sept. 26, 2023); see also USDA, Discrimination Financial Assistance Program, FAQ, pages i, ix, xi-xii (Updated Sept. 21, 2023). These Local Offices are not run or staffed by USDA or FSA.

E. Original Deadline of October 31, 2023, Extended to January 13, 2024

The original deadline for the Discrimination Financial Assistance Program was October 31, 2023. A common question from farmers was if that deadline would be extended. The congressional statute that created the Discrimination Financial Assistance Program did not set a deadline for applications. That means legally, if it chose to, USDA could change the deadline. And, on September 22, 2023, USDA announced that the deadline for the Program would be extended until January 13, 2024.⁷⁰

III. Deadline to Submit Documentation

As will be explained below, farmers will need to include a number of documents with their Application. The documents can be submitted at the same time the farmer files the Application. It is also possible—if a farmer chooses to file the Application online—to mail or personally deliver the supporting documents to one of the regional offices created by the vendors hired by USDA.⁷¹ The rules for submitting supporting documentation are described in the following sections.

A. Submit Documentation Along with Application

Farmers may choose to submit all of their documentation at the same time they file their Application. If that option is chosen, the deadline for both the Application and the documentation is January 13, 2024. If the farmer applies online, all supporting documentation submitted at that time will need to be in a pdf format.⁷² If the farmer applies in person, it is possible the staff at one of the regional offices can help the farmer upload the documents.

B. Submit Documentation Separately from Application

Farmers may also choose to submit their documents separately from the Application. This option is only available if the farmer does the Application online. For documents that are submitted separately to be considered on-time, the documents must be either be postmarked (if mailed) or received (if personally delivered) within two business days after the online Application is submitted.⁷³ This means that documents submitted could in theory be sent after January 13, 2024.

1. Send Documentation by Mail

Documents can be sent to a regional office by mail. If so, this must be done by either first class or overnight mail.⁷⁴ If this method is used, the documents sent to the

⁷⁰ USDA Press Release No. 0196.23, USDA Extends Application Deadline for Discrimination Financial Assistance Program to January 13 (September 22, 2023), available at <https://www.usda.gov/media/press-releases/2023/09/22/usda-extends-application-deadline-discrimination-financial>.

⁷¹ USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

⁷² USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

⁷³ USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

⁷⁴ USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

regional office by mail must be postmarked within the second business day after the online submission.

2. Deliver Documentation in Person

Documents can be brought to a regional office in person. If this method is used, the documents must be given to the regional office within the second business day after the online submission.⁷⁵

Suppose, for example, a farmer submits an Application online on Tuesday, the fifteenth. The supporting documents must either be mailed and postmarked by Thursday the seventeenth or delivered in person by Thursday the seventeenth. USDA does not define business days for this Program.⁷⁶ Business days probably do not include Saturdays, Sundays, and federal holidays.⁷⁷

IV. Deadline to Ask USDA for Documents: November 3, 2024

USDA has created a way for farmers to ask USDA for copies of documents that the farmer may need or want when filling out the Application.⁷⁸ That could mean, for example, USDA loan documents for conservation or other farm programs. In addition, USDA has some documents from earlier USDA discrimination cases. USDA says it has lists of people that participated in those claims processes, USDA says it does not have other documents from those claims processes.

The deadline for those requests is November 3, 2023. If the request is made after November 3, 2023, USDA says it will not respond to the request before the Program Application deadline.⁷⁹

To request documents from USDA, farmers should send a request by email to info@22007apply.gov.⁸⁰ If the farmer does not have access to email, USDA says the farmer may call 1-800-721-0970 to get information about how to request documents by mail.

Normally, there is a charge to farmers for receiving documents from USDA. USDA says the charge is completely waived for copies that are sent electronically.⁸¹ For paper copies of records waived up to 125 pages.⁸²

If a farmer requests documents from USDA, USDA says:

⁷⁵ USDA, Discrimination Financial Assistance Program, FAQ, page xi (Updated Sept. 21, 2023).

⁷⁶ USDA Discrimination Finance Assistance Program materials, USDA Handbooks, and the Federal Rules of Civil Procedure seem not to define “business day.”

⁷⁷ Official legal holidays are at 5 U.S.C. § 6103. Treasury Department rules, for example, say a business day does not include legal public holidays, any day declared to be a holiday by federal statute or executive order, and any day with respect to which the U.S. Office of Personnel Management has announced that Federal agencies in the Washinton, D.C. area are closed. See 51 C.F.R. § 800.203.

⁷⁸ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

⁷⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

⁸⁰ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

⁸¹ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

⁸² USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

[it] will make every effort to search for and prepare the records and send them to [the farmer] prior to this program's filing deadline of January 13, 2024.⁸³

USDA notes, however, that it may not have kept all of the farmer's documents—especially for documents that are over a certain number of years old.⁸⁴ It remains unclear how long USDA has kept various records and whether USDA will be able—with any certainty—to provide all of the documents that farmers request.

Because it is not certain in advance what documents will be produced by FSA, it makes sense for farmers also to seek documents from other sources.⁸⁵

Record requests, including details on the information to include in the requests, are discussed in Chapter Nine.

⁸³ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

⁸⁴ Rules for documents are discussed on the National Archive website. See <https://www.archives.gov/records-mgmt/rcs/schedules/index.html?dir=/departments/department-of-agriculture/rg-0145> (Sept. 8, 2023).

⁸⁵ Other sources might include documents from other agencies such as the Bureau of Indian Affairs (BIA).

Chapter Four - Eligibility: Who Is Eligible

I. Introduction

This Chapter discusses who can be eligible for the Discrimination Financial Assistance Program. The Program creates several categories of individuals who can be eligible, and the rules for eligibility can be confusing. This Chapter is intended to sort through the various eligibility rules for those who want to apply. It looks at eligibility in the following ways.

First, the Chapter discusses the terms used to describe the people who are eligible to apply. In general, farmers must have experienced discrimination in USDA farm lending programs to be eligible for the Program.

Next, this Chapter explains the rule that only people—and not legal entities—may receive a payment under this Program. As will be explained more fully below, farmers who have membership interests in legal entities may apply for the Program.

Third, this Chapter discusses the two main groups of people who can be eligible for this Program. These are: (1) farmers who personally experienced discrimination in FSA farm lending programs; and (2) people who assumed or were assigned a USDA farm lending program loan from another person that had experienced discrimination related to the same loan.

Fourth, this Chapter discusses the eligibility of people who have farmed. It then discusses the eligibility of those that intended to farm but were unable to do so because of USDA discrimination.

Finally, this Chapter discusses the eligibility requirements for farmers who received a USDA farm lending program loan. It also discusses farmers who attempted to become a borrower of a USDA farm lending program but did not receive a loan.

II. Farmers, Ranchers, and Forest Landowners

The congressional act that created the Discrimination Financial Assistance Program says that farmers, ranchers, and forest landowners can be eligible.⁸⁶ These terms are not defined in the statute, however. As a practical matter, the rules that set Program eligibility focus on discrimination in USDA farm lending programs that are currently run by USDA's Farm Service Agency (FSA) and were formerly run by USDA's Farmers Home Administration (FmHA). This means that, at minimum, individuals who are eligible for the Program must have received, or tried to receive, a farm loan program loan from FSA or FmHA. The types of USDA loans that can create eligibility for this Program are discussed in Chapter Five.

To keep things short, this Guide refers to "farmers" instead of "farmers, ranchers, and forest landowners" when it discusses people that can be eligible for the Program.

⁸⁶ IRA § 22007 (Aug. 16, 2022).

III. Individuals Only—No Legal Entities

Only individuals—and not business entities, such as a corporation, an LLC, and so forth—can be eligible for this Program.⁸⁷ People who farmed as a part of an entity are eligible, but it is the individual person, and not the legal entity, that must apply.

If a farmer applied for a USDA farm lending program loan as a business entity, it looks like any payment the farmer might be eligible for under this Program will be calculated based on the farmer's percentage interest in the business entity that received the loan. For this reason, if a farmer is applying for the Program based on discrimination that occurred on a loan that was taken out in the name of a business entity, the Program Application asks for detailed information on both the individual farmer who is applying as well as the business entity that received the loan.⁸⁸

IV. Experience of Discrimination—Personally or Via an Assigned or Assumed Loan

In general, a farmer can be eligible for a payment in the USDA Discrimination Financial Assistance Program in one of two ways.⁸⁹ First, a farmer can be eligible if the farmer personally experienced discrimination in a USDA farm lending program. Second, a farmer can be eligible if the farmer has an assigned or assumed USDA farm loan, and the original borrower for that loan experienced discrimination on the same debt.

A. Farmer Experienced Discrimination in Farm Lending Programs

A farmer can be eligible under the Program if the farmer personally experienced discrimination in a USDA farm lending program.⁹⁰ The vast majority of people eligible under the Program will fit into this category.

A farmer can be eligible for the Program as someone who experienced discrimination even if the farmer no longer has a farm lending program loan with USDA.

A person also can be eligible if that person no longer farms.

B. Farmer Has Assumed a Loan, Or Been Assigned a Loan, that Was Affected by Discrimination

A farmer can be eligible under the Program if the farmer has assumed, or was assigned, a USDA farm lending program loan.⁹¹ To be eligible under this category, the original holder

⁸⁷ USDA, Discrimination Financial Assistance Program, FAQ, No. 11, page v (Updated Sept. 21, 2023).

⁸⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, page 1, and Step 2, pages 7-8.

⁸⁹ IRA § 22007 (Aug. 16, 2022); USDA, Discrimination Financial Assistance Program, FAQ, No. 1, page ii (Updated Sept. 21, 2023).

⁹⁰ IRA § 22007 (Aug. 16, 2022); USDA, Discrimination Financial Assistance Program, FAQ, No. 1, page ii (Updated Sept. 21, 2023). See also USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, pages 5-9.

⁹¹ USDA, Discrimination Financial Assistance Program, FAQ, No.1, page ii (Updated Sept. 21, 2023); USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, pages 5-9.

of the loan must have personally experienced discrimination with that same loan before it was assumed or assigned.

For this eligibility to apply the farmer must continue to hold the loan that was assumed or assigned.

It is possible that a person that holds a loan that was assumed or assigned no longer farms. Eligibility should be possible for that person.

1. Assumed Loans

USDA farm lending programs have set of rules that apply when the USDA farm lending program loan is made to a farmer and the loan is later taken over by a new farmer.⁹²

Often this transaction is done through what USDA calls a Transfer and Assumption. In a USDA Transfer and Assumption, a new farmer assumes the loan and the collateral for the loan is transferred to the new farmer.⁹³ This can be done if the original farmer is having a hard time making payments and wants out of the loan, for example. It can also be done if the original farmer has died. Once a transfer and assumption is complete, the new farmer owns the collateral and also is responsible for the debt and making payments on the loan. At times, the new farmer may only have assumed part of the loan.⁹⁴ It is also possible for a USDA farm lending program loan to have been made to a farmer, and later assumed by a new farmer even though the collateral is not transferred.⁹⁵

Detailed rules cover the way collateral can be transferred and the loan assumed under a USDA Transfer and Assumption.⁹⁶

2. Assigned Loan

USDA farm lending rules seem not to discuss loan assignments.⁹⁷ Legally, an assignment usually means that some kind of property, or legal interest, is transferred from one person to another.⁹⁸ A loan, along with the collateral for a loan, can be assigned. An assigned loan is therefore similar to a transfer and assumption in that the loan continues to exist, but it is now in the hands of a second farmer and not the farmer who originally got the loan.

⁹² 7 C.F.R. §§ 765.401 to 765.406; FSA Handbook, 4-FLP, Regular Direct Loan Servicing, pages 9-1 to 10-4, paras. 246-251 and 266-268 (June 29, 2023).

⁹³ FSA Handbook, 4-FLP, Regular Direct Loan Servicing, Exhibit 2, page 11, Transfer and Assumption (June 29, 2023).

⁹⁴ See, for example, FSA Handbook, 4-FLP, Regular Direct Loan Servicing, page 9-2, para. 246.D (June 29, 2023).

⁹⁵ See, for example, FSA Handbook, 4-FLP, Regular Direct Loan Servicing, page 9-1, para. 246.A (June 29, 2023).

⁹⁶ The rules for FSA transfers and assumptions can be found in the Federal Regulations as well as in FSA's internal handbook for loan servicing. See 7 C.F.R. §§ 765.401 to 406; FSA Handbook, 4-FLP, Regular Direct Loan Servicing, pages 9-1 to 10-4, paras. 246-251 and 266-268 (June 29, 2023).

⁹⁷ It may be that instead of assignments borrowers almost always use a transfer and assumption.

⁹⁸ Black's Law Dictionary, "Assignment" (6th ed. 1990).

3. Assumption and Assignment Transactions Can Be Complicated

Assumption of loans and the assignment of loans can be complicated transactions. The important point for the purposes of this Program is that the farmer filing an Application must be able to show that the original loan was assumed by, or assigned to, the farmer. The farmer applying for the Program must then show that the farmer who originally had the loan experienced discrimination connected to that loan.

C. No Estate Claims

In general, no estate claims are allowed in the USDA Discrimination Financial Assistance Program.⁹⁹ In other words, if a farmer experienced USDA discrimination on a loan in 2015, and the farmer passed away in 2020, that farmer's estate, or the farmer's heirs, may not file an Application for this Program on the deceased farmer's behalf.

The sole exception to this rule concerns loans that were assumed or assigned, as explained in the section above. USDA says directly that eligibility based on an assumed or assigned loan can work if the farmer who now holds the debt inherited the debt that was the subject of USDA farm loan discrimination.¹⁰⁰

V. Borrowers or Attempted Borrowers

Another aspect of eligibility for the USDA Discrimination Assistance Program relates to whether the farmer was a borrower from USDA for a farm lending program loan.¹⁰¹ In general, farmers can be eligible in two ways.

First, farmers that received a USDA farm lending program loan can be eligible for the Program.

In addition, a farmer can be eligible if they tried to participate in a USDA farm lending program loan but was unable to do so because of discrimination by USDA.

VI. Farmed or Would Have Farmed

Eligibility for this USDA Discrimination Assistance Program takes into account the difference between those people who farmed and those who never farmed but would have farmed if they had received a loan from USDA.¹⁰² In other words, it is possible for someone to apply for this Program even if they never actually farmed. The challenge for those people will be providing enough documentation to show that they would have been able to farm if they had received a USDA farm lending program loan. This possibility is discussed in more detail in Chapter Ten with the walk through of the Application.

⁹⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 5, page iii (Updated Sept. 21, 2023).

¹⁰⁰ USDA, Discrimination Financial Assistance Program, FAQ, No. 1, page ii (Updated Sept. 21, 2023).

¹⁰¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, pages 16-20.

¹⁰² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, pages 10-15. See also USDA, Discrimination Financial Assistance Program, FAQ, No. 12, page v (Updated Sept. 21, 2023).

VII. Citizenship and Immigration Status

To be eligible for the USDA for USDA farm lending programs, and therefore for the Discrimination Assistance Program, all applicants must meet certain citizenship and immigration status requirements. In general, farmers must fall within one of three categories. The farmer must be either: (1) a United States citizen; (2) a Qualified Alien; or (3) a United States Non-Citizen National.¹⁰³ “Qualified Alien” and “United States Non-Citizen National” have very specific, legal meanings. These are described in the sections below.

A. U.S. Citizen

Citizens of the United States are eligible for this Program.¹⁰⁴

B. U.S. Noncitizen National

A farmer can be eligible for this Program if the farmer is a United States (U.S.) Noncitizen National.¹⁰⁵

A U.S. Noncitizen National is defined as a person born in American Samoa or Swains Island on or after the date the U.S. acquired American Samoa or Swains Island.¹⁰⁶ For people born in the Swains Island, this includes anyone born after March 4, 1925.¹⁰⁷ The definition of a U.S. Noncitizen National also includes a person whose parents are U.S. Noncitizen Nationals.

Typical documentation for a U.S. noncitizen national, which is a fairly uncommon citizenship status, includes a birth certificate or passport with a document bearing a photograph of the person.¹⁰⁸

¹⁰³ Neither the Program Application, nor the Program FAQ directly addresses the citizenship status requirements for this Program. This conclusion, therefore, is drawn from both the eligibility rules for USDA's farm lending program loans, as well as the documentation requirements for farmers who are applying for this Program as applicants who attempted to obtain a USDA farm lending program loan but were unable to do so. See FSA Handbook, 3-FLP, Direct Loan Making, page 4-4, para. 64.A (July 20, 2023) (citing 7 C.F.R. § 764.101(c)), and FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, page 8-5, para. 108.F (Sept. 26, 2022) (citing 7 C.F.R. § 762.120). See, also, USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

¹⁰⁴ See, for example, USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, page 2 (listing the various types of identification documentation an applicant can provide, including a “U.S. citizen ID card.”).

¹⁰⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

¹⁰⁶ See, for example, FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 2, page 21, “U.S. Noncitizen National,” Exhibit 9 (July 20, 2023); see also FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, Exhibit 8, page 1 (Sept. 26, 2022)

¹⁰⁷ And for people born in America Samoa, this would include anyone born after February 16, 1900—meaning anyone that is alive today. See, for example, U.S. Department of State, Foreign Affairs Manual (FAM), 8 FAM 308.2-1, available at [https://fam.state.gov/FAM/o8FAM/o8FAMo3o8o2.html#:~:text=INA%203o8\(1\)%20is%20retroactive.at%20the%20time%20of%20birth](https://fam.state.gov/FAM/o8FAM/o8FAMo3o8o2.html#:~:text=INA%203o8(1)%20is%20retroactive.at%20the%20time%20of%20birth) (Sept. 8, 2023).

¹⁰⁸ FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 2, page 21, “U.S. Noncitizen National” (March 29, 2023).

C. Qualified Alien

A farmer can be eligible for this Program if the farmer is a qualified alien.¹⁰⁹ Qualified alien is defined by federal statute.¹¹⁰ Under this definition, there are eight categories of people who are considered qualified aliens. For more information on each type of qualified alien see the federal statute cited in the footnotes at the bottom of the page.

1. Alien Admitted for Permanent Residence

To be eligible for this category of qualified alien, the alien must be admitted as a lawful permanent resident under the Immigration and Nationality Act (INA).¹¹¹ A permanent resident will often have proof of citizenship status in the form of a U.S. Citizenship and Immigration Services (USCIS) Form I-551, commonly known as a “green card.”¹¹²

2. Alien Granted Asylum

A qualified alien includes an alien who was granted asylum under section 208 of the Immigration and Nationality Act (INA).¹¹³

3. Refugee Admitted to the United States

A qualified alien includes a refugee admitted under section 207 of the Immigration and Nationality Act (INA).¹¹⁴

4. Alien Who is Paroled

A qualified alien includes an alien paroled into the United States under section 212(d) of the Immigration and Nationality Act (INA) for at least a period of one year.¹¹⁵

¹⁰⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

¹¹⁰ This status is identified in section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). See 8 U.S.C. § 1641(b); see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 2, page 18, “Qualified Alien,” Exhibit 8 (March 29, 2023); FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, Exhibit 7, page 1 (Sept. 26, 2022)

¹¹¹ FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023). The Immigration and Nationality Act (INA) can be found at 8 U.S.C. § 1101 et seq.

¹¹² For example, see FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 2 (March 29, 2023); FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, Exhibit 7, page 2 (Sept. 26, 2022)

¹¹³ INA § 208, at 8 U.S.C. § 1158; see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹¹⁴ INA § 207, at 8 U.S.C. § 1157; see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹¹⁵ INA § 212(d)(5), at 8 U.S.C. § 1182(d)(5); see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

5. Alien Whose Deportation is Being Withheld

A qualified alien includes an alien whose deportation is being withheld under section 243(h) or the Immigration and Nationality Act (INA).¹¹⁶

6. Alien Granted Conditional Entry

A qualified alien includes an alien who was granted conditional entry according to section 203(a)(7) the Immigration and Nationality Act (INA), as in effect before April 1, 1980.¹¹⁷

7. Alien who is a Cuban/Haitian Entrant

A qualified alien includes a Cuban or Haitian entrant, as defined by section 501(e) of the Refugee Education and Assistance Act of 1980.¹¹⁸

8. Alien Who has Been Battered or Subjected to Extreme Cruelty

A qualified alien includes an alien who has been battered or subjected to extreme cruelty.¹¹⁹ Whether an alien has been battered or subjected to extreme cruelty is determined by section 431 of the Immigration and Nationality Act (INA).¹²⁰

¹¹⁶ INA § 243(h), at 8 U.S.C. § 1253; see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹¹⁷ INA § 203(a)(7), at 8 U.S.C. § 1153(a)(7); see also FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹¹⁸ FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹¹⁹ FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8, page 1 (March 29, 2023).

¹²⁰ INA § 431, at 8 U.S.C. § 1641.

Chapter Five - Eligibility: USDA Farm Lending Programs

I. Introduction

Discrimination that counts as part of the Discrimination Financial Assistance Program must have taken place in a USDA farm lending program. This can include direct loans, and—in limited situations—guaranteed loans. What counts as a USDA farm lending program can be confusing. The following sections describe what loans are included as USDA farm lending program loans for this purpose. This Chapter also discusses the eligibility of direct and guaranteed loans.

