SLF
SOUTHEASTERN LEGAL FOUNDATION

560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
www.SLFLiberty.org

November 8, 2022

Submitted Electronically to
Regulations.gov
Hon. Tom Vilsack
Office of the Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Re: Notice of Request for Public Comment on Providing Financial Assistance for Producers and Landowners Determined to have Experienced Discrimination
Docket ID No. USDA-2022-0015; 87 Fed. Reg. 198 (Oct. 14, 2022)

Dear Secretary Vilsack:

Southeastern Legal Foundation (SLF) appreciates the opportunity to submit comments regarding the Notice of Request for Public Comment on the implementation Section 22007 of the Inflation Reduction Act (IRA) that aims to provide financial assistance the nation's farmers, ranchers, and forest landowners who experienced discrimination in the Department of Agriculture's farm lending programs.

SLF is a nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has advocated for limited government, individual liberties, and the free enterprise system in the courts of law and public opinion. SLF believes that the U.S. Constitution is a complete document, creating limits on government. When the government goes beyond those limits, we hold the government accountable.

Today, we find ourselves on multiple battlegrounds fighting to save the American Republic. Section 22007 touches upon two of the most important fronts: the fight for equal protection under the law and the struggle to restore constitutional balance. When the government treats people differently because of the color of their skin, it engages in illegal and unconstitutional state-sanctioned discrimination. In its efforts to advance so-called racial justice and equity, the government succeeds only in dividing our nation by race rather than uniting it. Furthermore, the Constitution settled upon a delicate balance of power between the three branches of government. When one branch of government assumes powers vested in either of the other two, liberty is threatened. According to James Madison in the Federalist Papers, the accumulation of legislative,

executive, and judicial powers "in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist Papers, No. 47 at 220 (James Madison) (Fall River Press ed., 2017).

For the reasons explained in this letter, we call upon the Department to ensure that the financial assistance it offers is based on status as an uncompensated victim, not race. We also call upon the Department to ensure that it only rely upon third-party entities to administer Section22007 funds in a constitutional manner. The Department should institute rule making procedures in order to define eligibility criteria, and to lay out a process for adjudicating claims that comports with the Administrative Procedures Act and the requirements of due process.

Equal Protection

Section 22007 of IRA would provide financial assistance of up to $500,000 to farmers, ranchers, or forest landowners determined to have experienced discrimination in the Department of Agriculture's farm lending programs. Section 22007's relationship to another program that similarly provided assistance to "socially disadvantaged" farmers and ranchers based upon race is noteworthy because it raises concerns that Section 22007 may be administered on a discriminatory basis.

In conjunction with Section 22008, this law repealed and replaced Section 1005 of the American Rescue Plan Act of 2021 (ARPA). Under Section 1005, the Farm Service Agency (FSA), an agency of the Department of Agriculture, was authorized to forgive the loans of "socially disadvantaged farmers and ranchers." The term, "socially disadvantaged," was defined to mean Black, Latino, American Indians, Asians, etc. In other words, it operated to forgive loans solely based on race, an obvious affront to the constitutional guarantee of equality.

SLF immediately challenged Section 1005, resulting in one of two nationwide preliminary injunctions in what was one of the best examples of SLF's principles put into action. The injunctions halted this unconstitutional program before it was fully implemented. The Department's record defending the program was entirely unblemished by success, as various courts entered various forms of injunctive relief. *See Holman v. Vilsack*, 2021 U.S. Dist. LEXIS 127334 (W.D. Tenn. July 8, 2020) (enjoining Section 1005's farm loan relief portion of ARPA); *Faust v. Vilsac*k, 519 F. Supp. 3d. 470 (E.D. Wis. 2021); *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex. July 1, 2021); and *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021). These one-sided results are not surprising. For over sixty years, the Supreme Court has repeatedly thrown out race-based, government benefits programs, holding firm to the principle that the Constitution is colorblind.

When Congress replaced Section 1005 with Section 22007, the injunction was dissolved. Because Section 22007 was intended to circumvent a final decision, it is critical that the Department not administer Section 22007 in a way that is similarly discriminatory. The Department must not simply assume that all those it previously categorized as "socially disadvantaged" based on their race are actual victims of discrimination.

We understand and acknowledge that the Department has a sad and tragic history of racial discrimination in its past. And we also understand that the Department's history of racial discrimination had genuine costs on minority farmers and ranchers. Here, we must point out that the United States government has gone to extraordinary lengths to address actual victims of USDA's troubling history. *See Pigford v. Glickman* ("*Pigford I*"), No. 97-1978 (D.D.C.); *Keepseagle v. Veneman*, No. 99-03119 (D.D.C.); *Garcia*, No. 00-