II. Defining USDA Farm Lending Programs

The statute passed by Congress that created the Discrimination Financial Assistance Program says that to be eligible for the Program the farmer must have experienced discrimination “in [USDA] farm lending programs.”¹²¹ USDA has taken that broad guidance and decided what counts as a USDA farm lending program for the purposes of the Discrimination Financial Assistance Program. Loans that are included, and loans and programs that are not included, are discussed below.

A. USDA Loans that Are Included

Only USDA farm lending programs can create eligibility. As of now, these loan programs are all run by USDA’s Farm Service Agency (FSA). In years past, USDA farm lending programs were run by USDA’s Farmers Home Administration (FmHA).

In the Application, USDA lists loans that count as USDA farm lending program loans.¹²² The Program FAQ similarly limits eligibility to certain loans.¹²³ USDA appears to have intended to include all USDA farm lending program loans.

The eligible loans include the following.

1. Farm Ownership Loans (FO)

Farm Ownership Loans (FO) are included in the Program.¹²⁴ FSA makes many Farm Ownership (FO) loans.¹²⁵ In general, these loan funds are used to buy real estate or to improve a farm’s operation with buildings and other things connected to the loan.

¹²¹ IRA § 22007 (Aug. 16, 2022).

¹²² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16.

¹²³ Emergency Livestock Loans (EL) are listed as eligible in the FAQ but only listed in the Program Application as eligible for guaranteed loans. Compare USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023), with USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, pages 16-17.

¹²⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹²⁵ For additional information on Farm Ownership Loans, visit USDA, Farm Ownership Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/farm-ownership-loans/index> (Sept. 8, 2023).

2. Farm Operating Loans (OL)

Farm Operating Loans (OL) are included in the Program.¹²⁶ Farm Operating Loans are a very common form of FSA loan.¹²⁷ These loans are often used for annual operating expenses and other short-and medium-term purchases, such as machinery and equipment. Seeds, fertilizer, and livestock are also the sorts of things that are often bought with Operating Loan funds.

3. Microloans (ML)

Microloans (ML) are included in the Program.¹²⁸ Microloans, which can be either operating loans or ownership loans, are made for less money than traditional operating or ownership loans.¹²⁹ They also have reduced paperwork requirements when compared to traditional operating or ownership loans.

4. Youth Loans (YL)

Youth Loans (YL) are included in the Program.¹³⁰ A Youth Loans is a type of FSA Operating Loan that is intended to help young people—between the ages of ten and twenty—pay for income-producing agricultural projects.¹³¹

5. Farm Storage Facility Loans (FSFL)

Farm Storage Facility Loans (FSFL) are included in the Program.¹³² These are a relatively recent form of loan—first developed in May 2000—intended to provide low-interest financing for farmers so they can build or upgrade farm facilities that store commodities.¹³³

¹²⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹²⁷ For additional information on Farm Operating Loans, visit USDA, Farm Operating Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/farm-operating-loans/index> (Sept. 8, 2023).

¹²⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹²⁹ For additional information on Microloans, visit USDA, Microloans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/microloans/index> (Sept. 8, 2023).

¹³⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹³¹ For additional information on Youth Loans, visit USDA, Youth Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/youth-loans/index> (Sept. 8, 2023).

¹³² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹³³ For additional information on FSFLs, visit USDA, Farm Storage Facility Loan Program, at <https://www.fsa.usda.gov/programs-and-services/price-support/facility-loans/farm-storage/index> (Sept. 8, 2023). In 2019, FLAG also published a Farmers' Guide to the Farm Storage Facility Loan Program, and that publication is available at <http://www.flaginc.org/wp->

6. Emergency Loans (EM)

Emergency Loans (EM), which are made to help farmers after a natural disaster, are included in the Program.¹³⁴ Emergency Loans can be used for many of the same purposes as Operating Loans.¹³⁵ It is possible, therefore, that farmers will think they received an Operating Loan (OL), but it was actually an Emergency Loan (EM). Local USDA offices sometimes used these two loan programs in a mixed and matched way depending on the current terms of the loans, whether a local disaster had been declared, and which loans had funding at the moment. Several different sub-types of EM loans were sometimes made.

7. Economic Emergency Loans (EE)

Economic Emergency (EE) Loans are included in the Program.¹³⁶ The vast majority of these loans are very old, and few likely still exist. Economic Emergency loans were made to help farmers continue farming during periods of economic emergency—including when there was a lack of agricultural credit or unfavorable production costs and commodity prices.¹³⁷ Economic Emergency loans were sometimes divided between operating-type loans and real estate-type loans. These loans are no longer funded.

8. Emergency Livestock Loans (EL)

Emergency Livestock Loans (EL) are listed in the Program FAQ as creating eligibility for Discrimination Financial Assistance.¹³⁸ They are also listed in the Program Application under the section that lists possible guaranteed loan types.¹³⁹ EL loans are not listed as a possible direct loan type in the Application.¹⁴⁰ It is unclear if direct EL loans were ever made. If farmers believe they had one, how the farmer should fill out Step 4.A of the Application, which asks the farmer to identify loans from a number of choices that do not include Emergency Livestock Loans is also unclear.

[content/uploads/2019/06/Farmers%E2%80%99-Guide-to-the-Farm-Storage-Facility-Loan-Program-June-2019.pdf](https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/emergency-farm-loans/index) (Sept. 8, 2023).

¹³⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ No. 6, page iii (Updated Sept. 21, 2023).

¹³⁵ For additional information on Emergency Loans, visit USDA, Emergency Farm Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/emergency-farm-loans/index> (Sept. 8, 2023).

¹³⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹³⁷ See, for example, 7 C.F.R. § 761.2(b), Economic Emergency Loan (2023).

¹³⁸ Both the website for the Discrimination Financial Assistance Program and the FAQ reference the eligibility of Emergency Livestock Loans. See USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023); and Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, Lending Covered, at <https://www.22007apply.gov/eligibility.html#lending-covered> (Sept. 26, 2023).

¹³⁹ See USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4B, page 17.

¹⁴⁰ See USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16.

9. Soil and Water (SW)

Soil and Water Loans (SW), which have generally been used for some form of soil or water conservation purpose, are included in the Program.¹⁴¹ They seem to have been considered a type of Farm Ownership Loan, but are also listed in the rules separately.¹⁴² These loans could be used, for example, to correct a hazardous environmental condition or to install tiles, terraces, or waterways.¹⁴³ Soil and Water Loans are no longer made by USDA's Farm Service Agency (FSA).

10. Conservation Loan (CL)

Conservation Loans (CL), which are used to fund conservation practices, are included in the Program.¹⁴⁴ Conservation Loans are made to help farmers implement conservation practices that are approved by USDA's Natural Resources Conservation Service (NRCS).¹⁴⁵ Purposes of the loans can include reducing soil erosion, improving water quality, and promoting sustainable and organic farm practices.

11. Softwood Timber Loan (ST)

Softwood Timber Loans are included in the Program.¹⁴⁶ These loans were made to financially distressed borrowers who agreed to take marginal land—such as highly erodible land—out of agricultural production. Then, the farmers could grow softwood timber.¹⁴⁷ As with Economic Emergency Loans, Softwood Timber Loans are no longer made, and therefore the majority of these loans that still exist will be very old.¹⁴⁸

12. Grazing

Grazing loans are included in the Program.¹⁴⁹

B. Loans and Programs that are NOT Included

There are several types of loans and programs that are not included in the Discrimination Financial Assistance Program. When a loan is not included it means that discrimination related to that loan or program does not create eligibility for the Discrimination Financial

¹⁴¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹⁴² See, for example, 7 C.F.R. § 764.151(c) (2023); see also FSA Handbook, 3-FLP, Direct Loan Making, page 7-3, para. 131.D (July 20, 2023).

¹⁴³ FSA Handbook, 3-FLP, Direct Loan Making, page 7-3, para. 131.D (July 20, 2023).

¹⁴⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹⁴⁵ A USDA Fact Sheet on Conservation Loans is available at <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2019/conservation-loan-program-factsheet-19.pdf> (Sept. 8, 2023).

¹⁴⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹⁴⁷ See, for example, 7 C.F.R. § 761.2(b), Softwood Timber Program (2023).

¹⁴⁸ 7 C.F.R. § 761.2(b), Softwood Timber Program (2023).

¹⁴⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4A, page 16; USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

Assistance Program. In other words, a farmer cannot use discrimination that occurred in a non-eligible loan program as the basis for applying for the Discrimination Financial Assistance Program.

Other types of USDA farm lending program loans may have been made over the years, although if so it was likely a very long time ago. If a loan type is not included in the Application or the USDA FAQ for this Program, that USDA loan program probably does not create eligibility for the Program. If a farmer experienced discrimination with a loan that is not listed as included for this Program, it may be worth trying to convince USDA and the Program decision makers that the farmer's loan was a part of USDA's farm lending programs and thus eligible for Discrimination Financial Assistance.

Below are some examples of loans and programs that are not eligible for the Program.

1. Programs Run by Tribal, State, and Local Governments

Loans or other programs run by tribes, states, or local governments are not eligible for this Program. This means, for example, that a county conservation program, or a loan program run by a state Department of Agriculture, or a tribe, do not create eligibility.

If a tribal, state, or local government made a guaranteed FSA loan, eligibility is possible. The eligibility of guaranteed loans is discussed in more detail later in this Chapter.

2. Non-USDA Federal Programs

A number of federal agencies have programs that sometimes make loans to farmers or otherwise seek to help them.¹⁵⁰ Loans with these other agencies or programs do not create eligibility for the Discrimination Financial Assistance Program.

3. COVID-19 Relief Generally Not Included—with An Exception

During the COVID-19 crisis, a number of government programs sought to help people, including farmers.¹⁵¹ Several of these programs were run by the Treasury Department, the Small Business Administration (SBA), as well as USDA. Some of these COVID-19 programs involved loans. For example, the SBA, along with the Treasury Department, ran what was known as the Paycheck Protection Program (PPP).¹⁵² The PPP made forgivable loans to small businesses, including farms. Many farmers took part in PPP. PPP loans are not, however, part of the USDA Discrimination Financial Assistance Program. Similarly, the COVID-19 Economic

¹⁵⁰ For example, for Small Business Administration (SBA) Loans, see <https://www.sba.gov/funding-programs/loans> (Sept. 8, 2023).

¹⁵¹ The way COVID-19 relief programs worked for farmers is discussed in several Guides published by Farmers' Legal Action Group. These Guides can be found at <http://www.flaginc.org/covid-19-guide/> (Sept. 8, 2023).

¹⁵² For an overview of PPP, see FLAG, Farmers' Guide to the 2021 Paycheck Protection Program (PPP) (March 31, 2021), at <http://www.flaginc.org/wp-content/uploads/2021/03/Farmers-Guide-to-the-2021-Paycheck-Protection-Program-PPP-1st-Edition-March-31-2021.pdf>.

Injury Disaster Loans (EIDL) program, also run by SBA, are not included for this Program.¹⁵³

One way that COVID-19 relief could come into play with this Program would be if USDA discriminated in how it carried out the COVID-19 relief that was designed to help farmers who had USDA farm loan program loans. So, for example, during COVID-19 USDA announced a moratorium on foreclosures and other actions on Farm Service Agency (FSA) direct loans.¹⁵⁴ It is possible that USDA discriminated against some borrowers who had an eligible loan for this Program if USDA carried out aggressive collection actions during a period when USDA had declared a moratorium on those types of collection actions. If that happened, the discrimination could make a farmer eligible under this Program.

4. Other USDA Programs

USDA runs many programs that are designed to help farmers. These other programs—which are generally not a part of FSA's Farm Loan Programs—do not create eligibility for this Program. This means that USDA farm payment programs, as well as conservation and disaster programs, for example, do not create eligibility.

This can be confusing because often times several USDA programs are run out of the same local office buildings. In addition, other USDA programs, such as a conservation cost-share, can feel like a farm loan. These other types of programs, however, do not create eligibility for this Program.

Some farmers may also wonder if they can apply for this Program if they experienced discrimination in another USDA program and that discrimination caused them to default on a USDA farm lending program loan. For example, suppose a farmer applied for FSA's Livestock Forage Disaster Program (LFP) and was denied due to discrimination.¹⁵⁵ Without the funds from LFP, the farmer was not able to make payments on a USDA farm lending program loan. In this situation, the farmer would not be eligible for the Discrimination Financial Assistance Program because the actual discrimination did not occur in connection with a USDA farm lending program even though the discrimination caused the farmer to be unable to make a payment on a USDA farm loan.

¹⁵³ For an overview of the EIDL program, see FLAG, Farmers' Guide to COVID-19 Relief (Third Ed.) (Aug. 4, 2020), at <http://www.flaginc.org/wp-content/uploads/2020/08/Farmers%E2%80%99-Guide-to-COVID-19-Relief-3rd-Edition-August-4-2020.pdf>.

¹⁵⁴ See FSA, USDA Temporarily Suspends Debt Collections, Foreclosures and Other Activities on Farm Loans for Several Thousand Distressed Borrowers Due to Coronavirus (Jan. 26, 2021), at <https://www.fsa.usda.gov/news-room/news-releases/2021/usda-temporarily-suspends-debt-collections-foreclosures-and-other-activities-on-farm-loans-for-several-thousand-distressed-borrowers-due-to-coronavirus>.

¹⁵⁵ For information on this program, see USDA, Livestock Forage Disaster Program, at <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-forage/index> (Sept. 8, 2023).

5. USDA Farm Programs that Involve Loans

USDA has a number of programs that are designed to improve farm prices and farm income. Some of these, which are administered by the Commodity Credit Corporation (CCC), make what are known as nonrecourse loans to farmers.¹⁵⁶ In general, when a farmer produces a crop the farmer receives a loan that gives the farmer money right away. Later, the farmer can either pay off the loan or give the crop to CCC as payment. If the crop price is high, the farmer can pay off the loan. If the crop price is low, the farmer can let CCC have the crop. The end result is a program that supports the price of the crop. Discrimination in this loan program does not create a basis for an Application in the USDA Discrimination Financial Assistance Program.

6. USDA Rural Development Housing and Other Loans

USDA's Rural Development mission area makes what are known as rural housing, or Rural Development (RD), loans. These loans do not create eligibility for this Program because they are not farm loans.¹⁵⁷ This can be confusing because at one time USDA farm lending programs and rural housing loans were run by the same USDA agency—the Farmers Home Administration (FmHA).¹⁵⁸ In addition, it is possible that some farmers have both a USDA farm lending program loan as well as a USDA rural development loan.

III. Both Direct and Guaranteed Loans Can be Eligible

USDA farm lending programs include both direct loans and guaranteed loans. Discrimination in a USDA direct farm loan program loan will almost always create the possibility for eligibility for this Program. Discrimination concerning a guaranteed loan, on the other hand, will in most cases not create eligibility for this Program. These rules are discussed below.

A. Difference Between Direct and Guaranteed FSA Loans

In a direct loan, USDA's Farm Service Agency (FSA) or USDA's Farmers Home Administration (FmHA), is the lender.¹⁵⁹ Most eligible loans for this Program will be direct USDA loans.

¹⁵⁶ For a short summary of this type of program, see Donald B. Pederson et al, *Agricultural Law*, at 10-12 (1996). For a definition of nonrecourse loans that refers to these programs, see Blacks' Law Dictionary, "Nonrecourse loan" (6th ed. 1990). For a summary of current USDA loan programs that support prices, see USDA Fact Sheet, Marketing Loan Assistance and Loan Deficiency Payments (September 2020), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/mal_ldp_fact_sheet.pdf.

¹⁵⁷ USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023).

¹⁵⁸ For a brief summary of the history of FmHA and FSA, see FSA, History of USDA's Farm Service Agency, at <https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index> (Sept. 8, 2023).

¹⁵⁹ For an overview of FSA's Loan Programs, including direct loans, see FSA, Farm Loans Overview, Fact Sheet (March 2020), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/farm_loans_overview-factsheet.pdf.

In a guaranteed loan, a non-USDA entity—such as a bank or a credit union—makes the loan, and USDA guarantees the loan.¹⁶⁰ With a guaranteed loan, if the borrower is unable to pay back the loan, and the lender follows USDA rules when servicing the loan, the vast majority of the lender's loss is picked up by USDA.

B. Discrimination in Direct and Guaranteed Loans that Can Create Eligibility

The Financial Discrimination Assistance Program only provides assistance for discrimination by USDA. This means that if a farmer experienced discrimination in an FSA direct farm loan program, that discrimination may well be eligible under this Program because USDA, through FSA, is the lender in a direct loan.

Discrimination in FSA guaranteed loans creates eligibility for this Program only if the discrimination was by USDA.¹⁶¹ For example, with many guaranteed loans USDA must provide approval of the loan to the farmer.¹⁶² In addition, guaranteed loans may not go forward without USDA's agreement on the borrower's cash flow projection and other eligibility aspects of a farmer's guaranteed loan application.¹⁶³ If USDA discriminated against a farmer with respect to its role in approving a guaranteed loan, that discrimination could create eligibility for this Program.

If, on the other hand, it was a private lender that discriminated against a farmer—and not USDA—that discrimination does not create eligibility for this Program. As a result, it is important to know if the discrimination experienced by the farmer in relation to a guaranteed loan was by USDA or the non-USDA lender.

C. Deciding Whether a Loan is Direct or Guaranteed Can be Confusing

USDA guaranteed loans can easily be confused with USDA direct loans.¹⁶⁴ This is true for several reasons.

First, at present USDA's Farm Service Agency (FSA) has a role in both. For a direct loan, USDA's FSA is the actual lender. For a guaranteed loan, even though a non-USDA lender

¹⁶⁰ FSA, Guaranteed Loan Program, Fact Sheet (March 2020), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/guaranteed_loan_program-factsheet.pdf; FSA, Guaranteed Farm Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/guaranteed-farm-loans/index> (Sept. 8, 2023).

¹⁶¹ USDA, Discrimination Financial Assistance Program, FAQ, No. 6, page iii (Updated Sept. 21, 2023). For its part, the Inflation Reduction Act, which authorizes the Discrimination Financial Assistance Program, says that eligible discrimination must take place “in [USDA] farm lending programs.” IRA § 22007 (Aug. 16, 2022). USDA has decided that discrimination “in” the lending programs means discrimination by USDA, and not discrimination by the guaranteed lenders.

¹⁶² See, for example, FSA Handbook, 1-FLP, General Program Administration, pages 2-20 to 2-21, paras. 29.D-E (Aug. 2, 2023).

¹⁶³ For examples of FSA's role in determining a guaranteed loan borrower's eligibility, see FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, page 7-4, para. 96.D; page 8-1, par. 100A, page 8-5, par. 109.J, page 8-10, para. 109.A (Sept. 26, 2022).

¹⁶⁴ For current FSA rules for guaranteed loans, see FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing (Sept. 26, 2022); and FSA Handbook, 1-FLP, General Program Administration (Aug. 2, 2023). For current FSA rules for direct loans, see FSA Handbook, 3-FLP, Direct Loan Making (July 20, 2023).

makes the loan, many of USDA's FSA rules govern who is eligible for the loan, the terms of the loan, and the actions the lender can take if the farmer gets behind on payments to the lender. In addition, for many guaranteed loans, USDA's FSA must approve the loan before it is made.

Second, the eligibility rules—such as the inability to get credit elsewhere, the need to have a satisfactory credit history, cash flow requirements, and so forth—are similar for both direct and guaranteed loans.¹⁶⁵

Third, the types of loans available, the purposes for which loan funds can be used, and even the names of the loan types, are similar between the two programs. For example, Operating Loans (OL) and Farm Ownership Loans (FO) are available as both direct or guaranteed loans.¹⁶⁶ In addition, the USDA appeals system is available for both direct and guaranteed loans, although there are some differences in what decisions are appealable.¹⁶⁷

As a result, it is possible that a farmer will not know whether a loan application or an actual loan was for a guaranteed or a direct loan.

D. Finding Out if a Farm Loan was Direct or Guaranteed

If the farmer is unsure about whether the loan the farmer sought, or received, was a direct or guaranteed loan, several strategies might be used.

First, if the farmer has any loan papers from the actual loan or the loan application, the papers will either have a private lender (such as a bank), or FSA, as the lender or receiver of the Application. Most of the important documents from the loan—the loan agreement, mortgage, and so forth—will show if the lender was USDA or FSA, or another lender.

Second, if the farmer got a direct loan, payments on the loan are made to FSA. If the farmer has a guaranteed loan, payments on the loan are made to a private lender. Old checkbooks, for example, might show whether the payments were made to FSA or another lender.

Finally, the farmer could request records from USDA that would show whether the loan was a direct or guaranteed loan. For example, the request could be for copies of available records related to either, or both, direct and guaranteed loans. It would be helpful for the farmer to give as much information about the loan, including the year the farmer received the loan, the purpose of the loan, and so on. USDA has set up a process for requesting records for purposes of applying to this Program.¹⁶⁸ More details on this process are provided in Chapter Nine of this Guide.

¹⁶⁵ For a FSA Fact Sheet that describes both direct and guaranteed loans, see FSA Fact Sheet, Farm Loans Overview (March 2020).

¹⁶⁶ For a Fact Sheet that describes both, see FSA Fact Sheet, Farm Loans Overview (March 2020). See also, FSA, Farm Loan Programs, Direct Loans vs. Guaranteed Loans (Aug. 7, 2023).

¹⁶⁷ The rules governing appeals of direct and guaranteed loans can be found in FSA Handbook, 1-APP, Program Appeals, Mediation, and Litigation (Sept. 12, 2016).

¹⁶⁸ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

Chapter Six - Eligibility: Discrimination

I. Introduction

For a farmer to receive financial assistance in the USDA Discrimination Financial Assistance Program there must be a determination that the farmer “experienced discrimination” in USDA farm lending programs.¹⁶⁹ This Chapter discuss the Program rules for discrimination eligibility. It includes explaining what it means for a farmer to have experienced discrimination for purposes of this Program.

II. Timing of Discrimination: Before January 1, 2021

For a farmer who experienced discrimination in a USDA farm lending program to be eligible for the Discrimination Financial Assistance Program, the discrimination experienced must have taken place before January 1, 2021.¹⁷⁰ It does not matter how long ago the discrimination occurred so long as it happened before January 1, 2021.

This also means that for a farmer who now holds a loan that was assumed or assigned, the original discrimination must have taken place before January 1, 2023.¹⁷¹ The rules do not limit eligibility based on when the assumption or assignment took place.

III. Defining Discrimination

USDA provides a short definition of discrimination to be used for in the Discrimination Financial Assistance Program. The USDA definition essentially has two parts.

First, according to USDA “[d]iscrimination means treating some people differently from others, for illegitimate reasons.”¹⁷²

Second, to treat someone differently than others based on an illegitimate reason means people are treated differently because of their:

race, color, national origin or ethnicity, sex, sexual orientation, gender identity, religion, age, marital status, disability, and in reprisal/retaliation for prior civil rights activity.¹⁷³

When it comes to discrimination law, lawyers call these groups of people “protected classes” or say that discrimination based on membership in any of these groups are “prohibited bases” for

¹⁶⁹ IRA § 22007 (Aug. 16, 2022).

¹⁷⁰ IRA § 22007 (Aug. 16, 2022); USDA, Discrimination Financial Assistance Program, FAQ, No. 1, page ii (Updated Sept. 21, 2023).

¹⁷¹ IRA § 22007 (Aug. 16, 2022); USDA, Discrimination Financial Assistance Program, FAQ, No. 1, page ii (Updated Sept. 21, 2023).

¹⁷² USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). The Application asks for information regarding actions USDA took against the farmer because of race, color, national origin, and so forth. USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

¹⁷³ USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). The same groups are listed on the Application. USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

discrimination. In this Guide we use the term “covered bases” when we refer to decisions based on race, gender, and so forth.

USDA rules for this Program follow fairly closely the main body of law that makes discrimination in lending illegal—the Equal Credit Opportunity Act (ECOA).¹⁷⁴ This suggests that other aspects of ECOA credit discrimination law can be helpful to know when trying to understand this Program and the sorts of things that farmers might want to include in their Applications.

IV. Closer Look at Covered Bases

In general, the list of covered bases for this Program includes many familiar groups. A few of them warrant some additional discussion. Each covered basis for this Program is defined below.

A. Race

Discrimination based on race can be a basis for an Application in this Program.¹⁷⁵

If farmers applying believe they experienced discrimination based on race, the farmers are asked to identify their race. The choices are as follows.

- (1) American Indian or Alaskan Native. For this Program, American Indians may list race as the basis of discrimination.¹⁷⁶ They may also list national origin.¹⁷⁷ Race can be listed as “American Indian or Alaska Native.” National origin can be the basis of discrimination. The farmer should describe tribal membership.
- (2) Asian.
- (3) Black/African American.
- (4) Native Hawaiian/Other Pacific Islander.
- (5) White.
- (6) Other (please specify). There does not appear to be any limit on the race that people can list here.

¹⁷⁴ The Equal Credit Opportunity Act (ECOA) makes discrimination in aspects of a credit transaction illegal. See 15 U.S.C. §§ 1691 et seq. An excellent resource that describes credit discrimination law and ECOA from the general viewpoint of those experiencing discrimination is a publication by the National Consumer Law Center. See Jeremiah Battle, Jr. et al, *Credit Discrimination* (8th ed. 2022). In general, credit discrimination law prohibits lenders, like USDA, from using certain factors—such as race, national origin, or sex—as the basis for credit determinations. Battle, *Credit Discrimination* § 3.2, at 47.

¹⁷⁵ USDA, *Discrimination Financial Assistance Program (DFAP) Application*, Step 5, page 21; USDA, *Discrimination Financial Assistance Program*, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁷⁶ USDA, *Discrimination Financial Assistance Program*, FAQ, No. 8, page iv (Updated Sept. 21, 2023). According to general discrimination laws, discrimination against American Indians can count as discrimination based on race. See Battle, *Credit Discrimination* § 3.3.1, at 48.

¹⁷⁷ USDA, *Discrimination Financial Assistance Program*, FAQ, No. 8, page iv (Updated Sept. 21, 2023). According to general discrimination laws, discrimination against American Indians can count as discrimination based on race or national origin. See Battle, *Credit Discrimination* § 3.3.1, at 48.

B. Color

Color is a prohibited basis for discrimination under the Program.¹⁷⁸

C. National Origin or Ethnicity

National origin and ethnicity are prohibited bases for discrimination under the Program.¹⁷⁹

The Application asks the farmer to name the farmer's national origin or ethnicity, or both, as the basis of the discrimination.¹⁸⁰ There are two choices in the Application: (1) Hispanic or Latino; and (2) Other (please specify).

In credit discrimination law, national origin can include a person's ancestry and their country of birth.¹⁸¹ Similarly, discrimination on the basis of inability to speak English is a form of discrimination on the basis of national origin.¹⁸²

As noted above, for this Program, American Indians are protected from discrimination by the prohibition of discrimination on the basis of national origin as well as on the basis of race.

D. Sex, Sexual Orientation, Gender Identity

The USDA Discrimination Financial Assistance Program uses a broad definition of discrimination when it comes to sex and gender. "Sex, sexual orientation, and gender identity" are covered bases for filing an application in the Program.¹⁸³ This would seem to protect a wide range of people. It should include discrimination based purely on sex ("women can't be cattle ranchers") and sexual orientation ("gays do not belong on a farm"). It also should include various other forms of gender identify-based discrimination.

1. Sex

On the Application, if the discrimination is based on sex, USDA gives the farmer the chance to choose between: (1) male; (2) female; and (3) non-binary.¹⁸⁴

Discrimination based on whether a person is pregnant could count as sex discrimination.¹⁸⁵

¹⁷⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). Color is also a prohibited basis under ECOA, federal Civil Rights Acts, and other discrimination laws. See Battle, Credit Discrimination § 3.3.1, at 47-48.

¹⁷⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). In credit discrimination law, denial of credit based on citizenship status may not be illegal. See Battle, Credit Discrimination § 3.3.3.4, at 49-51.

¹⁸⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

¹⁸¹ Battle, Credit Discrimination § 3.3.3.2, at 48.

¹⁸² Battle, Credit Discrimination § 3.3.3.3, at 48-49.

¹⁸³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁸⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

¹⁸⁵ Battle, Credit Discrimination § 3.4.1, at 53.

2. Sexual Orientation

Sexual orientation is not defined by USDA. The Application describes sexual orientation as, “e.g. status of being gay or lesbian.”¹⁸⁶ Because “e.g.” means “for example,” protection on the basis of sexual orientation should mean other sexual orientations in addition to being gay or lesbian.¹⁸⁷ The Application allows the farmer to describe the farmer’s sexual origination in the farmer’s own words.

3. Gender Identity

Gender identity is not defined by USDA. The Application lists the category as “Gender Identity (e.g. the status of being transgender).” Because “e.g.” means “for example,” protection on the basis of gender identity should mean identities in addition to being transgender.¹⁸⁸ The Application allows the farmer to describe the farmer’s gender identity.

In addition, discrimination based on whether someone does not conform to gender-specific stereotypes is illegal.¹⁸⁹ So, discrimination against a man who dresses in what people would be considered to be feminine clothing is covered.

E. Religion

Discrimination based on religion can be the basis for an Application in the USDA Discrimination Assistance Program.¹⁹⁰ The Application asks the farmer to name the farmer’s religion.

Creeds are closely associated with religious belief. But a creed can also be a set of fundamental beliefs that are not religious in nature.¹⁹¹ To the extent that discrimination is based on a creed that is not related to a religion, it likely would not create eligibility for this Program.

F. Age

Discrimination based on age can be the basis for an Application in this Program.¹⁹² The Application asks for the age of the farmer. In credit discrimination law, this is generally taken to mean discrimination based on being too old.¹⁹³ For example, under ECOA, people aged sixty-two or older are often considered “elderly” and are protected from age-based discrimination.

¹⁸⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

¹⁸⁷ Black’s Law Dictionary, “E.g.” (6th ed. 1990).

¹⁸⁸ Black’s Law Dictionary, “E.g.” (6th ed. 1990).

¹⁸⁹ Under ECOA, such discrimination is considered a form of sex discrimination. See Battle, Credit Discrimination § 3.3.4.3, at 51-52.

¹⁹⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁹¹ Black’s Law Dictionary, “Creed” (6th ed. 1990); Battle, Credit Discrimination § 3.3.2, at 48.

¹⁹² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁹³ Battle, Credit Discrimination § 3.4.2, at 48.

For purposes of this Program, a farmer could probably make a case in an Application that there was discrimination based on age because the farmer was thought to be too young. As long as the farmer could meet all of the requirements for a USDA farm lending program, including being old enough to sign a binding contract, a young farmer could submit a successful Application for this Program.¹⁹⁴

G. Marital Status

Discrimination based on marital status can be a basis for filing an Application in the Program.¹⁹⁵ In credit discrimination law, this means that there can be no discrimination based on whether the person is single, divorced, separated, married, or widowed.¹⁹⁶

H. Disability

Discrimination based on disability can be a basis for filing an Application under the Program.¹⁹⁷ In general, disability is defined in the law as a physical or mental impairment which substantially limits one or more major life activity.¹⁹⁸ Disability discrimination can include having a record of this kind of impairment in the past or being considered to be impaired in this way.

Although disability is not a covered basis under the Equal Credit Opportunity Act (ECOA), The Rehabilitation Act does prohibit this discrimination.¹⁹⁹

I. Reprisal or Retaliation for Prior Civil Rights Activity

Reprisal or retaliation for prior civil rights activity can be the basis of an Application in the Program.²⁰⁰ The reprisal or retaliation could itself count as discrimination.

According to the Application, prior civil rights activity can include things like filing a prior complaint.²⁰¹ This would seem to mean a discrimination complaint filed by the farmer against USDA.²⁰² It can also include additional forms of activity, such as complaining in other ways about USDA decisions, assisting other people in making complaints, and participating in general civil rights activities.

It is also possible for a farmer to apply for this Program even if the farmer previously filed a discrimination complaint against USDA with the Office of the Assistant Secretary for

¹⁹⁴ For a general credit discrimination discussion of this argument, see Battle, Credit Discrimination § 3.4.2, at 53-55.

¹⁹⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁹⁶ Battle, Credit Discrimination § 3.4.1, at 52-53.

¹⁹⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

¹⁹⁸ Battle, Credit Discrimination § 3.5.2.2, at 57-58.

¹⁹⁹ Rehabilitation Act § 504, 29 U.S.C. § 701.

²⁰⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

²⁰¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

²⁰² Additional information on filing a discrimination complaint against USDA can be found at USDA, How to File a Program Discrimination Complaint, at <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> (Sept. 8, 2023).

Civil Rights (OASCR) for discrimination that took place before January 1, 2021.²⁰³ In that situation, the farmer does not need to close or stay their complaint in order to be eligible for this Program. The Program FAQ notes that the payment for this Program could be reduced if the farmer was awarded damages in the prior complaint process.

V. Options for Members of Native American Tribes

As noted above, in this Program, members of Native American Tribes may select either race or national origin, or both, as the basis of discrimination.²⁰⁴ Race can be listed as “American Indian or Alaska Native.” National origin can be the basis of discrimination and the farmer should describe tribal membership.

VI. Misidentification or Incorrect Perception Can Create Eligibility

It is possible for discrimination to take place based on a misidentification. If that happens, it still counts as discrimination. USDA mentions in the application that if the discrimination was based on a perceived, but not actual, status or identity, that should be explained.²⁰⁵

For example, if a USDA employee discriminated against a person because the employee thought the farmer was gay, or transgender, but farmer is not actually gay or transgender, that treatment still counts as discrimination for this Program.

VII. Unique Character of USDA Farm Lending Programs

USDA farm lending programs provide favorable terms for borrowers. Applicant requirements, collateral and repayment rules, interest rates, and the opportunity for restructuring loans all make USDA loans quite different from most agricultural lending and other lending. Frequently, discrimination in these loan programs amounts to loan officers applying a stricter form of rules to some farmers and not others. It is important, therefore, not to take what may seem like an intuitive approach to identifying discrimination.

One example of the unique character of USDA farm lending programs is the existence, for many years, of what is technically known as the “loan continuation policy.”²⁰⁶ The loan continuation policy allowed farmers to get an operating loan even if the farmer was unable to pay all of the farmer’s current debts. The loans, which must be used for essential annual operating and family living expenses, allowed farmers in financial trouble to continue farming. This policy, when applied correctly, saved thousands of farmers from foreclosure and liquidation. It is a policy that few, if any, private lenders would adopt. The failure to apply the policy to all farmers equally constitutes a common form of discrimination.

VIII. Defining What it Means to Experience Discrimination—Being Treated Differently

As explained in the introduction to this Chapter, the law that created the Discrimination Financial Assistance Program requires that for a farmer to receive financial assistance there

²⁰³ USDA, Discrimination Financial Assistance Program, FAQ, No. 4, page iii (Updated Sept. 21, 2023).

²⁰⁴ USDA, Discrimination Financial Assistance Program, FAQ, No. 8, page iv (Updated Sept. 21, 2023). According to general discrimination laws, discrimination against American Indians can count as discrimination based on race or national origin. See Battle, Credit Discrimination § 3.3.1, at 48.

²⁰⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

²⁰⁶ For a historical view, see Farmers’ Guide to FmHA, at 7-25 to 7-26 (4th ed. 1990).

must be a determination that farmer “experienced discrimination” in USDA farm lending programs.²⁰⁷

USDA, in turn, has defined discrimination in this Program to mean “treating some people differently from others, for illegitimate reasons.”²⁰⁸ We also know that there are several illegitimate reasons—or prohibited bases—for which someone could be treated differently than others. These include race, national origin, sex, disability, age, and so on.²⁰⁹

What, exactly, does it mean to be treated differently on the basis of one of these illegitimate reasons? USDA does not provide many details for this part of the Program.

Being “treated differently” should be defined broadly. The treatment in question can therefore mean almost any kind of decision that USDA made concerning a farmer’s loan or loan application. We tend to think about discrimination as involving some sort of a denial—of a loan, or of some other right or possibility.

Discrimination, however, can be broader than an official denial of a loan. Discrimination can be in discouraging an application so that no real denial can take place. Discrimination can also be in the terms of the loan or how the borrower is treated once the loan is made. All of these possibilities are discussed below.

USDA provides several examples of the possible forms of discriminatory treatment, and these are described below.

IX. Possible Examples of Discrimination

There are many possible ways discrimination can occur. Discrimination can be obvious, and it can be subtle.

USDA has discussed several types of possible discrimination that farmers could have experienced and that can and should be raised by farmers in the Discrimination Financial Assistance Program.

As USDA explains:

Covered discrimination could include, for example: failure to provide appropriate assistance; delay in processing loan or loan servicing application; denial of a loan or loan servicing; prevention from applying for a loan or loan servicing; adverse loan terms; unduly onerous supervision of loan requirements—where these were due to where these were due the customer’s race, color, national origin or

²⁰⁷ IRA § 22007 (Aug. 16, 2022).

²⁰⁸ USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). The Application asks for information regarding actions USDA took against the farmer because of race, color, national origin, and so forth. USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

²⁰⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023). The same groups are listed on the Application. USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21.

ethnicity, sex, sexual orientation, gender identity, religion, age, marital status, or disability, or in reprisal/retaliation for prior civil rights activity.²¹⁰

This is a list of examples and is far from a thorough list. By saying discrimination “could include, for example” those listed actions, USDA is noting that there can be others. On the USDA website for the Program, USDA includes a similar list and notes that the list “does not include all potential, covered discrimination, nor does it limit a potential applicant’s ability to apply.”²¹¹

The following sections include types of discrimination mentioned by USDA. They also expand the list somewhat by looking at examples of discrimination that are commonly mentioned by farmers and farm advocates.

Listed below are six general types of discrimination. They follow the farmer’s steps in getting a loan: (1) discouraging an application for a loan or not helping the farmer apply; (2) delaying the loan decision; (3) denying the loan for illegitimate reasons; (4) discriminatory loan terms; (5) release of income; and (6) failing to give farmers notice of loan servicing when it is needed or denying loan servicing altogether.

A. Discourage an Application for a Loan or Not Help Farmer

Many farmers seek a loan but never officially apply because they are discouraged from doing so. This will result in no paperwork that documents the denial.

1. Discourage From Applying

As USDA notes, preventing an application for a loan can be a form of discrimination. This includes any action by USDA that discouraged a person from applying.²¹²

In general, USDA regulations have required local offices to encourage farmers to apply and to give assistance to farmers as farmers try to figure out what program or programs will best meet the needs of the farmer.²¹³ If farmers, therefore, are told that there are no applications available, that loan money has run out, or that they should just come back later, this can be discrimination if there is a difference in treatment because of a covered basis.

²¹⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

²¹¹ This list includes: (1) failure to provide appropriate assistance; (2) delaying processing loan or loan servicing application; (3) denial of a loan or loan servicing; (4) prevention from applying for a loan or loan servicing (5) adverse loan terms; and (6) unduly onerous supervision of loan requirements. Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

²¹² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023); Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

²¹³ For many years, explicit language requiring USDA to encourage loan applications could be found in 7 C.F.R. § 1910.

2. Fail to Assist Farmer

If USDA refused to help a farmer with a loan application, or otherwise failed to assist a farmer, that can count as discrimination.²¹⁴ USDA rules have generally required USDA to help farmers with applications.²¹⁵ In this instance, there might be a noticeable difference between the assistance given to some farmers and not others.

B. Late Decision on Loan or No Action at All

If because of a covered basis, USDA is late in processing a farmer's loan, or otherwise delays its response to an application, that can be a form of discrimination.²¹⁶

USDA has generally had specific time frames within which it must make loan decisions. Often, for example, USDA should have made decisions within sixty calendar days of when a completed loan application was submitted.²¹⁷

A delay in approving the loan is damaging as it prevents the farmer from doing important tasks. This is true even if the loan is eventually approved. Similarly, if the farmer is approved, but the loan funds are presented to the farmer after a loan delay, this can be very damaging to the operation. In some instances, for example, a delay of even a few weeks can make a profitable crop impossible.

In addition, USDA sometimes simply never gives a farmer an answer on the loan. A long delay in a denial can be more harmful than the denial itself because it means that the farmer did not have as much time to secure an alternative of some kind or plan the year going forward without the loan funds.

C. Denial of a Loan

As USDA notes, discrimination can occur if USDA denied assistance to a farmer. This could take the form of denying the farmer's loan application.²¹⁸

²¹⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023); Discrimination Financial Assistance Program, Eligibility, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html> (Sept. 26, 2023).

²¹⁵ See, for example, FSA Handbook, 3-FLP, Direct Loan Making, page 3-1, para. 41.A (July 20, 2023); See also Farmers' Guide to FmHA, chapter 7 (3rd ed. 1990). Regulations have, for example, called for USDA officials give assistance when it is necessary for the person filling out an application and to provide assistance as necessary to help applicants complete applications.

²¹⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023); Discrimination Financial Assistance Program, Eligibility, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html> (Sept. 26, 2023).

²¹⁷ For contemporary rules, see, for example, 7 C.F.R. § 764.53(c); and FSA Handbook, 3-FLP, Direct Loan Making, page 15-1, para. 351.A (July 20, 2023). For a view some previous rules see, Farmers' Guide to FmHA, Chapter 7 (4th ed. 1990).

²¹⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023); Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

If it occurs because of a covered basis, denial of a loan can be discriminatory if the farmer was eligible for the loan or if USDA made the same loan to others in the same situation even if they were not eligible. If the farmer got an official denial of a loan there would usually be a letter of denial sent to the farmer from USDA.²¹⁹ If the farmer has that letter, and the USDA was incorrect in its response to the application, it would be good to include it with the Application for this Program along with an explanation of why the reasons for the denial are wrong. For example, if USDA said the farmer did not cash flow the loan—that is to say, the farmer could not project enough income to make payments over the term of the loan—and USDA did not use the farm and home plan the farmer proposed or USDA was in error on the cash flow in some other way, this is a helpful thing to include because it explains how the discrimination occurred.

Common loan denials that have been based, in part, on subjective factors have included: rules requiring the farmer be creditworthy, rules requiring sufficient farm training and experience; rules requiring farmers to have good character; and rules requiring farmers to be unable to get credit elsewhere that met the farmers' needs.²²⁰

Eligibility rules for USDA farm lending programs have changed some over the years but there is a basic consistency in the requirements.²²¹

D. Unfavorable Loan Terms

Discrimination can occur in the terms of a loan that is made.²²² Although the rules for USDA loans are extensive, it has always been possible for loan officials to make loan terms more or less favorable to the farmer. This has provided a means for discrimination to occur despite the fact that the loan is made and its general terms are governed by USDA regulations and rules. The following loan terms have sometimes been used in a discriminatory way.

1. Supervision of Loan Requirements

In some cases, USDA has the ability to require borrowers to use a supervised bank account for the loan money the farmer borrowed from USDA.²²³ A supervised account makes it extremely cumbersome for the farmer to get access to loan funds because USDA must approve of every transaction in writing. USDA rules say

²¹⁹ See, for example, FSA Handbook, 3-FLP, Direct Loan Making, pages 15-15 and 15-16, para. 356.B (July 20, 2023).

²²⁰ For a historical summary of these rules see, FLAG, Farmers' Guide to FmHA, at 7.15 to 7.27 (4th ed. 1990).

²²¹ For current loan eligibility rules, see FSA Handbook, 3-FLP, Direct Loan Making, Part 4 (July 20, 2023); For current eligibility rules see, generally, FSA Handbook, 3-FLP, Direct Loan Making, Part 4 (July 20, 2023); FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, Part 4 (Sept. 26, 2022). For a look at how the rules looked as of 1990 see, Farmers' Guide to FmHA (4th ed. 1999), at Chapter 7 (available from FLAG).

²²² Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

²²³ See, for example, FSA Handbook, 1-FLP, General Program Administration, Part 4 (Aug. 2, 2023). USDA notes that this can be a form of discrimination. Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

supervised bank accounts should be uncommon.²²⁴ The requirement of a supervised bank account therefore creates significant difficulties for the farmer, and these difficulties are magnified if USDA balks at some spending plans.

2. Underfunding

Underfunding can be discriminatory and can be severely damaging to a farming operation. For example, when a farmer applies for an Operating Loan the goal is generally to provide enough money to operate for the year. If USDA approves the loan for a lesser amount, many farmers take the loan in hopes that they can make do, and the operation is badly harmed. A number of rules set the amount of a loan that should have been made. If the farmer could show repayment ability, provide adequate security, and meet other requirements, the full loan request should have been made under USDA rules.²²⁵

3. Higher Interest Rate

Discrimination could take the form of high interest rates. In general, USDA has used a standard set of rules for interest rates, and these vary with government-based interest rates. Discrimination can occur in at least a couple of ways; First, the farmer might have been given the wrong type of loan. Interest rates vary by loan type, and different loans can often be used for a similar purpose. Second, USDA has often had reduced interest rates, called limited resource interest rates and USDA has failed to offer them to eligible borrowers.

4. Collateral Requirements

Collateral is required for almost every USDA farm lending loan. Discrimination can occur when USDA requires more collateral for the loan than is needed and is in excess of what USDA rules require. For example, for many years an Operating Loan (OL) could be made under the rules with collateral that is equal to the value of the loan.²²⁶ Discrimination has occurred when USDA required more collateral than is required under the rules. Discrimination can also occur if, because of a covered basis, USDA requires more collateral for one farmer than for another farmer in a similar situation.²²⁷ In addition, even though Operating Loan rules, when followed correctly, would rarely have required real estate as collateral for the loan, farmers often believe that they experienced discrimination when USDA required land, sometimes, including a home, for an Operating Loan.

Excessive collateral is one of the forms of discrimination that is much more damaging than it may appear to be on the surface. Once real estate serves as

²²⁴ See, for example, 7 C.F.R. § 761.51(a); FSA Handbook, 1-FLP, General Program Administration, page 4-1, para. 101.B (Aug. 2, 2023).

²²⁵ For a historical view, see Farmers' Guide to FmHA, chapter 7 (4th ed. 1990).

²²⁶ For a historical view, see Farmers' Guide to FmHA, page 7-22 to 7-24 (4th ed. 1990).

²²⁷ For example, under current rules, collateral must secure at least 100% of the loan, but not more than 150 percent. So, if USDA required 150 percent security for one farmer but not for others in the same situation, that could be discriminatory. See 7 C.F.R. § 764.255(c)(1); FSA Handbook, 3-FLP, Direct Loan Making, page 9-16, para. 205.A (July 20, 2023).

collateral, the land and buildings become vulnerable to foreclosure if the farmer has a hard time paying back the loan. Further, even if loan payments are all made on time, by tying up property with liens that are unnecessary, USDA makes it much more difficult for the farmer to get additional credit from private lenders.

E. Release of Income

When a farmer receives a loan, the farmer is asked to provide security for it. This security often includes some or all of the farmer's property—such as crops, livestock, poultry, equipment—and the proceeds from the sale or exchange of that property. The farmer grants the lender a security interest in the types of property that the farmer sells to make a living.

USDA has generally been required to release income from the sale of farm production in order to allow the farmer to pay for essential family living and farm operating expenses. Under USDA rules, this is called “releasing normal income security.”²²⁸ If USDA refused to release the income the farmer could easily be forced out of business.

F. Subordination of Loans

USDA farm loan rules allow USDA to change its security interest to benefit the farmer.²²⁹ A common subordination takes place when USDA has a security interest in the farmer's property. For example, the collateral, or security interest, might be the farmer's crops. In a subordination, USDA lets another lender have the first lien on that crop and USDA takes second position. This can help the farmer get a loan when one would not otherwise be possible. Subordinations have been a part of USDA farm lending rules for many years. Often times, however, they have not been made available to some farmers.

G. Loan Servicing

One of the most important aspects of USDA farm lending rules concerns what USDA calls loan servicing. Loan servicing includes the rules for what should happen when a farmer has difficulty making payments on the loan.

If applied correctly, loan servicing rules for USDA farm lending programs—especially after 1989—provided powerful assistance to struggling farmers.²³⁰ Loans can be rescheduled and therefore stretched out over time. Payments can be deferred. Interest rates at times could be lowered. Write-down of loans are also possible. Even if a foreclosure is coming, the loan servicing rules allow farmers options that permit them to keep at least the homestead of the farm.

²²⁸ See, for example, 7 C.F.R. § 765.303(b); FSA Handbook, 4-FLP, Regular Direct Loan Servicing, pages 7-7 and 7-8, para. 163.A (June 29, 2023).

²²⁹ Black's Law Dictionary “Subordination agreement” (6th ed. 1990). For current FSA rules see 7 C.F.R. § 765.205(a). For a discussion of how subordinations worked in 1990, see FLAG, Farmers' Guide to FmHA, §§ 7.28 to 7.31 (4th ed. 1990).

²³⁰ For current rules related to loan servicing, see FSA Handbook, 4-FLP, Regular Direct Loan Servicing (June 29, 2023), and FSA Handbook, 5-FLP, Direct Loan Servicing-Special and Inventory Property Management (June 6, 2023). For a historical view see Farmers' Guide to FmHA, chapter 10 FmHA (4th ed. 1990).

Loan servicing rules require USDA to make these programs available for farmers.²³¹ Often, discrimination meant that farmers in troubles never knew of loan servicing options, and USDA moved directly to repossession of property and foreclosure. In other instances, delays in applying loan servicing meant that the policies, even if ultimately considered, would no longer be effective.²³²

H. How to Know if the Treatment is Different

In order for the USDA treatment of the farmer to count as discrimination, the treatment must have been different than that received by others because of a covered basis.²³³

In general, there are at least two ways that a farmer can show that there was difference in treatment. Although they both will often be true at the same time, this will not always be the case.

1. USDA Broke its Own Rules

If USDA denied a farmer a loan, or did not take some other action in a USDA farm lending program that the farmer sought, and USDA broke its own rules in doing so, it seems fair to assume that most other people received the proper treatment. If a farmer knows that the farmer was eligible for a loan, based on USDA rules, or was denied for an incorrect application of the rules, the farmer should say so in the Application for this Program.

2. Farmer Knows Others Treated Differently

If USDA denied a farmer a loan, or made a decision that harmed the farmer, and the farmer knows that other people received better treatment, this counts as discrimination.

It is important to note that this is true even if USDA was following its own rules when it made the decision.

For example, if a female farmer applies for a loan, and the farmer is denied because USDA said she did not have the experience or management ability, but the farmer knows that men who had the same experience or management skills were approved for a loan, this should count as discrimination. This would be true even if the female farmer did not meet all of the loan eligibility requirements—as long as a man in the same situation, and who similarly would not meet all eligibility requirements, was given the loan.

²³¹ See 7 C.F.R. § 766.101(a); FSA Handbook, 5-FLP, Direct Loan Servicing-Special and Inventory Property Management, page 3-2, para. 66.A, page 3-4, para. 67.A (June 6, 2023).

²³² USDA notes that this can be the basis of discrimination. Discrimination Financial Assistance Program, Am I Eligible?, Eligibility, How Discrimination Occurred, at <https://22007apply.gov/eligibility.html#discrimination> (Sept. 26, 2023).

²³³ USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

3. “Smoking Gun” Not Needed

In credit discrimination law, “smoking gun” proof of intentional discrimination—in the form of an insult or a statement that certain people will not get loans—is not required. Nor is it required in the USDA Discrimination Financial Assistance Program. If, however, a USDA official made such a statement or took an action that showed blatant and obviously discriminatory intention the farmer should include this information in their Program Application.²³⁴

In addition, farmers do not need to name a similarly situated farmer that was treated better than them.

²³⁴ Battle, Credit Discrimination § 4.2.2, at 69-70.

Chapter Seven - Standard of Evidence

I. Introduction

In order to succeed in the USDA Discrimination Financial Assistance Program, the farmer who applies must provide evidence that the farmer experienced discrimination. The amount of evidence that a farmer must provide in order to have a successful Application is what is called the “evidentiary standard.” The inevitable question, then, is how much evidence must a farmer provide? USDA describes an evidentiary standard that answers the question of how much evidence.²³⁵ The evidentiary standard, according to USDA, is “substantial evidence.”²³⁶

Several important points follow from this short, but very important, part of the rules for the Program. This Chapter will discuss those points. That will include a discussion of how USDA defines substantial evidence and what the definition means for farmers who choose to apply for this Program.

II. Evidentiary Standard v. Burden of Proof

If this was a sign-up for a claims process that was part of a court case, instead of referring to an “evidentiary standard,” we would instead likely be discussing a “burden of proof.” Because this Program is not a part of a court case, technically the standard used is not a burden of proof.

That said, the evidentiary standard mentioned in USDA discussions of the Program is itself taken directly from the various burdens of proof used in court cases. Many people will be familiar with burdens of proof, and they vary greatly.²³⁷ Some are harder to meet, in other words, than others. For example, “beyond a reasonable doubt” is a burden of proof used in criminal cases and is a very hard standard to meet.²³⁸ “Preponderance of the evidence” is a burden of proof generally used in civil (non-criminal) cases.²³⁹ It is quite hard to meet, although it is a much easier burden to meet than “beyond a reasonable doubt.” As an example, if a farmer appeals a farm loan decision through USDA’s National Appeals Decision, the burden of proof has long been a “preponderance of the evidence.”²⁴⁰

“Substantial evidence” is the evidentiary standard used in this Program. It is also a legal burden of proof used in some legal proceedings.²⁴¹

III. Substantial Evidence Defined

As USDA explains, the farmer must provide “specific evidence” of discrimination.²⁴² As noted above, the evidentiary standard for the Program is that the farmer must show with “substantial evidence” that the discrimination took place. This means that when a decision-maker looks at

²³⁵ USDA, Discrimination Financial Assistance Program, FAQ, No. 10, page iv (Updated Sept. 21, 2023).

²³⁶ USDA, Discrimination Financial Assistance Program, FAQ, No. 10, page iv (Updated Sept. 21, 2023).

²³⁷ Black’s Law Dictionary, “Burden of Proof” (6th ed. 1990).

²³⁸ Black’s Law Dictionary, “Beyond a Reasonable Doubt” (6th ed. 1990).

²³⁹ Black’s Law Dictionary, “Preponderance of Evidence” (6th ed. 1990). It is often described as meaning more probably than not.

²⁴⁰ See Karen R. Krug, USDA’s National Appeals Division Procedures and Practices, at page 50 (2003) (available from FLAG); 7 C.F.R. 11.8(e) (2023).

²⁴¹ Black’s Law Dictionary “Substantial Evidence Standard” (6th ed. 1990).

²⁴² USDA, Discrimination Financial Assistance Program, FAQ, No. 10, page iv (Updated Sept. 21, 2023).

the application that person will be looking to see if the farmer provided substantial evidence of discrimination.

USDA says that in order to meet the substantial evidence standard:

You should provide relevant evidence that a reasonable person could accept as adequate to support the conclusion that discrimination occurred.²⁴³

This definition should mean that an applicant can be denied only if a reasonable person could not conclude that discrimination occurred.²⁴⁴

IV. “Substantial Evidence” is a Low Standard of Evidence

USDA has created a Program in which the standard of evidence is quite low.

As explained above, substantial evidence is a lower, easier to show, standard of evidence than the burden of proof that a court would use in a civil case. For example, if a farmer can show with substantial evidence that the farmer experienced discrimination, the farmer should have success in this Program. But, if the same farmer filed a lawsuit in court accusing USDA of discrimination, the court would likely use a more difficult burden of proof than substantial evidence. As a result, with generally the same evidence, a court might find no discrimination occurred while this Program would find that discrimination occurred. The same difference in result could be true for a USDA Office of the Assistant Secretary for Civil Rights (OASCR) discrimination investigation because that office uses a preponderance of evidence standard.

V. Program Application: How to Show Substantial Evidence of Discrimination

If a farmer filed an Application that said little more about discrimination than something extremely brief, such as “I was discriminated against when I tried to get a loan,” that statement, by itself, will probably not meet the substantial evidence standard. The point of the Application is to give the farmer the chance to provide more evidence of discrimination than a single statement.

The substantial evidence standard in this Program can be met in two ways: (1) description of the farmer’s experience; and (2) documents. This Program is not a trial. There will be no witnesses, no discovery, no cross-examination of witnesses. Instead, every piece of evidence that the farmer can provide will either be in the form of a statement by the farmer or a document that the farmer submits.

A. Statements Describing Experience—Details Matter

When farmers include the details of their experiences this helps add to the evidence, make the story more persuasive, and help the decision maker decide if the substantial evidence standard for showing discrimination is met. The detail helps fill in the picture of what actually happened. When the details are consistent with one another, and include facts

²⁴³ USDA, Discrimination Financial Assistance Program, FAQ, No. 10, page iv (Updated Sept. 21, 2023).

²⁴⁴ Some legal definitions of substantial evidence are slightly different. One dictionary describes it as evidence “which a reasonable mind might accept as adequate to support a conclusion.” Black’s Law Dictionary “Substantial Evidence Standard” (6th ed. 1990).

that would be true for that specific farmer, they move the farmer's Application toward the substantial evidence standard.

For example, if the farmer says the denial was for an operating loan in 2010, and the farmer later explains that in 2010 prices for the crop the farmer marketed were very good, and weather in the farmer's county was excellent, the consistency of the facts of the story help add to the persuasiveness of the Application.

B. Documentation of Experience

The same is true for documents that the farmer might find and send in with the Application. If the farmer can find documents that show the owned land in that county and had farm expenses—for example with a copy of county tax records, and copies of checks made to a feed store—these help support the farmer's description and gets the farmer closer to giving the decision maker substantial evidence of discrimination. Documents, as a later Chapter discusses, can include written statements from people the farmer knew. Such statements also can be valuable evidence.

C. In Sum—Proof of Intentional Discrimination is Not Required

In credit discrimination law, “smoking gun” proof of intentional discrimination—in the form of an insult or a statement that certain people will not get loans—is not required. Discrimination can be shown if an eligible person is treated differently than someone else based on race, national origin, sex, and so forth. For our purposes, on an Application it is helpful to note that the treatment violated USDA's rules. This helps show that others received different treatment. It also can help if the farmer knows that other people received different, more favorable, treatment. This sort of comparison is not required, but helps establish that the treatment was discriminatory.

Chapter Eight - Losses from Discrimination

I. Introduction

The Application for the USDA Discrimination Financial Assistance Program asks farmers to describe the losses they suffered as a result of discrimination.

Although the Program is not a lawsuit, and the financial assistance is not designed to compensate for damages to the farmer, the questions for losses focus on some of the same sorts of things a court would consider when calculating damages that resulted from credit discrimination. The law regarding damages can be helpful when filling out the Application in a couple of ways that are discussed below.

II. What is Included in Discrimination Losses

USDA does not provide much guidance as to how a farmer should show losses that resulted from discrimination.

The Application focuses on three categories of losses: (1) loss of farmland or home; (2) offsets, garnishments and similar actions taken by USDA to collect a debt; and (3) “other economic losses.”²⁴⁵

A. Loss of Farmland or Home

The Application includes a section for describing land that was lost due to discrimination.²⁴⁶ Farmers should include as much detail as possible about the farmland that was lost. USDA, for example, suggests documentation that can include deeds, property records, proof of sale, and so forth. The Application also asks about the number of acres lost. Similar information is asked for if the farmer lost a home.

USDA does not ask the farmer to say how much the land or home was worth in dollars.

B. Offsets, Garnishments, Deficiency Judgment

The Application asks farmers if there were “offsets, garnishment, or deficiency judgments” that were imposed on the farmer as a result of “defaulting on [the farmer’s] USDA farm loan or USDA foreclosing on [the farmer’s] USDA farm loan.”²⁴⁷

Offsets, garnishments, and deficiency judgments are all legal actions that USDA and other lenders can sometimes take to collect a debt from farmers or others.

1. Defining Offset

For the purpose of this Application, an offset occurs when USDA reduces a payment that would have been made to the farmer as a result of a debt the farmer owes to USDA. This could be, for example, a Conservation Reserve Program (CRP) payment or other payment that USDA would have made. An offset can also mean money taken

²⁴⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, pages 28-31.

²⁴⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, pages 28-29.

²⁴⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, question 4, page 29.

by the Treasury Department out of a farmer's IRS tax refund or other federal government payment, such as a Social Security payment.

2. Defining Garnishment

A garnishment is an action a creditor can take to get the property—including the wages—of someone who owes a debt.²⁴⁸ It is not clear if USDA intends this to mean any sort of legal action taken by USDA to get money or property from the farmer. If there are other similar actions, such as the repossession of property or taking money from a bank account, that might not technically count as a garnishment, but the farmer could list those in the third category below on deficiency judgments.

3. Deficiency Judgment

A deficiency judgment can take place after a foreclosure.²⁴⁹ Suppose, using low numbers to keep things simple, the farmer owes 100 dollars. The farmer's farm is taken by USDA in a foreclosure, and USDA receives 80 dollars when it sells the farm. The farmer still owes USDA 20 dollars. If USDA goes to court to collect the 20 dollars and gets the court to agree, USDA can get a legal judgment that says USDA can take more actions against the farmer to collect the 20 dollars. That court action results in what is known as a deficiency judgment.

C. Other Economic Losses

The Application allows the farmer to describe "other economic losses" that are not already listed, and that were the result of the discrimination.²⁵⁰

1. Must be Other Losses

The losses listed in the "other economic losses" section of the Application must be in addition to things already included in the Application. In other words, they should not include things like farmland lost or the loss of a home. Also, according to the Application, do not include agricultural equipment lost along with a farm. Although, if the farmer did not lose the farm, but did lose agricultural equipment due to repossession, that should probably be mentioned in this question. Livestock losses should be included in this question as well.

2. Must be Economic Losses

In the Application, USDA specifically describes the additional losses as other economic losses. This could suggest that the farmer should not include losses that are not economic in nature, although this point is not clear. In discrimination law generally, damages awarded are often for actual losses. These can include tangible losses, which are similar to economic losses. They can also include intangible

²⁴⁸ Black's Law Dictionary, "Garnishment" (6th ed. 1990).

²⁴⁹ Black's Law Dictionary, "Deficiency judgment" (6th ed. 1990).

²⁵⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, question 5, page 30.

losses.²⁵¹ Among other things, intangible losses can include emotional distress, pain and suffering, humiliation, or damage to a credit rating.

It may make the most sense to describe what the law would call intangible losses in Step 5 of the Application where the farmer describes the actual discrimination experienced.

III. Documentation

USDA suggests that documentation of other economic losses be included. USDA suggests including tax records that show revenue and profits before the discrimination and after, receipts, business plans, or other records.

A. Calculations Required

When an amount is given for other economic losses due to discrimination, USDA requires the farmer to show “[y]our calculation of the amount of the loss, specifying components of the loss with dates and amounts.”²⁵² As a math teacher would say in school, “show your work” when you described economic losses in dollar amounts.

B. No Clear Guidance

Step 6 in the Application does not give clear guidance about how a farmer should describe or calculate the economic losses that are due to discrimination. The following sections describe some suggestions that are based on more general legal principles.

IV. Losses in General Under Discrimination Law

When the legal system finds discrimination, it often looks at what it calls damages that should be paid as a result of the discrimination.²⁵³ The following sections give some suggestions about how a farmer might explain economic losses based on what we know about damages in discrimination law.

A. Tie Losses to the Discrimination

When writing about economic losses it makes sense to assume the discrimination described earlier is accepted as true. Next, the challenge becomes how to link that discrimination to economic losses.

The connection between the discrimination and the losses described in the Application needs to be very tight. In discrimination law more generally, damages need to be the natural, direct, and proximate result of the discrimination. A proximate cause to a harm is one in which, without that cause, the harm would not have resulted.²⁵⁴ Put differently, the discrimination must play a substantial part in bringing about, or actually causing, the damage. Or, differently yet again, the proximate cause of harm means that the harm was a direct result of, or a reasonably probable consequence of, the discrimination.

²⁵¹ Battle, Credit Discrimination § 11.8.2, pages 259-261.

²⁵² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, page 30.

²⁵³ Battle, Credit Discrimination § 11.8, pages 258-261.

²⁵⁴ Black’s Law Dictionary, “Proximate cause” (6th ed. 1990).

B. Calculations Do Not Need to Be Exact

While the link between discrimination and the economic harm needs to be tight, the estimate of the damages does not need to be exact. In discrimination cases, courts understand that an exact calculation is impossible.

That said, in this Program it is extremely important to show how the farmer's estimate of damages was calculated and how the farmer reached a certain dollar amount as the economic damages from discrimination.

Any harm that is the basis for the economic damage should be the natural, direct, and proximate result of the discrimination. Put somewhat differently, the harm caused by the discrimination should be foreseeable. In addition, the harm must have been actually and directly caused by the discrimination and the damage must be a reasonably certain and definite result of the discrimination—although uncertainty as to the dollar amount of the harm does not prevent recovery.

Several aspects of general discrimination law damages can be useful to people who apply for this process.

The following are a few examples of economic losses that might have happened for a farmer who experienced discrimination by USDA.

1. Lost Profits

Loss of profits is one of the damages that is recognized under discrimination law. Lost profits can be included even if there is some uncertainty as to the exact amount. If it was a new farm operation, the farmer should try to show how the farm would likely have been profitable if there had been no discrimination. The same is true for a farm that has yet to be profitable. If the discrimination was a late loan, the farmer might show with numbers how much yield was lost due to the lateness and how much that reduced the farmer's income that year.

2. Expenses

Reasonable expenses that are a natural result of the discrimination can be included in the harm. The expenses should be reasonable and needed. For example, if USDA repossessed a hay bailer, an extra cost might be the out-of-pocket cost to hire someone to do custom hay bailing.

3. Loss of Property

Discrimination may result in the loss of property. Harm in this case can be measured by the value of the property to the farmer. This is sometimes calculated as the rental value of the property involved. For example, if the discrimination caused a delay in the purchase of the land, the rental value of the land can be counted as one of the harms.

4. Failure to Receive a Loan

The damage due to the failure of USDA to make a loan might include the difference in interest rates or the loss of opportunity from the lack of the loan.

Chapter Nine - Documentation

I. Introduction

In order to succeed in the USDA Discrimination Financial Assistance Program, the farmer who applies must provide evidence that the farmer experienced discrimination. As the Application points out, a number of important aspects of the farmer’s story can be supported by documents.

The types of documents that a farmer can use to support their Program Application can vary widely. A farmer might use less formal documents, such as farming receipts or old checkbook receipts. A farmer might also want to submit more formal documents, such as USDA records, or tax forms.

The sections below outline some things to think about when preparing to submit documentation for the Program Application. It also describes important documentation terms that are used in the Program Application.

II. Documentation Generally

In some cases, a farmer may not have precise legal documents or other records that support, for example, the fact that the farmer has actually farmed. Seemingly innocuous or forgotten records, however, can serve a similar purpose. Old checkbook records can show farm expenses, for example. In addition, property tax records might be online and go back several years.

III. Application: Documentation Requests

For nearly every step in the Program Application there are document requests. These requests are grouped into two important categories—what the Application calls “must” documents and “may” documents. The document requests in the Application can be found in a grey box on the right-hand side of the page. It is important to read the document requests carefully.

Descriptions of “must” and “may” documents, as well as other possible types of documentation, are described in the next sections.

A. “Must” Documents

The Application requires that farmers submit specific types of documents, and it will be essential to provide those documents. These are what the Application calls “must” documents. As the Application states:

The instructions use the word **must** where documentation is strictly required; this means you must supply the requested supporting documents.²⁵⁵

Even when documents are required, there is flexibility in the Application in terms of the exact type of document that can be submitted. Nearly every time a specific “must” document—or required document—is listed in the Application, it is also possible to submit an “other” document. So, as an example, for farmers who have owned farmland the Application says that the farmer must submit documentation to show proof of that

²⁵⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, page 1.

ownership.²⁵⁶ The Application goes on to say that the required documentation could include a deed, property tax records, or a producer farm report showing ownership of the land. But the Application also states that the farmer can provide an “Other” document. This means that if farmers do not have one of the three listed documents, farmers can still meet the requirement if they submit a different form of documentation that similarly shows their ownership of the land. This might include a check to the county for real estate property taxes, for example.

B. “May” Documents

Nearly as important as the required documents are those that are not absolutely required. These are what the Application calls the “may” documents. Although these “may” documents are not required, in many places the Application suggests that it would be very beneficial to the farmer applying to provide those requested documents. As the Application itself says:

The instructions use the word **may** where documentation would be helpful to assessing your Application. This means that your Application would be stronger if you provide documentation.²⁵⁷

C. Sworn Statements

In several places in the Application it allows sworn statements to be submitted as a supporting document. Neighbors, bankers, people at the mill or cooperative, and many other people may have specific recollections that they would be willing to share. These recollections can be submitted in the form of a sworn statement that is made under penalty of perjury. USDA has created a template that farmers can use when submitting a sworn statement.²⁵⁸ In some parts of the Application, such as when the farmer is trying to show that the farmer attempted to apply for a loan, these statements should be from a non-relative.

IV. Requesting USDA Records—And Concerns

Important farmer records may include USDA documents. One example of a document that could help is a Receipt for Service, which details the reasons for a farmer’s visit to a Farm Service Agency (FSA) office and how FSA responded. Other documents could include specific loan documents, such as loan applications or loan agreements, or any letters or communications from USDA or the FSA regarding a farmer’s application for a USDA farm lending program. Records from old USDA discrimination cases could also be helpful.

If the farmer does not have these records in their possession, the farmer can request them from USDA. As is explained below, farmers have reason to be concerned about whether this will be an

²⁵⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, page 10.

²⁵⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, page 1.

²⁵⁸ The template that can be used for submitting a sworn statement can be download in English or Spanish by visiting Discrimination Financial Assistance Program, Resources & Documents, Supporting Documentation Templates, Statement Under Penalty of Perjury Template, at <https://www.22007apply.gov/resources.html#supporting-docs> (Sept. 26, 2023).

effective way to get farmer records. Where possible farmers should look for sources of the same or similar documents from places other than USDA.

A. Request Must be Made by Email

USDA has established a process for requesting documents from USDA that will be submitted as part of the Discrimination Financial Assistance Program. This process involves emailing USDA and providing specific details. The request must be made in writing, and by email. The farmer making the request can specify if they want to receive the records in paper form, by mail, or electronically by email.

The FAQ for this Program outlines all of the details that must be included in the email.²⁵⁹ Below are the required pieces of information to include in the email request for records from USDA:

- Your name, address, phone number, and email.
- Proof of your identity. You can provide your last four digits of your social security number, or a scan or photo of your driver’s license or of other state identification.
- Whether the request is for your own records or for someone else’s records. If you are requesting someone else’s records, you need proof of their identity, proof of your identity, and also proof that they have authorized you to request their file (for example, written consent from the person, or a court order, or a power of attorney).
- The state and county/counties where loans and loan servicing were sought.
- The type of records you want (for example, farm loan records).
- The relevant year or range of years in which the records requested were created.
- How you would like to receive the copy of the records; mailed paper-copy or electronic file.

B. Deadline for Records Request: November 3, 2023

The deadline for a request to USDA is November 3, 2023. USDA says that anyone who requests records for the Program Application after this deadline “will not receive a response prior to the deadline for this Application.”²⁶⁰ This is an extension of earlier deadlines.²⁶¹

C. What Records USDA Will Make Available By USDA

USDA notes that it may not have kept all of the farmer’s documents—especially for documents that are over a certain number of years old.²⁶² It remains unclear how long USDA has kept various records and whether USDA will be able, with any certainty, to provide all of the documents that farmers request.

It is hard to anticipate the extent to which documents will be sent to farmers. The sections below summarize what we know.

²⁵⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

²⁶⁰ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

²⁶¹ The original deadline was September 6, 2023. USDA then extended it to September 29, 2023.

²⁶² USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

1. USDA Says it Will Make Every Effort to Get Records to Farmers

USDA says that “it will make every effort to search for and prepare the records and send them to [farmers] prior to the filing deadline of January 13, 2024.”²⁶³

2. Discrimination Case Records

USDA says it has records on the various large USDA discrimination cases that were filed several years ago. USDA provided the National Administrator with lists of people who applied in the various processes that came out of the prior cases and who was paid through them.²⁶⁴

3. USDA Destroys Some Records

USDA notes that they dispose of certain records within a number of years if the records are not the subject of active litigation.²⁶⁵ As a result, USDA says, USDA may not have records past a certain number of years.

4. USDA Keeps Some Records for Longer Periods

USDA keeps some records for quite long periods. We know that at least some digital records have been preserved and have already been sent to program administrators.²⁶⁶ We know also that because a farmer who causes the government a loss on a USDA farm lending loan is no longer eligible for another loan, USDA must keep records of many borrowers for a very long time so as to make sure these people never get a loan again.

5. Types of Records Possibly Available

At least some USDA records are in hard copy. As USDA notes, these records are often eventually destroyed. USDA has also long kept borrower records on computers in a database. In the past, USDA has had a search capacity for the records and was able to retrieve information about loans, payments, and the resolution of loans. Previously, USDA also has had a system of archived records that were kept on microfiche. These also contained detailed loan information about farm loans. Which of these records are still maintained, and whether they will be searched based on record requests for this Program, is unknown.

D. USDA Records Can be Especially Helpful for Two Purposes

USDA records might be especially helpful in showing two things. First, USDA documents can show that a farmer actually farmed. Second, USDA documents can show that a farmer sought or received a USDA farm loan.

USDA documents that can help show farmer activity and interactions with USDA include the following:

²⁶³ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

²⁶⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 7, page 32.

²⁶⁵ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

²⁶⁶ USDA, Discrimination Financial Assistance Program, FAQ, No. 18, pages vii (Updated Sept. 21, 2023).

- (1). Form AD-2047, Customer Data Worksheet;
- (2). Form FSA 578. Report of Acreage;
- (3). Form FSA-2001, Request for Loan Assistance;
- (4). Producer Farm Data Report; and
- (5). AD 1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification.

In addition, farmers could ask for records about any loan or loan application that could be found that concerned the farmer. Farmers might ask for copies of both paper records and any database or other computer-based records that exist.

E. Concerns About USDA’s Document Search – But Still Worth Pursuing

Farmers interested in looking at their old USDA lending records have reason to be concerned about the process that is taking shape for farmers to get records from USDA. Even assuming that USDA makes every effort to get records to farmers if a request is made by November 3, 2023, we do not know the actual extent of the searches, whether all available records will be searched, or if all records shared with the Program administrators will also be shared with farmers. That said, as farmers search for documents to use in their Applications, it seems well worth the effort to try to get relevant documents from USDA.

F. Look for Alternatives

As it stands right now, although there are reasons to be concerned about the thoroughness and effectiveness of USDA record searches, farmers should certainly try to use the USDA records search system. Farmers should also try alternatives to get their records.

G. What Records Will Go to Decision Makers

USDA has hired a vendor, a National Administrator, to make final decisions on individual applications. USDA has shared information about individual USDA farmer loans with the National Administrator. USDA says it did so for three reasons.²⁶⁷ First, USDA hopes it helps create an efficient process to review and make decisions on Applications. Second, USDA hopes that the shared information will help decision makers review Applications and make decisions. Third, USDA hopes the information helps decision makers make sure the information in the Applications is accurate.

What is included in the information given to decision makers by USDA is not completely known, but it likely includes records on individual farmers and their interactions with USDA. Also a bit unclear is how the records will be used by those making decisions about Applications. We also do not know for sure if the records that are made available to decision makers will also be made available to farmers that request them.

V. Other Possible Ways to get USDA Records—Freedom of Information Act (FOIA)

Farmers have also long had the right to get a copy of their own USDA farm lending program file through the Freedom of Information Act (FOIA). As of 1990, a farmer had the right to see their

²⁶⁷ This information is from USDA email communication.

records relatively quickly.²⁶⁸ At present, USDA rules suggest that a FOIA request by a farmer for the farmer's own records would likely normally take a few weeks.²⁶⁹ Because farmers will not know with certainty, and in advance, what documents USDA might provide through the record request process described above, some farmers may wish to submit a separate FOIA request for their records. USDA, however, has said that they will not be able to respond to FOIA requests filed in the normal way quickly enough to get farmers their records quickly. That probably means that FOIA is not a helpful strategy for farmers to get their records quickly. Given the new deadline for an Application of January 13, 2013, using the formal FOIA process might be helpful.

VI. Other Possible Way to Get USDA Records—Local Offices

USDA has asked that farmers seeking records go through the e-mail process described above. USDA, however, cannot stop someone from calling, emailing, or walking into a local Farm Service Agency (FSA) office and asking for their records. In some cases, the local officials may make things available. At least some offices are referring farmers who request records to the email system set up for this Program. Some offices have asked people why they want the records. It may be that if the request is for personal use, as opposed to the USDA Discrimination Financial Assistance Program, the answer may be different. It is of course possible that farmers want to be aware of the records USDA has regarding them. Farmers' Legal Action Group (FLAG) has strongly urged all USDA borrowers to ask for and keep a copy of all USDA farm lending records about the farmer and has made this suggestion for at least thirty-five years.²⁷⁰

Farmers considering this option are sometimes concerned about retaliation by the local office. This, of course, is a legitimate concern, and one that each farmer must weigh. It is illegal for a USDA official to retaliate against a farmer for asking for records and for filing an Application in this Program.²⁷¹

It is also possible that an email request to USDA for farm lending records will be funneled to a local office anyway. That would mean that a local request for records might not increase the risk of retaliation because the local office will know of the farmer's request through the email system regardless.

²⁶⁸ As of 1990, for example, after a request USDA had ten working days to tell the farmer if the records would be available, and then thirty days to thirty days to produce the records. See Farmers' Guide to FmHA (4th ed. 1990).

²⁶⁹ See 7 C.F.R. § 1.6(b) (2023); USDA, Farm Production and Conservation Business Center (FPAC), Freedom of Information Act (FOIA), Response Time, at <https://www.fpacbc.usda.gov/foia/index.html> (Sept. 26, 2023). For additional information on FOIA requests, see generally 5 U.S.C. §§ 552, 552a; 7 C.F.R. §§ 1.01-1.12; and USDA, Farm Production and Conservation Business Center (FPAC), Freedom of Information Act (FOIA), at <https://www.fpacbc.usda.gov/foia/index.html> (Sept. 26, 2023).

²⁷⁰ See Farmers' Guide to FmHA, page 4.2 (4th ed. 1990) ("if you are having problems with FmHA, your first step should be to get a copy of your file from them.")

²⁷¹ Discrimination Financial Assistance Program, FAQ, page i (Updated Sept. 21, 2023).

Chapter Ten - A Trip Through the Application

I. Introduction

This Chapter takes a closer look at the Application for the Discrimination Financial Assistance Program. It is important that every person applying for this Program, and every person helping an applicant, read through the Application very carefully.

This Chapter does not discuss every question in the Application. Instead, it focuses on the aspects that seem especially important or which could benefit from additional explanation. When reading this Chapter it would be helpful to have a copy of the Application in hand in order to follow along. It will likely also be helpful to have a copy of the Document Checklist that USDA has created. This Checklist provides a list of all of the possible documents that could be required for each step in the Application.²⁷²

II. Application Overview

The Program Application is long—forty pages to be exact. Not every part of every page will need to be filled out by each farmer. However, in order to determine which parts must be completed, each farmer must carefully read every page of the Application and follow the prompts as directed.

Completing the application is likely to take considerable time. It also requires farmers to remember and describe the discrimination they experienced.

The Application is broken down into ten steps. These steps represent different categories of questions. The steps cover topics like the various eligibility aspects of the Program, the type of discrimination the farmer experienced, and the economic losses the farmer suffered because of the discrimination. In addition, each step is broken down into subsections, referred to in this Guide as Parts, that usually correspond to a letter: Part A, Part B, Part C, and so forth.

The ten steps of the Application are as follows:

Step 1: About You

Step 2: Type of Applicant

Step 3: Eligibility for this Program as a Farmer or Rancher

Step 4: Eligibility for this Program as a Borrower or Attempted Borrower in a USDA Farm Loan Program

Step 5: Discrimination in USDA Farm Loan Programs

Step 6: Losses from Discrimination for Applications Who Have Operated a Farm or Ranch

²⁷² To download a copy of the USDA Discrimination Financial Assistance Program (DFAP) Application Document Checklist, see Discrimination Financial Assistance Program, Resources & Documents, Supporting Documentation Templates, at https://www.22007apply.gov/media/Checklist_Printable_English.pdf (Sept. 26, 2023).

Step 7: Prior Claims, Complaints, and Appeals

Step 8: Additional Information (Optional)

Step 9: Taxpayer Information Request

Step 10: Signatures and Certifications

III. Application Steps

This Chapter provides a walkthrough of each Step in the Application.

Each Step asks for documents. Some documents are called “must” documents by USDA because they must be sent in. Others are called “may” documents because they can be helpful to submit but are not required.

To make it easier to follow along, each Step will start on a new page.

Step 1: About You (Application Pages 1-4)

Step 1: About You (Application Pages 1-4)

Step 1 of the Application asks for three categories of information.

First, Part A asks for identifying information about the applicant—the farmer who is applying for the Program.

Part B asks for contact information for what the Application calls “Alternate Contacts”—people that may be contacted with questions about the farmer or the Application.

Part C asks for information about anyone who is helping the farmer prepare the Application.

A. Identifying Information

Part A of the Application asks for identifying information about the farmer who is applying for the Program and to whom a payment would be made if the farmer is found to have experienced discrimination. Because this Program only makes payments to individuals, and not legal entities, this Step only asks questions about the individual applicant. Step 2 will ask for details on any entities that the farmer may have been a part of.

A couple aspects of Part A deserve more discussion.

1. Other Names

Part A asks the farmer to provide “any other name that you have used or done business with USDA under.”²⁷³ This question is looking for any other name the farmer has had, such as a maiden name. It is especially looking for any other name the farmer used in their earlier dealings with USDA. This is especially important in case there are USDA documents or records that list a name different than the farmer’s name as listed on the Program Application.

Farmers who participated in previous USDA discrimination cases, should include any name they used in those earlier cases if that name is different than the farmer’s current name.

2. Required Documentation

Part A of Step 1 requires that a farmer provide at least two forms of identification.²⁷⁴ The Application lists over a dozen possibilities that a farmer can choose from. The farmer may choose any two of the documents listed.

In addition, the farmer must provide either their Social Security Number (SSN) or their Individual Taxpayer Identification Number (ITIN). The farmer must also

²⁷³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, Part A, page 1.

²⁷⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, Part A, page 2; USDA, DFAP Document Checklist, pages 1-2.

Step 1: About You (Application Pages 1-4)

submit a photocopy of an official or financial document that shows the farmer's SSN or ITIN.

B. Alternative Contacts

It is surprisingly easy to lose track of someone in a process such as this. Because of this reality, Part B of Step 1 asks the farmer to designate two people that can be contacted about the Application if it is needed.²⁷⁵ One alternate contact is someone that could be contacted only if USDA or the vendors are unable to reach the farmer. For example, if the number provided for the farmer is no longer in service. The other alternate contact is someone whom the farmer is authorizing USDA or the vendors to reach out to in order to discuss the farmer's application.

It is not required that a farmer list any alternate contacts.

1. Someone Who Can Provide USDA with the Farmer's Contact Information

The first type of alternate contact is someone who could provide USDA with the farmer's contact information if USDA or a vendor is unable to reach the farmer. This contact would not be allowed to discuss the substance of the farmer's application with USDA. Instead, USDA would only reach out to this alternate contact in order to get help in locating the farmer.

2. Someone USDA Can Contact to Discuss the Farmer's Application

The second type of alternate contact is someone with whom USDA or the Administrators can discuss the farmer's Application. In some instances the farmer may be asked for additional clarifying information. If the farmer fills out an alternate contact in Part B of Step 1 it means the farmer authorizes USDA or a USDA vendor to speak about their Application with the alternate contact.

It is unclear exactly what type of information might be asked of the alternate contact or what might prompt questions for the alternate contact. Because of this unknown, if the farmer chooses to list an alternative contact who can be contacted for a discussion of the Application, the farmer should feel comfortable with that contact answering questions about any aspect of the Application.

If the alternative contact is a farm advocate or other person working with the farmer to help prepare their Application, it makes sense to check the "Other" box and explain what role the alternate contact has.

C. Information About Anyone Helping Prepare the Form

Part C of Step 1 asks for the farmer to list the name and contact information for anyone who helped the farmer fill out the Application. This could include, for example, a farm

²⁷⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, Part B, page 3.

Step 1: About You (Application Pages 1-4)

advocate or a technical assistance provider from a farm organization. It could also include the farmer's legal guardian, if the farmer has one.

1. No Requirement to Get Help with Application

There is no requirement that a farmer have anyone help them fill out the Application. If a farmer chooses to get assistance, the name of the person who helped them should be included in Part C of Step 1. In addition, anyone who helps the farmer with their Application must sign a certificate in Step 10.

Some people will try to take advantage of farmers and—for example—insist that the farmer needs to hire a lawyer in order to apply for this Program. No such lawyer is required. Farmers should be aware of scam artists and anyone asking for money to help the farmer complete the Application.

2. Documentation—A Must for Legal Guardians Only

The only documentation request for Part C of Step 1 applies if the farmer has a legal guardian who helps the farmer fill out the Application. If that is the case, the legal guardian must provide proof of their status as the farmer's guardian by submitting a copy of the Court order that named the legal guardian.²⁷⁶

²⁷⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 1, Part C, page 4; USDA, DFAP Document Checklist, page 2.

Step 2: Type of Applicant (Application Pages 5-9)

Step 2: Type of Applicant (Application Pages 5-9)

Step 2 of the Application seeks information about the type of farmer that is applying. Specifically, this step is looking to find out whether the farmer was a sole or co-borrower on a USDA loan, whether the farmer was a member of an entity that participated in a USDA farm lending program, or whether the farmer is applying as someone who assumed or was assigned a USDA farm loan program debt from another person.²⁷⁷

A. Specific Types of Applicants

Under Step 2, there are five possible types of applicants. When considering what type of applicant a farmer qualifies as, it is important to think about the farmer in terms of their status when they applied for a USDA farm lending program loan.

The five types listed in Step 2 are: (1) an individual who applied for a USDA farm loan without a co-borrower; (2) an individual who applied for a USDA farm loan with a co-borrower; (3) a member of a legal entity that participated in a USDA farm lending program; (4) an individual—without a co-borrower—who assumed, or was assigned, the debt of a USDA farm lending program loan from another; and (5) an individual—with a co-borrower—who assumed, or was assigned, the debt of a USDA farm lending program loan from another.

1. Estate Claims—Not Allowed

In general, farmers are not allowed to apply for this Program on behalf of a deceased relative. The only claims on behalf of another person allowed in this Program are those where the farmer assumed or was assigned the original USDA borrower's debt. It is likely that few farmers will fall into this category. As a result, estates, in general, are not allowed to file an Application. A more detailed explanation of estate claims is provided in Chapter Four of this Guide.

2. Only Fill Out Applicable Part of Step 2

The farmer needs to fill out those parts of Step 2 that apply to the farmer's specific situation. Farmers do not need to fill out parts of the Application that do not apply to the farmer. In other words, if the farmer is applying as someone who had a co-borrower on their USDA loan—such as a spouse—the farmer only needs to fill out Part B on co-borrowers. Similarly, if the farmer is applying as a member of an entity, the farmer need only fill out Part C, which asks for information about entities.

If the farmer is applying as an individual who personally participated in USDA farm lending program—and the farmer did not have a co-borrower, or was not a member of an entity—the farmer does NOT need to fill out Step 2. This is because the farmer already provided their identifying information in Step 1.

²⁷⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, page 5.

Step 2: Type of Applicant (Application Pages 5-9)

B. Information About Co-Borrowers

When there are co-borrowers on a loan it means both people signed the loan paperwork or would have signed for the loan if it had been made. Many loans will only have one borrower. Even if two or more people farmed together, co-borrowers only exist if more than one person signed the actual loan paperwork. If the farmer had a co-borrower on their USDA farm program loan, Part B of Step 2 will ask for information on that co-borrower.

1. Documentation for Co-Borrowers—“May” Documentation Only

Part B of Step 2 does not require that the farmer provide documentation of the co-borrower. Instead, Part B offers suggestions for documentation that farmers “may” provide.²⁷⁸ If the farmer has access to any of the suggested documents it would likely be useful to provide them.

The Application provides four examples of documents a farmer could include to reflect that they had a co-borrower on a USDA farm program loan.

First, farmers could submit a Form FSA-2001. This is a “Request for Direct Loan Assistance” from FSA.²⁷⁹

Second, the farmer could submit a promissory note. A promissory note is a document that says the farmer—or in this case, the co-borrowers—owe money.

Third, a farmer could submit a mortgage deed. A mortgage deed can be provided as documentation if it lists both co-borrowers. A mortgage deed is a legal agreement that lists specific property as collateral for a loan.

Fourth, the farmer could provide other documents. These could include documentation from a bank account, for example, which lists both borrowers.

C. Information About Entities

The vast majority of farms in the United States are not formal legal entities—such as corporations or Limited Liability Companies (LLC)—but they do exist. USDA makes loans to entities as well as to individuals. If a farmer participated in a USDA farm loan program as a member of an entity, Step 2 is where the farmer must provide information on that entity, as well as any other members of the entity. Any entity a farmer lists in this part must have the same name as the entity that is listed on the USDA farm lending loan program documents.

²⁷⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, Part B, page 6; USDA, DFAP Document Checklist, page 2.

²⁷⁹ For reference, form FSA-2001 is available for download at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/direct-loan-apps/Form_FSA_2001_Request_For_Direct_Loan_Assistance.pdf.

Step 2: Type of Applicant (Application Pages 5-9)

Step 2 also asks that the farmer indicate their percentage of interest in the entity at the time discrimination occurred. This is asked because if a farmer is found eligible for this Program, the payment will be based on the farmer's percentage interest in the entity.²⁸⁰ So, for example, a farmer who had a 75 percent interest in an entity that was discriminated against would likely receive more of a payment than the farmer who had a 25 percent interest in the same entity.

1. Documentation for Entities

For Part C of Step 2, some of the documentation for applicants who are applying as members of an entity are required, "must" documents, while others are optional, "may" documents.²⁸¹

a. "Must" Document—Entity Taxpayer Identification Number

For a farmer who is applying as a member of an entity, the Application requires that the farmer provide documentation of the entity's taxpayer identification number (TIN). This could include either an IRS-created tax form or any other business record that includes both the name of the entity and the TIN.

b. "May" Documents

Part C of Step 2 provides examples of several documents that a farmer can choose to submit but is not required to provide. There are two general categories of "may" documents listed in Part C. If the farmer has these documents, it is likely beneficial to provide them.

First, Part C of Step 2 says that a farmer may provide additional documentation to show the name of the entity. This could include a tax document or other government-issued document.

Second, if a farmer is applying for the Program as a member of an entity, the Application says it "would be stronger" if the farmer provides documentation to show both the farmer's membership interest in the entity, as well as the interest of any other members.²⁸² This language suggests that such documentation is not required, but that it would be beneficial for a farmer to provide the documentation. The Application provides examples of such documentation, including tax returns, USDA farm loan program documents, or articles of incorporation for the entity.

²⁸⁰ USDA, Discrimination Financial Assistance Program, FAQ, No. 11, page v (Updated Sept. 21, 2023).

²⁸¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, Part C, pages 7-8; USDA, DFAP Document Checklist, pages 2-3.

²⁸² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, page 8.

Step 2: Type of Applicant (Application Pages 5-9)

D. Assigned or Assumed Debt

Part D of Step 2 is only for farmers who are applying as individuals that have an assumed or assigned debt from a USDA farm lending program and the original borrower experienced discrimination by USDA.

This is a very specific category of applicants. It is possible that there are farmers who want to apply for this Program who may now own the land that a deceased farmer owned, or who may have continued the farming operation after the original farmer passed away. There may also be farmers who want to apply who helped the deceased farmer with their operation while they were still living. None of these farmers are eligible unless the deceased farmer had a USDA farm lending program loan and the loan itself was assigned to, or assumed by, the farmer who wishes to apply for the Program.

For farmers who fall into this category, Part D of Step 2 asks for information about the original borrower—that is to say, the farmer who had the original USDA farm loan program loan, and who experienced discrimination by USDA.

1. Documentation of Assumptions or Assignments—“May” Documents Only

Step 2 of the Application says that a farmer may provide documentation of the assignment or assumption.²⁸³ This could include a copy of the loan or mortgage assignment or assumption or another document that indicates the farm loan was assigned or assumed.

²⁸³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 2, page 9.

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

As explained in detail in Chapter Four of this Guide, individuals can be eligible for this Program if they are, or were, farmers. People can also be eligible if they tried to farm but were unable to do so because of discrimination by USDA. Step 3 of the Application asks for information about this aspect of eligibility.

USDA is interested in understanding whether an applicant has ever farmed. This is likely because USDA says that applicants who have never farmed “will receive substantially less financial assistance than those who did” farm.²⁸⁴

Part A of Step 3 is for those individuals who are farming or farmed in the past. Part B of Step 3 asks for information from individuals who never farmed but would have farmed if not for discrimination by USDA. An applicant should only fill out the specific part that applies to their situation—whether they have farmed or never farmed.

A. Applicants Who Are, or Were, Farmers and Ranchers

Part A of Step 3 is only for applicants who are farming or who have farmed in the past. Because the financial assistance will be greater for those applicants who have farmed, it is important that the questions in Step 3 be filled out completely and with as much detail as possible.

1. Details are Important

These questions in Step 3 should be answered in detail. The time period that Step 3 of the Application is mostly concerned with is when the discrimination occurred. For example, Part A of Step 3 asks whether the farmer owned or leased farmland “during the period of discrimination.”²⁸⁵ A farmer’s situation—whether as a lessee or a landowner—may have changed over time and may now be different than at the time when the farmer experienced discrimination. It is therefore important when filling out this Step of the Application to read the questions carefully.

2. Addresses Can be Confusing

Part A of Step 3 asks for the farmer to provide the address for the farmland that they owned or leased during the period of discrimination. This could be difficult for some to provide. Rural street addresses have not been in existence forever, and farmland is often in unincorporated areas or townships within counties. In addition, Post Office locations do not always line up with towns of residence, land that is farmed is often not the same address as the home address, and many pieces of farmland have no actual address. For this reason, all information that can help narrow down the location of the farm will help. As an example, if a specific postal address is not known, it could help to write something such as:

²⁸⁴ USDA, Discrimination Financial Assistance Program, FAQ, No. 12, page v (Updated Sept. 21, 2023).

²⁸⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, page 10.

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

Raised corn for silage on fields in the far south-central part of Jackson County, north of Highway 150, but east of Big Creek.

3. Urban Farming

There is no prohibition against financial assistance to urban farmers in this Program. Therefore, an urban farmer who was discriminated against by USDA in relation to a USDA farm lending program should fill out Part A of Step 3 as well.

4. Farm Numbers and Farm Tract Numbers

Farm numbers are part of a system developed by USDA to track land for farm program purposes. It dates back to the New Deal ninety years ago. This system created what are known as FSA farm numbers and FSA farm tract numbers. In general, a farm number is a number that can be assigned by USDA, through FSA, when the land in question is part of a single farming operation.²⁸⁶ It is also possible for land with different owners to be combined into a single farm for purposes of a farm number.

A farm number is tied to the land—and not the farmer—and therefore if a farmer buys land it may already have a farm number. Similarly, if a farmer moves and buys land in another location, that land will have a different farm number.

Not all farmers who will apply for this Program will have a farm number. This is particularly true for farmers who were denied a USDA farm loan program loan. Others may not be aware of their farm's Farm Number. In addition, farmers that were unlikely to use other USDA programs are less likely to have farmed land that had a farm number. For example, direct marketers, truck farms, and livestock farms have generally been among those less likely to have a history with USDA. On the other hand, some farmers may have farmed multiple areas of land, and thus have many farm numbers or many farm tract numbers.

It is not required that a farmer provide a farm number or farm tract number. It can be helpful to do so if the farmer is able to track down the appropriate number. Farmers who believe they have a farm number or farm tract number, but who do not know what that number is, may email USDA to request that information.

²⁸⁶ For a short discussion of farm numbers, see RAFI, How & Why to Get a Farm Number (July 31, 2020), at <https://www.rafiusa.org/blog/beginning-farmers-how-and-why-to-get-a-farm-number/>. For the official rules for creating or changing a Farm Number, see FSA Handbook, 10-CM, Farm Records and Reconstitutions (May 18, 2023), at https://www.fsa.usda.gov/Internet/FSA_File/10-cm_r02_a02.pdf. A Farm Tract, by contrast, is an area of contiguous land that is under the same ownership and operated as a farm. FSA Handbook, 10-CM, Farm Records and Reconstitutions, Exhibit 2, page 15, "Tract" (May 18, 2023).

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

5. Describing the Operation

Part A of Step 3 is where the Application asks the farmer to describe their farming operation. As noted above, detail is important. “Beef cattle” could intuitively seem like an adequate answer. Much more helpful, however, is:

We had a cow-calf operation. The bulls were mainly Herefords. Usually, we had about twenty cows. They were on pasture, but we put up some hay for the winter. We usually sold the calves as yearlings, although we butchered some and sold meat to neighbors. We had a small shed for bad weather and a small hay barn. Our neighbor usually baled hay for us.

The more detail a farmer can provide when describing the operation, the more convincing it will be to those reviewing the Application that farmer has in fact farmed.

6. Documentation for Applicants Who Have Farmed

Some of the documentation for applicants who have farmed in Part A of Step 3 are required, while others are optional to provide.²⁸⁷

a. “Must” Documents

For applicants who have farmed, Part A of Step 3 has only one clearly required “must” document. If the farmer owned their farm or ranch, the farmer must submit documentation to show that ownership.²⁸⁸ This could be a copy of a deed, property tax records, a producer farm report that shows the name of the owner, or another document that shows the farmer applying was the owner of the farm.

b. “May” Documents

For applicants who have farmed, Part A of Step 3 says that documentation may be provided which shows the location of the farming operation as well as documentation to show that the farmer did in fact farm.

First, Part A of Step 3 provides examples of documents a farmer can provide to show where their farm is located.²⁸⁹ If a farmer knows the farm number or farm tract number for their land, or if they have their USDA farm loan number, the farmer does not need to provide additional documentation. If the farmer does not have any of that information, Step 3 says that a farmer “may”

²⁸⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part A, pages 10-12; USDA, DFAP Document Checklist, pages 3-4.

²⁸⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part A, page 10; USDA, DFAP Document Checklist, page 3.

²⁸⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part A, page 10; USDA, DFAP Document Checklist, page 4.

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

provide a deed, property tax records, a copy of a lease, marketing or other business materials that include the address of the farm, a land survey, or any other document that could be viewed to reliably show the location of the farm.

Second, Part A of Step 3 says applicants who have farmed may provide documentation to show they have farmed.²⁹⁰ If the farmer knows the farm number or farm tract number for their farm, or if they have their USDA farm loan number, the farmer does not need to provide documentation to show they farmed. If the farmer does not have that information, Step 3 says the farmer may submit other documentation. This could include a copy of a lease, a copy of an IRS form 1040, Schedule F, financial records, a State Agricultural Land Valuation document, or records from a third-party farm supplier that show the farm ownership of the farm.

To show the applicant farmed, Part A of Step 3 also says that the applicant could provide a statement under penalty of perjury—a sworn statement—from a non-family member who has knowledge that the applicant farmed.²⁹¹ USDA has created a template with the recommended language to use when submitting a sworn statement.²⁹² If this template is used, a notary is not required. For applicants who do not have other documentation to show they farmed, providing a sworn statement could be useful. The statement should describe the applicant's farm and how the person signing the statement has knowledge of the farming operation.

In addition, old receipts from a grain mill, check book statements for tractor tire repair, veterinarian bills, and other seemingly piecemeal records may be a good way to establish farming when other records are not available.

²⁹⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part A, page 11; USDA, DFAP Document Checklist, page 4.

²⁹¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part A, page 11; USDA, DFAP Document Checklist, page 4.

²⁹² The template for the sworn statement can be download in English or Spanish by visiting Discrimination Financial Assistance Program, Resources & Documents, Supporting Documentation Templates, Statement Under Penalty of Perjury Template, at <https://www.22007apply.gov/resources.html#supporting-docs> (Sept. 26, 2023).

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

c. Documents if Owned or Leased Farmland

A copy of a lease could be helpful to show the farmer actually farmed. Despite the common legal requirement that enforceable leases of real estate for more than a year must be in writing, many leases of farmland were not—and are not—in writing. It would not be uncommon for lease payments to be in cash or for there to be a rough system of payment in a commodity. A farmer rents a hay field, for example, and payment is half of the hay crop. In general, therefore, documentation for rented land will be harder to come by than documentation for owned land.

B. Applicants Who Never Farmed, But Would Have

Part B of Step 3 is only for applicants who never farmed but who would have farmed had USDA not discriminated against them in a way that prevented the applicant from obtaining a USDA farm loan program loan.

With unusual exceptions, such as with USDA Emergency Loans, there has been no requirement that USDA farm lending program applicants be active farmers.²⁹³ In fact, some USDA programs explicitly aim to fund beginning farmers. Loan applications by people who are not yet farmers are actively encouraged by USDA and are contemplated by USDA rules and by statute.²⁹⁴ In other words, for purposes of this Program, applications from non-farmers are perfectly legitimate.

1. What Counts as Farming

There may be a tendency for people to say they never really farmed even though they arguably farmed—but only on a small scale. There is no definition of a farm for this Program, and thus no requirement that a farm must be of a certain size. Under USDA farm loan program rules, a farmer needs to have an operation large enough to be considered a farm, and not just a residence, within their community.²⁹⁵ The farm lending program rules require this to be true only after the loan is closed.²⁹⁶ In other words, there is no need to have an existing, active farm when a person applies for a USDA farm lending program.

In addition, if a person sold or bartered fruits or vegetables this could easily be considered a small farm. A commonly used definition of farming—requiring that a farm have sales of over one thousand dollars per year in a normal year—could be a

²⁹³ For example, in order to apply for a USDA Emergency Loan, the farmer must be what USDA calls an “established farmer.” See FSA Handbook, 3-FLP, Direct Loan Making, page 10-8, para. 242.C, Exhibit 2, page 9, “Established farmer” (March. 29, 2023).

²⁹⁴ See, for example, USDA, Beginning Farmers and Ranchers Loans, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/beginning-farmers-and-ranchers-loans/index> (Sept. 8, 2023).

²⁹⁵ See, for example, FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 2, page 11, “Farm” (March. 29, 2023).

²⁹⁶ 7 C.F.R. section 764.101(k) (2023).

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

useful definition although it is a creation of the agricultural census and has no official status for purposes of this Program.²⁹⁷

The point here is that the applicants for this Program may actually have had a farming operation at the time they applied to USDA but might not necessarily believe they did. Because this Program tends to provide more financial assistance to those who have farmed than those who have not, it is important to seriously consider whether the person applying has ever farmed.

2. Documentation for Non-Farmers

The need for documentation is likely even more important for applicants who have never farmed. This is true because it can be much harder to show something that you would have done than to show something you actually did.

Although Step 3 does not list any “must” documents for applicants who have never farmed, it does note: “For this part, more documentation would be helpful to your Application.”²⁹⁸ It seems fairly clear, therefore, that it is in the applicant’s best interest to try and provide documentation to show they genuinely planned on becoming a farmer.

Part B of Step 3 provides several examples of the types of documentation an applicant could provide to show they intended to farm.²⁹⁹ This includes: a business plan, marketing plan, USDA farm loan program application, receipts that evidence the purchase of items used in farming or that show an equipment lease, documentation of farm-related education or employment, or other documents that help to show that the applicant intended to farm.

Part B of Step 3 also says that a sworn statement, made under penalty of perjury from a non-family member, could be provided. For example, extension agents, potential landlords, clergy, farm organizations, or other non-family members may have specific knowledge of the applicant’s intention and plans for their farm. USDA has created a template with the recommended language to use when submitting a sworn statement.³⁰⁰

²⁹⁷ See, for example, USDA, National Agricultural Statistics Service, Census of Agriculture, at <https://www.nass.usda.gov/AgCensus/> (Sept. 26, 2023).

²⁹⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part B, page 13; USDA, DFAP Document Checklist, page 4.

²⁹⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 3, Part B, page 13; USDA, DFAP Document Checklist, pages 4-5.

³⁰⁰ The template for the sworn statement can be download in English or Spanish by visiting Discrimination Financial Assistance Program, Resources & Documents, Supporting Documentation Templates, Statement Under Penalty of Perjury Template, at <https://www.22007apply.gov/resources.html#supporting-docs> (Sept. 26, 2023).

Step 3: Eligibility for this Program as Farmer or Rancher (Application Pages 10-15)

3. Details are Important

As has been mentioned in several places in this Guide, the details and descriptions an applicant provides are essential. For applicants who have never farmed, the details are even more important, especially if the applicant has limited documentation of their plans to farm.

Other helpful information to include when filling out Part B of Step 3, and which are not specifically asked for in Part B of the Application, might be: knowledge of farming; background in farming; 4-H or FFA; planning to take training classes, and so forth. Many people who hope to farm are already doing something related to farming or doing something that would be considered farming but on a small scale. Descriptions of these activities, through the applicant's own account, or sworn statements from others who knew about the applicant's plans, may be helpful. Question 2.j in Part B allows space for the farmer to "Provide any other details that demonstrate that you intended to farm or ranch."

Step 4: Eligibility for this Program as a Borrower or Attempted Borrower in a USDA Farm Loan Program (Application Pages 16-20)

Step 4: Eligibility for this Program as a Borrower or Attempted Borrower in a USDA Farm Loan Program (Application Pages 16-20)

Step 4 of the Application is designed to determine the eligibility of a farmer as either a USDA farm lending program borrower or as someone who tried to become a borrower but never received a loan due to discrimination by USDA. This Step also seeks to find out whether the farmer was, or attempted to become, a direct loan borrower or a guaranteed loan borrower.

Another very important aspect of this Step, which is described in detail below, relates to the requirement that some applicants provide proof of their citizenship status.

A. Borrowers of USDA Direct or Guaranteed Loans

Parts A and B of this Step are to be filled out by farmers who were borrowers in a USDA farm lending program.³⁰¹ Step A asks for information from borrowers who had a direct farm loan with USDA, while Step B asks for information from borrowers who had a farm loan that was guaranteed by USDA.

The distinction between whether a farmer was a borrower for a direct or guaranteed loan is important. As Chapter Five of this Guide discusses in detail, for a borrower of a guaranteed farm loan to be eligible for this Program, the discrimination must have been in the actions of USDA, not the private lender. For purposes of this Step, however, the information the Application is seeking is information about the loans themselves, and not about the discrimination.

1. Details of Actual Loans—Direct and Guaranteed

Parts A and B of Step 4 ask that applicants who are borrowers of USDA farm loan program loans to provide information on the type of loan they received. This includes the farm loan number if it is known, as well as the specific type of loan. This can be harder than it seems.

Farmers will know the purpose of the loan they received, but they may not know the precise type of loan—for example, was it an Operating Loan (OL) or an Emergency Loan (EM). Because USDA will have access to many loan records, it is important that applicants are precise when they complete this Step so that whoever reviews the farmer's Application does not conclude the Application is being made in bad faith, when in fact the farmer simply did not know their specific loan type.

A farmer's records of the loan should help the farmer identify the type of loan they received. If farmers do not have access to those records they may want to submit a record request from USDA. This process, which is discussed in detail in Chapter Nine of this Guide, does not guarantee that a farmer will receive the records they are

³⁰¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Parts A and B, pages 16-17.

Step 4: Eligibility for this Program as a Borrower or Attempted Borrower in a USDA Farm Loan Program (Application Pages 16-20)

looking for, but it is likely worth the request. The deadline to request any records from USDA is November 3, 2023.³⁰²

2. “Must” Documentation for USDA Farm Loan Borrowers

Farmers who received USDA direct farm loans, as well as those who received USDA guaranteed farm loans, must provide specific documentation to show their participation in a USDA farm lending program.³⁰³

a. Documentation of Loan

Applicants who are borrowers of USDA farm loan program loans—whether direct or guaranteed—must provide information about the loan. If the applicant knows the farm loan number for their loan, no additional documentation is needed. If, on the other hand, an applicant does not know their farm loan number then the Application requires that at least one of the following be submitted: (1) some type of loan documentation, such as a loan application or a letter from USDA or FSA indicating the loan was approved; (2) a promissory note that was signed by the applicant at the beginning of their loan term; (3) proof of loan payments the applicant made, including cancelled checks or bank statements that show the applicant made a loan payment; or (4) any other document that helps to show that the farmer was in fact a recipient of a direct or guaranteed USDA farm lending program loan.³⁰⁴

b. Proof of Citizenship—NOT Required

Unlike applicants who have never received a USDA farm lending program loan, applicants who are, or have been, borrowers of a USDA farm loan program loan will not need to provide any documentation of their citizenship status when applying for this Program.³⁰⁵ This is true for both borrowers of USDA direct and guaranteed loans. The reason for this is that to qualify for a USDA direct farm loan, or a USDA guaranteed farm loan, the farmer must meet certain citizenship requirements. Namely, the farmer must be either a U.S. citizen, a U.S. non-citizen national, or a qualified alien under federal

³⁰² For specific details on how to request documents from USDA, see USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

³⁰³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Parts A and B, pages 16-17. The USDA DFAP Document Checklist suggests that only borrowers of USDA direct loans need to provide such documentation. However, that may be an error, and farmers of USDA guaranteed loans probably should also provide the documentation listed on page 16 of the Application. See USDA, DFAP Document Checklist, page 5.

³⁰⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Parts A and B, page 16.

³⁰⁵ See generally USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Parts A and B, page 16 (no documentation requirements for citizenship status are noted).

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immigration laws.³⁰⁶ These three categories of eligible citizenship are the same three categories that are required in order for a farmer to be eligible to receive assistance under this Program.

So, if a farmer previously received a USDA farm loan program loan, it means the farmer already provided the necessary proof of their citizenship status to USDA, and no additional documentation is needed.

B. Applicants Who Attempted to Participate in a USDA Farm Loan Program

Parts C and D of Step 4 are for farmers that attempted to participate in a USDA farm loan program but were unable to do so because of discrimination by USDA.³⁰⁷

1. What it Means to Attempt to Participate

An attempt to participate in a USDA farm loan program can mean that the farmer applied with USDA and was officially denied. Farmers describe the denial of an application as a common form of discrimination.

Attempting to participate can also mean that the farmer never was able to file an actual application.

Attempting to participate in a loan program is not necessarily the same thing as attempting to farm. Many active farmers have been denied loans by USDA. This is in part why the Application makes a distinction both between applicants who farmed and those who did not (Step 3 of the Application) as well as a distinction between applicants who were USDA loan borrowers and those who were not (Step 4 of the Application).

This is another section of the Application where details are important. Farmers should do their best to include specific details about the loan they attempted to get—whether a direct farm program loan, or a guaranteed loan. If the farmer remembers dates, locations, or other details about trying to get a USDA farm loan those should also be included.

³⁰⁶ For the citizenship status eligibility requirements for USDA direct farm loan program loans, see FSA Handbook, 3-FLP, Direct Loan Making, page 4-4, para. 64.A (July 20, 2023) (citing 7 C.F.R. § 764.101(c)); for the citizenship status eligibility requirements for USDA guaranteed farm loan program loans, see FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, page 8-5, para. 108.F (Sept. 26, 2022) (citing 7 C.F.R. § 762.120).

³⁰⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Parts C and D, pages 16-20.

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2. Documentation for Farmers Who Attempted to Participate in USDA Farm Loan Programs

The exact documentation requirements for applicants who attempted to become USDA farm lending program borrowers, but never obtained a loan, are somewhat confusing. On one hand, the Application uses “may” language to describe a series of documents a farmer could provide to show that the farmer attempted to participate in a USDA direct or guaranteed farm lending program.³⁰⁸ This language, as we know, means that providing the documentation is optional, and not required. However, immediately below this list of documents the Application refers to additional documents that “must also” be provided by those farmers who attempted to obtain a USDA guaranteed farm loan.³⁰⁹ In other words, the “must also” language suggests that the initial list of documents might be required instead of optional. USDA probably intended these to be may documents and not must documents.

Despite this ambiguity, it seems likely that it will be important for farmers who are applying for this Program as applicants who attempted to become USDA farm loan program borrowers to provide as much documentation as they can to evidence their attempts. In part, this is because the Program provides financial assistance only to those farmers who experienced discrimination by USDA. It follows that it is likely very important that a farmer be able to show that they attempted to get a loan from USDA. If that cannot be shown, the decision-makers will likely have a hard time concluding USDA discriminated against the farmer.

What we know about the documentation requests for attempted USDA farm loan program borrowers are in the sections below.

a. “May” Documentation of Loan Attempt

The Program Application, as noted above, says that farmers “may” provide documentation of their attempts at obtaining a direct or guaranteed farm program loan from USDA.³¹⁰ Several types of documentation are listed as examples: a copy of the farmer’s loan application or application for a guarantee (form FSA-2211); a receipt for service reflecting the farmer’s attempts to obtain a loan; a letter from USDA that relates to the loan; a prior complaint against USDA by the farmer—either from a court of law or from a USDA administrative process; a sworn statement by a non-relative of the farmer’s that explains how the farmer attempted to obtain a loan, and how the non-relative has knowledge of that attempt; or a letter from a non-

³⁰⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 18; USDA, DFAP Document Checklist, page 5.

³⁰⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 18; USDA, DFAP Document Checklist, pages 5-6.

³¹⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 18; USDA, DFAP Document Checklist, pages 5-6.

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relative, close in time to the event, that explains how the farmer attempted to obtain a loan from USDA.

The above list of documents provides examples of the types of documentation a farmer could submit. Applicants are free to submit any other documentation that credibly supports the farmer's story of attempting to obtain a USDA farm program loan.

b. Additional “Must” Documents for Attempted Guaranteed Loan Borrowers

The Program Application says that a farmer must provide specific documentation if the farmer attempted to obtain a guaranteed USDA farm program loan.³¹¹ This documentation could take the form of a loan decision or conditional decision by a bank, the farmer's Application for Guarantee (Form FSA-2211), or any correspondence with USDA, FSA, or a lending institution that references updates, information, or decisions about the farmer's loan application. The farmer can also provide any other document that shows similar information.

c. Proof of Citizenship Status— Required if Not a U.S. Citizen

Farmers who are not U.S. citizens, and who attempted to participate in a USDA farm lending program but were unable to obtain a loan because of USDA discrimination, must provide additional documentation to show the farmer's citizenship status.³¹²

As discussed in detail in Chapter Four of this Guide, to be eligible for USDA farm lending programs, and therefore for this Program, a farmer must fall into one of three immigration status categories: (1) a U.S. citizen; (2) a Qualified Alien; or (3) a U.S. Non-Citizen National.³¹³ Applicants who are, or were, borrowers in a USDA farm lending program will have already met these citizenship status requirements because the citizenship requirements for this Program are the same as for USDA's farm lending programs. Applicants who

³¹¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, Part D, page 18; USDA, DFAP Document Checklist, page 6.

³¹² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17; USDA, DFAP Document Checklist, page 5.

³¹³ Neither the Program Application, nor the Program FAQ directly addresses the citizenship status requirements for this Program. This conclusion, therefore, is drawn from both the eligibility rules for USDA's farm lending program loans, as well as the documentation requirements for farmers who are applying for this Program as applicants who attempted to obtain a USDA farm lending program loan but were unable to do so. See FSA Handbook, 3-FLP, Direct Loan Making, page 4-4, para. 64.A (July 20, 2023) (citing 7 C.F.R. § 764.101(c)), and FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, page 8-5, para. 108.F (Sept. 26, 2022) (citing 7 C.F.R. § 762.120). See, also, USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

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have never been found eligible for a USDA farm lending program, however, will need to provide documentation that they meet these citizenship status requirements.

It is the farmer's citizenship status at the time the farmer applied for a USDA farm program loan that is relevant for purposes of the Application. So, for example, if a farmer is currently a U.S. citizen, but at the time they applied for a USDA farm loan program loan they were a qualified alien, the farmer would need to provide proof of their citizenship status at the time they attempted to obtain the USDA loan.

i. Required Documents for U.S. Non-Citizen Nationals

For U.S. Non-Citizen Nationals that attempted to obtain a USDA farm lending program loan, documentation must be provided to show their status as a U.S. non-citizen national.³¹⁴ There are several possible documents that can meet this requirement. These documents are described in detail in a Farm Service Agency (FSA) Handbook.³¹⁵

ii. Required Documents for Qualified Aliens

For qualified aliens that attempted to obtain a USDA farm lending program loan, documentation must be provided to show their status as a qualified alien.³¹⁶ There are several possible documents that can meet this requirement. One such document is what is commonly called a "green card," or more formally known as U.S. Citizenship and Immigration Services (UCSIS) Form I-551. The additional documents that a qualified alien could provide are described in detail in a Farm Service Agency (FSA) Handbook.³¹⁷

³¹⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

³¹⁵ For a complete list of the possible documents a U.S. non-citizen national can submit, see FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 9 (July 20, 2023), at https://www.fsa.usda.gov/Internet/FSA_File/3-flp_ro2_a48.pdf.

³¹⁶ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 4, page 17.

³¹⁷ For a complete list of the possible documents a qualified alien can submit, see FSA Handbook, 3-FLP, Direct Loan Making, Exhibit 8 (July 20, 2023), at https://www.fsa.usda.gov/Internet/FSA_File/3-flp_ro2_a48.pdf.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

Step 5 of the Application is where the farmer is asked to describe the discrimination they experienced by USDA. With this Step, the Application seeks to find out the basis of USDA's discrimination against the farmer. In other words, the Application asks the farmer to select which covered basis the farmer falls into.

This Step also asks the farmer to provide details about exactly how USDA discriminated against the farmer. The Application asks several questions related to the discrimination, and it is important the farmer be as detailed as possible when answering those questions.

A. Basis of Discrimination—the Farmer's Prohibited Class

Part A of Step 5 asks the farmer to select the basis of discrimination that applies to their situation—meaning which protected class they fall into. If more than one basis applies, the farmer may select as many as are applicable.

The bases of discrimination were discussed at length in Chapter Six of this Guide. They include:

race, color, national origin or ethnicity, sex, sexual orientation, gender identity, religion, age, marital status, disability, and in reprisal/retaliation for prior civil rights activity.³¹⁸

Several other points are worth mentioning in more detail. They are listed below.

1. Incorrect Perceptions

In some situations, discrimination might take place because USDA incorrectly believed, or perceived, the farmer to be a member of a protected class when in reality they were not.

The example provided in Chapter Four of this Guide is useful to repeat here. If a USDA employee discriminated against a farmer because the employee thought the farmer was gay, or transgender, but farmer is not actually gay or transgender, that treatment counts as discrimination for this Program. Step 5 of the Application asks the farmer to note whether the discrimination they experienced was because of a misperception by USDA.³¹⁹

³¹⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, page 21; USDA, Discrimination Financial Assistance Program, FAQ, No. 7, page iii (Updated Sept. 21, 2023).

³¹⁹ Farmers should note if the discrimination was based on a misperception in Step 5. See USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part A, question 2, page 22.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

2. Documentation

For Part A of Step 5, there are two document requests made. One is a requirement for anyone who selects the basis of discrimination being their race as American Indian or Alaska Native. The other is an optional request for farmers who experienced discrimination because of reprisal or retaliation by USDA.

a. “Must” Documentation for American Indians or Alaska Natives

If a farmer selects as a basis of discrimination the fact that their race is American Indian or Alaska Native, the farmer must provide documentation of their race.³²⁰ This means showing that the person is a member of a federally recognized tribe or a state recognized tribe or a tribe that is seeking federal recognition. The Application says a farmer must provide either (1) an identification card that was issued by the federal government or a federally recognized tribal government, or (2) a letter or statement from the tribal government that states the farmer is a member of the American Indian tribe.

b. “May” Documentation Discrimination Based on Reprisal or Retaliation

If a farmer selects as a basis of discrimination reprisal or retaliation for prior civil rights activities, the Application says the farmer may provide documentation of those prior activities.³²¹ That documentation could include a prior complaint or a response to a complaint.

B. Details of the Discrimination Itself

Part B of Step 5 asks the farmer to describe the discrimination that the farmer experienced by USDA. This is the first place in the Application where the farmer is asked to describe the discrimination that occurred. Several questions are asked about the discrimination, and providing as much detail as possible will be important.

Several aspects of Part B are worth expanding upon.

³²⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part A, page 21; USDA, DFAP Document Checklist, page 6; USDA, Discrimination Financial Assistance Program, FAQ, No. 8, page iv (Updated Sept. 21, 2023).

³²¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part A, page 22; USDA, DFAP Document Checklist, page 6.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

1. Include Any and All Instances of Discrimination

Part B of Step 5 allows a farmer to describe multiple experiences of discrimination. The Application refers to each experience of discrimination as an “instance.”³²² The Application says that farmers should include “any and all instance of discrimination” that occurred. Farmers are therefore encouraged to include descriptions of as many instances of discrimination as they experienced.

If a farmer chooses to describe multiple instances of discrimination, the farmer should fill out pages 23 through 27 of the Application for each separate instance. The Application provides a place at the top of each of those pages to note the “Instance Number.” By writing about each instance separately and being sure to keep track of each instance by numbering them at the top of each page, it will help whoever is reviewing the farmer’s application understand what happened in each instance. The Application notes that a farmer can copy pages 23 through 27 as many times as needed in order to describe the number of instances of discrimination the farmer experienced.

2. Details Matter—Who, What, When, Where, Why and How

The Application includes ten separate questions within Part B that prompt the farmer for information about the discrimination.³²³ In other words, farmers are asked to describe in detail what happened when USDA discriminated against them. As has been mentioned before in this Guide, being thorough and detailed will likely be beneficial to the farmer’s Application.

Essentially, Part B of Step 5 asks the farmer to address the who, what, when, where, why and how of the discrimination they experienced. This will take some time, and lots of thought. As much as possible, it will help if the farmer can stick to answering each question that is asked, when it is asked. The final question of Part B allows a farmer to provide “any other information [the farmer] feels supports [their] claim that this instance of discrimination occurred.”³²⁴ In other words, if the farmer believes there are other details that are important to include, and the existing questions do not get at those details, there is a place for a farmer to include them.

³²² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, pages 23-27.

³²³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, page 22.

³²⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, question j, page 27.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

3. Describing Eligibility for a USDA Farm Lending Program

One question in Part B of Step 5 asks farmers to describe why they believe they were eligible for a USDA farm loan, or other loan action.³²⁵ This question is important because it will be much harder to convince the reviewer of an application that a farmer experienced discrimination by USDA if the farmer was not eligible in the first place for the loan or loan service they were seeking. For example, if a farmer applied for a USDA direct operating loan and was denied the loan, it is much more difficult to show that the denial was based on discrimination if the farmer did not meet all of the operating loan eligibility requirements.

This question, in other words, asks the farmer to explain their eligibility for a USDA farm loan program. The Application suggests that when answering this question a farmer could include a number of things.

4. Learning About Eligibility Rules

It is possible that many farmers may not remember the exact eligibility requirements of the loan they applied for. If that is the case, it could be helpful for the farmer to request their records from USDA about a loan denial. The deadline to do so is November 3, 2023. USDA has created a specific process for requesting USDA documents.³²⁶

Farmers may also want to look up the specific eligibility rules for the farm loan program they applied for. The recent version of these requirements can be found in several places, including USDA's Farm Service Agency (FSA) website.³²⁷ Detailed eligibility rules can also be found in FSA Handbooks.³²⁸

Some USDA farm lending eligibility rules have changed over time.³²⁹ It might be difficult to track down the precise rules for USDA farm loan programs from years past. Even if a farmer does not recall the exact eligibility rules, any details describing why farmers believed they were eligible at the time could be useful to include in this question. For example, the farmers may have known the loan program requirements, read a denial letter closely, or picked up a fact sheet about the program from their

³²⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, question b, page 24.

³²⁶ For specific details on how to request documents from USDA, see USDA, Discrimination Financial Assistance Program, FAQ, No. 18, page vii (Updated Sept. 21, 2023).

³²⁷ The FSA website provides links to each farm loan program loan that FSA offers. See FSA, Farm Loan Programs, at <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/index>.

³²⁸ For the current eligibility rules for USDA direct farm loan programs, see FSA Handbook, 3-FLP, Direct Loan Making, Part 4 (March. 29, 2023), available at https://www.fsa.usda.gov/Internet/FSA_File/3-flp_ro2_a48.pdf. For the current eligibility rules for USDA guaranteed farm loan programs, see FSA Handbook, 2-FLP, Guaranteed Loan Making and Servicing, page 8-5, para. 108.F (Sept. 26, 2022) (citing 7 C.F.R. § 762.120), available at https://www.fsa.usda.gov/Internet/FSA_File/2-flp_ro1_a59.pdf.

³²⁹ For a look at how USDA farm loan program rules looked as of 1990 see, Farmers' Guide to FmHA (4th ed. 1999), at Chapter 7 (available from FLAG).

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

local FSA office and made sure they qualified.

C. Documentation of Discrimination—“May” Documents Only

There are not any required documents that a farmer must provide for Step 5 of the Application. Step 5 does have two broad categories of documentation that a farmer may provide. These are described below.

1. “May” Documentation of Discrimination

Part B of Step 5 says that a farmer may provide documents to support the farmer’s allegations of discrimination.³³⁰ The Application provides several types of documentation a farmer can submit, though a farmer can provide any document they believe is relevant to show that the discrimination occurred. The Application lists three examples.

First, the farmer could submit documentation of a complaint or assertion of discrimination that the farmer made around the time that the discrimination occurred.

Second, the farmer could submit communications with USDA, FSA, or a lending institution that included discriminatory statements.

Third, the farmer could submit a sworn statement, made under penalty of perjury, from a non-family member, who can describe the discrimination and how they have knowledge of it.³³¹

2. “May” Documentation of Eligibility for USDA Farm Loan or Action

In Part B of Step 5 USDA suggests that farmers submit documentation that their education, farm experience, farm loan history, credit, collateral, and how [the farmer] met the financial requirements or program requirements for obtaining the requested loan or loan action.³³²

Further specific examples of documents that could help show the farmer’s eligibility for the loan in question are listed by USDA. They include the following.

³³⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, page 23; USDA, DFAP Document Checklist, pages 6-7.

³³¹ The template for the sworn statement can be download in English or Spanish by visiting Discrimination Financial Assistance Program, Resources & Documents, Supporting Documentation Templates, Statement Under Penalty of Perjury Template, at <https://www.22007apply.gov/resources.html#supporting-docs> (Sept. 26, 2023).

³³² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 5, Part B, question b, page 24; USDA, DFAP Document Checklist, page 7.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

a. Agricultural Education

Documents showing agricultural education can show that farmers met education and managerial ability requirements and show the seriousness of their attempt to farm. FFA and 4-H, workshops by grass roots farm organization, farm visits sponsored by cooperative extension, and individual learning by reading farm magazines and other material all could contribute here. If there are not documents to support these activities, the farmer could get a sworn statement that attests to the activity.

b. Farm Work Experience

Farm work experience also shows experience and ability to farm and to meet loan requirements for managerial ability. It is especially valuable if it is directly related to the farming that would have been financed by the loan. This experience could be paid or unpaid and could be on the family's operation or another farm. Statements from non-family members could help demonstrate this experience.

c. Farm Loan History

Farm loan history can show that the farmer had been eligible for farm loans in the past. This could help show creditworthiness and other requirements. If records show older USDA farm lending program loans it shows the farmer at one point meet all USDA eligibility requirements. Loan documents from other lenders could serve this purpose.

d. Credit

Documents showing a credit history can help show the farmer was creditworthy. Documents showing the farmer got loans are helpful in showing farm experience and other eligibility requirements.

e. Collateral

Records showing the farmer owned property that could be used for collateral show the farmer was likely to meet USDA requirements for collateral for loan making. This might include, for example, livestock, or land.

f. Non-Family Member Statements

A statement under penalty of perjury from a non-family member can be used to show that the farmer was eligible for a loan. This might be especially helpful if it was from a person who received a USDA loan and knew the requirements.

Step 5: Discrimination in USDA Farm Loan Programs (Application Pages 21-27)

g. Other Documents

A variety of other documents might be helpful. For example, if a farmer knew the reason for a denial, these documents might be used to show that the eligibility denial was an incorrect application of USDA rules.

Step 6: Losses from Discrimination for Applicants Who Have Operated a Farm or Ranch (Application Pages 28-31)

Step 6: Losses from Discrimination for Applicants Who Have Operated a Farm or Ranch (Application Pages 28-31)

Step 6 of the Application asks for information on the value of any losses that a farmer suffered because of USDA's discrimination.³³³

A. Step 6 is Only for Those Who Have Farmed

Step 6 is only for applicants who have operated a farm or ranch. If an applicant has never farmed they do not need to fill out Step 6 of the Application.

B. Mostly About Economic Losses

Step 6 of the Application seems to focus mainly on the economic losses that a farmer suffered because of the discrimination. This includes the loss of land as well as the loss of a home if it had been collateral for a USDA loan.

Economic losses also include any offsets, garnishments, or deficiency judgements the farmer experienced. Offsets and garnishments are types of collection actions that USDA can take—sometimes long after the farmer has stopped farming or a foreclosure has taken place. Offsets can be taken by USDA and by the Treasury Department. An example of an offset would be if USDA took a part of the applicant's farm program payments or if Treasury withheld a portion of the farmer's tax refund or Social Security payment. A deficiency judgment is money that is owed after a foreclosure.

Step 6 also provides a space where farmers can describe any "other economic loss" they experienced.

C. Losses Must be the Result of USDA Discrimination

The losses that Step 6 asks about are those losses that are due to USDA discrimination.³³⁴ In other words, it is important the farmer be able to connect the dots between the discrimination that occurred, and which the farmer described in Step 5, and the losses they experienced.

D. Documentation

Step 6 of the Application includes several possibilities of supporting documentation that a farmer may provide and only one type of required documentation.

³³³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, pages 28-31.

³³⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, question 6, page 31.

**Step 6: Losses from Discrimination for Applicants Who Have Operated a Farm or Ranch
(Application Pages 28-31)**

1. “Must” Document—Calculation of Economic Losses

If a farmer chooses to answer Question 5 of Step 6—the question where farmers can describe any other economic losses not already listed—the farmer must provide documentation to show how they calculated the value of the loss.³³⁵ The calculation must include the various components of the loss, including any relevant dates and amounts.

The Application also says that it “may be stronger if [farmers] also provide available documentation to support” the required calculations. This could include tax documents showing pre-loss revenue and profits, receipts, and business plans, among other things.

Providing as much detail and documentation about the claimed economic losses as possible is important. Although this Program is clear to state it does not intend to fully compensate farmers for their losses, it seems highly likely that these calculations will play a factor in determining how much of financial assistance a farmer receives.³³⁶

2. “May” Documentation

Step 6 provides a list of several types of documentation that a farmer may submit in order to document their economic losses. The types of suggested documentation are described below. A farmer can submit any additional documentation that helps to show the value of their economic losses that were caused by USDA.

The types of documentation listed below are just examples.

a. Documentation of Loss of Land

A farmer may submit with their application any documentation concerning the loss of agricultural land. For example, a foreclosure notice or order, or a proof of sale if the land was sold, could be provided.³³⁷

A farmer may also submit documentation to show how much land was lost. This could include any of the following: a deed; lease; property tax document showing the size of the farm or ranch; document previously provided to a federal or state agency that includes the size of the farm or ranch; a loan or

³³⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, page 30; USDA, DFAP Document Checklist, page 8.

³³⁶ See, for example, USDA, Discrimination Financial Assistance Program, FAQ, No. 12, page v, No. 19, page vii (Updated Sept. 21, 2023).

³³⁷ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, page 28; USDA, DFAP Document Checklist, page 7.

**Step 6: Losses from Discrimination for Applicants Who Have Operated a Farm or Ranch
(Application Pages 28-31)**

other USDA farm program document that includes the size of the farm or ranch; or a business plan that indicates the size of the farm or ranch.³³⁸

b. Documentation of Loss of Home

A farmer may submit with the Application any documentation concerning the loss of a house that was put up as collateral for a USDA farm lending program. For example, loan documentation showing that the house was included in the loan approval could be provided, or a USDA Security Instrument.³³⁹

To demonstrate that a farmer lost their home, the farmer may provide documentation such as paperwork of the sale of the land, a quit claim deed, loan servicing letters, or a foreclosure notice.³⁴⁰

c. Documentation of Offsets, Garnishments, or Deficiency Judgments

If a farmer experienced offsets, garnishments, or deficiency judgments because of USDA discrimination, the farmer can provide documentation to support those losses. This could include a Treasury offset letter, for example, or proof of a deficiency judgment.³⁴¹

³³⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, page 28; USDA, DFAP Document Checklist, page 7.

³³⁹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, pages 28-29; USDA, DFAP Document Checklist, page 8.

³⁴⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, pages 28-29; USDA, DFAP Document Checklist, page 8.

³⁴¹ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 6, page 29; USDA, DFAP Document Checklist, page 8.

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

Step 7 of the Application asks for information related to any prior litigation, claims resolution process, complaint, or appeal that resulted in the farmer receiving money or other relief for the same discriminatory conduct that the farmer alleges in this Application. The Application makes clear that a farmer's participation in any prior lawsuit, complaint, or appeal will not disqualify the farmer from a potential payment in this Program.³⁴²

A. Possible Prior Lawsuits, Complaints or Appeals

The types of possible prior lawsuits, complaints, or appeals against USDA are described below.

1. Earlier Litigation and Claims Resolution Processes

Over the past few decades there have been several cases of discrimination against USDA related to USDA's farm lending programs. Some of these cases result in class actions against USDA, while others led to various claims resolution processes.

There were five prior discrimination cases against USDA.

First, *Pigford v. Glickman* alleged discrimination against African American farmers and ranchers.

Second, *In Re Black Farmers Discrimination Litigation* alleged discrimination against African American farmers.

Third, *Keepseagle* alleged discrimination against Native American farmers and ranchers.

Fourth, *Garcia* alleged discrimination against Hispanic and Latino farmers. It resulted in the USDA Hispanic and Women Farmers and Ranchers Claims Resolution Process.

Finally, *Love* alleged USDA discrimination against women. It resulted in the USDA Hispanic and Women Farmers and Ranchers Claims Process.

Many farmers who are applying for this Program may well have been a part of one of these prior cases against USDA. If that is true, the farmer should include information on the case they were a part of in Step 7 of this Application.³⁴³

³⁴² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 7, page 32; USDA, Discrimination Financial Assistance Program, FAQ, No. 2, page ii (Updated Sept. 21, 2023).

³⁴³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 7, pages 32-34.

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

2. Program Discrimination Complaints Against USDA

By law, USDA is prohibited from discriminating against the farmers it serves.³⁴⁴ USDA allows farmers and others to file what are called Program Discrimination Complaints. In other words, if someone feels they have been discriminated against by USDA for an unlawful reason, the person may file a discrimination complaint with the USDA Office of the Assistant Secretary for Civil Rights (OASCR).³⁴⁵ The bases of discrimination for filing a Program Discrimination Complaint against USDA are similar—though not exactly the same—to the bases of discrimination for this Program.³⁴⁶ The Office of the Assistant Secretary for Civil Rights (OASCR), through the Center for Civil Rights Enforcement, is responsible for investigating farmer discrimination complaints.³⁴⁷

It is possible, therefore, that some farmers who are applying for this Program will have previously filed a Program Discrimination Complaint against USDA. Any farmer who has filed such a discrimination complaint—and alleged that the discrimination occurred prior to January 1, 2021—should include information on that complaint in Step 7 of this Application.³⁴⁸

3. Private Lawsuits

Over the years, some farmers have sued USDA for discrimination. Those farmers should describe those cases in this Step of the Application.

B. How Other Processes Matter

The earlier discrimination cases, as well as other litigation, appeals, and discrimination complaints matter for this Program in a few ways.

³⁴⁴ As USDA puts it, “USDA prohibits discrimination against its customers.” Filing a Program Discrimination Complaints as a USDA Customer, at: <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer> (Sept. 8, 2023).

³⁴⁵ USDA, Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance from USDA, DR 4330-002, § 5(a)(1) (July 27, 2021), available for download at <https://www.nifa.usda.gov/nondiscrimination-programs-activities-receiving-federal-financial-assistance-usda> (Sept. 26, 2023). USDA OASCR, How to File a Program Discrimination Complaint, at: <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> (Sept. 8, 2023).

³⁴⁶ For the complete list of the bases of discrimination when filing a Program Complaint against USDA, visit USDA, Filing a Program Discrimination Complaint as a USDA Customer, at <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer> (Sept. 26, 2023).

³⁴⁷ USDA, Filing a Program Discrimination Complaint as a USDA Customer (Sept. 8, 2023); 7 C.F.R. 15d.5(b) (2023); USDA, Nondiscrimination in Programs and Activities Receiving Federal Financial Assistance from USDA, DR 4330-002, § 5(c)-(d) (July 27, 2021), available for download at <https://www.nifa.usda.gov/nondiscrimination-programs-activities-receiving-federal-financial-assistance-usda> (Sept. 26, 2023).

³⁴⁸ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 7, pages 32-34.

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

1. Farmers Can File Lawsuits, Complaints—And Apply to This Program

Any farmer that took part in one of the earlier USDA discrimination cases, filed a separate lawsuit, or filed a discrimination complaint can file an Application in this Program.

2. Lawsuits, Complaints Not Required for This Program

A farmer can file an Application in this Program whether or not the farmer took part in one of the USDA discrimination lawsuits, or another lawsuit, or filed a discrimination complaint.

3. Farmer Did a Claims Process or Filed a Complaint and Lost—Not Relevant to This Program

A farmer that took part in one of the USDA discrimination lawsuit processes and lost can apply for this Program. This is true for several reasons. First, there are many reasons a farmer might have lost even though there was discrimination. The farmer, for example, might have filed late, or might have not told much of the story of discrimination, or was outside the time frame allowed in the cases. None of these reasons would be relevant for the Discrimination Financial Assistance Program. Further, there might be good information in the papers filed in those lawsuits that could help the farmer in this Program.

The same is true for a farmer who took part in a USDA discrimination complaint process and lost. In addition to the reasons described above for this decision to have little effect on the current Program, it is also the case that the burden of proof in a discrimination complaint process is much more difficult than in this Program. It could easily be the case that a farmer loses a discrimination complaint but wins in this Discrimination Financial Assistance Program.

4. If the Farmer Filed in One of Claims Processes and Won—Two Effects

If the farmer took part in one of the claims processes that came out of the USDA discrimination lawsuits and won on a claim, there are two results.

First, according to USDA, success in that process creates a presumptive assumption that the farmer experienced discrimination as it is understood in this Program. If the farmer is eligible under the current USDA Discrimination Financial Assistance Program, the farmer will automatically be assumed to have experienced discrimination. Farmers would still need to show, for example, that they formed or attempted to farm, although under the discrimination cases this was a condition of prevailing.

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

Second, USDA says that if a farmer got paid under one of the claims processes that came from a USDA discrimination lawsuit, it will reduce somewhat the financial assistance that the farmer would otherwise have received.³⁴⁹

5. USDA Appeals System

USDA runs an appeals system for farmers who receive adverse decision in USDA programs.³⁵⁰ USDA lending program decision can be appealed. The national Appeals Division (NAD) runs the appeals system.

If NAD rules in the farmer's favor, it means that USDA failed to follow its own rules and USDA was ordered by NAD to change its decision. Because these decisions show that USDA treated the farmer unfairly this is very valuable evidence for a farmer in the USDA Discrimination Financial Assistance Program.

If, on the other hand, NAD ruled against the farmer, that has little meaning for the purposes of the USDA Discrimination Financial Assistance Program. The burden of proof for appeals decisions is very high, so it could well be the case that discrimination took place but under NAD rules the decision on a loan would not be reversed. In addition, as is true for USDA discrimination complaints, it is impossible to know if the facts of the case were presented to NAD, how well the case was argued, and so forth. Finally, in a NAD hearing the farmer is not allowed to raise discrimination as a reason the farmer received and adverse decision.³⁵¹

C. Information About USDA Discrimination Cases is Confusing

Several aspects of the results of prior discrimination cases can be confusing. USDA has shared records of payments and other results with the decision-makers for this Program.

1. Did Not Actually Apply

Many people thought they applied for a prior claims process or lawsuit but did not actually have an application submitted. This was often due to people and organizations that claimed a claim was submitted for a person, but it was not.

2. Forms or Petitions Turned in Late

Many people sent in claim forms or petitions, but they were late in doing so and were therefore not able to succeed with their claims.

³⁴⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 2, page ii (Updated Sept. 21, 2023).

³⁵⁰ The rules for this appeals system can be found in FSA Handbook, 1-APP, Program Appeals, Mediation, and Litigation (Sept. 12, 2016).

³⁵¹ The rules for this appeals system can be found in FSA Handbook, 1-APP, Program Appeals, Mediation, and Litigation, page 6-3, para. 72.B (Sept. 12, 2016).

Step 7: Prior Claims, Complaints, and Appeals (Application Pages 32-34)

3. Payments Were Confusing

Money provided in many of the previous lawsuits and claims processes was confusing. Most people, if they prevailed, got fifty thousand dollars. They also got 12,500 dollars paid to the claimant's Internal Revenue Service (IRS) account to account for the tax consequences of the payments. Because this could result in a refund, many thought it was the actual payment. A very few got much larger awards. And a small number in the *Pigford* case got 3,000 dollars for noncredit claims.

4. Debt Forgiveness Was Confusing

Debt forgiveness in the cases was very confusing. It would be rare for anyone to know exactly how much of their debt was forgiven.

D. "May" Documentation to Show Participation in Prior Claims

Step 7 of the Application does not require that farmers provide any documentation to evidence their participation in prior lawsuits, claims, or appeals. The Application says that farmers may provide documentation to show any payment or other relief that a farmer received as part of a prior discrimination claim.³⁵² This could include, for example, a court or administration document, such as a lawsuit complaint, court order, judgment, or decision. It could also include an official notification of an award from a prior claim.

The Application notes, however, that a farmer does not need to request documentation of a prior award, if the farmer was a part of any of the earlier five prior discrimination cases against USDA. The Application says that the administrators for this Program have a full list of awards made under those five cases.

³⁵² USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 7, page 32.

Step 8: Additional Information—Optional (Application Pages 35-36)

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Step 8 of the Application allows farmers to submit additional information. For example, Step 8 states that a farmer “can add additional details to any answers [the farmer] already provided,” or the farmer can add other details if the farmer has additional information that the farmer believes is important to their Application.³⁵³

This Step of the Application does not seem to limit the type of additional information a farmer can provide. It does seem to suggest that the only information that will be taken into account when the decision-makers determine the amount of financial assistance a farmer is eligible to receive is information related to the first seven steps in the Application. Step 8 states, in clear language, that the first seven steps of the Application “are where program administrators will focus attention in determining amounts of financial assistance.”³⁵⁴ In other words, while it seems a farmer technically can provide any additional information they would like in Step 8, it is probably best if the farmer tries to connect their additional information to the topics addressed in the first seven steps.

³⁵³ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 8, page 35.

³⁵⁴ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 8, page 35.

Step 9: Taxpayer Information Request (Application Page 37)

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Step 9 of the Application asks for taxpayer information.³⁵⁵

The Internal Revenue Service (IRS), and likely a number of states, will “very likely” consider payments from this Program to be taxable income.³⁵⁶

As it stands right now there are efforts underway to address, in some way, the federal income tax burden of the Program financial assistance. If changes along these lines occur, there will be a revision of this Guide to reflect them.

Several points are worth mentioning with regard to this Step.

A. Only Provide Tax Information for the Applicant

The only taxpayer information that should be provided is information related to the person listed in Step 1 of the Application. This means that if an applicant had a co-borrower on a loan, or if the applicant is just one member of an entity, tax information on the applicant’s co-borrower or other entity members does not need to be provided. Similarly, if an applicant has a guardian, or is applying as someone who assumed a USDA farm loan debt from a now-deceased borrower, the only taxpayer information that needs to be provided is for the actual applicant—the person who is seeking to receive a payment from USDA.

B. “Must” Documents—Required Tax Forms

Applicants for this Program are required to provide completed tax documents. The type of documents to submit will differ depending on the citizenship status of the applicant.

1. U.S. Citizens, U.S. Resident Aliens, and U.S. Entities—IRS Form W-9

An applicant who is a U.S. Citizen, a U.S. resident alien, or a member of a U.S. entity, must submit a completed form IRS W-9, Request for Taxpayer Identification Number and Certification.³⁵⁷

2. Non-U.S. Citizens and Non-U.S. Resident Aliens—IRS Form W-8BEN, W-8EIC, or Other W-8

An applicant who is a Non-U.S. Citizen, or a Non-U.S. resident al must submit a completed form IRS W-8BEN, W-8ECI, or another applicable W-8.³⁵⁸

³⁵⁵ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 9, page 37.

³⁵⁶ USDA, Discrimination Financial Assistance Program, FAQ, No. 15, page vi (Updated Sept. 21, 2023).

³⁵⁷ Additional information about IRS Form W-9 can be found by visiting IRS, About Form W-9, Request for Taxpayer Identification Number and Certification, at <https://www.irs.gov/forms-pubs/about-form-w-9> (Sept. 26, 2023)

³⁵⁸ Additional information about the various IRS forms W-8 can be found by visiting IRS, Prior Year Forms and Instructions, at <https://www.irs.gov/prior-year-forms-and-instructions> (Sept. 26, 2023).

Step 9: Taxpayer Information Request (Application Page 37)

C. IRS Form-1099

Anyone who receives a payment from this Program will also receive an IRS Form-1099 that shows the amount of money received from the Program. Form-1099, in turn, is used when a person files their taxes.

D. Additional Tax Resources

Much remains unclear about how, exactly, a payment under this Program will be treated for tax purposes. It is also worth noting that state tax laws can differ from federal tax laws. It is always advised that farmers speak with a tax professional to better understand the potential tax consequences of receiving a payment from this Program. USDA has also partnered with various tax experts to help provide “general information and resources” regarding this Program and other agricultural taxes.³⁵⁹

³⁵⁹ USDA, Discrimination Financial Assistance Program, FAQ, No. 15, page vi (Updated Sept. 21, 2023). For additional information from the tax experts that USDA has partnered with more generally, visit USDA, Taxes and USDA Programs, at <https://www.farmers.gov/working-with-us/taxes>; Utah State University, Rural Tax Education, at <https://extension.usu.edu/ruraltax/>; and Agricultural Financial, Tax and Asset Protection, at <https://agftap.org/>.

Step 10: Signatures and Certifications (Application Pages 38-40)

Step 10: Signatures and Certifications (Application Pages 38-40)

Step 10 of the Application requires that the applicant, and anyone helping the farmer prepare their Application, initial and sign several certifications.³⁶⁰

A. Signature Page for the Applicant

Ideally every farmer would read and understand completely the Signature Page for applicants—page 39 of the Application. Two points are especially notable.

First, the farmer is saying the statements in the Application are true under penalty of perjury. This means that any false statements could result in fines, imprisonment, or other penalties that are allowed under federal law.

Second, the farmer is allowing USDA to collect information about the farmer, including loan and other records held by USDA and records from the discrimination cases. By signing this page the farmer is also giving USDA with the authority to provide those records to the people that will be evaluating applications.

B. Signature Page for a Preparer, if Applicable

The final page of the Application, page 40, is the Signature Page for preparers, guardians, or lawyers. This page requires that any person who helps the farmer prepare their Application certify that three things are true.

First, a preparer must certify that they helped prepare the Application based on information they obtained or which was provided to them by the farmer.

Second, a preparer must certify that they have informed the farmer whose Application they are helping to fill out that the government is not charging any fee to apply for this Program.

Third, a preparer must certify that they have no knowledge that any of the information included in the Application is incorrect or untruthful.

As with the applicant's Signature Page, when a preparer signs page 40 of the Application they are doing so under penalty of perjury.

³⁶⁰ USDA, Discrimination Financial Assistance Program (DFAP) Application, Step 10, pages 38-40.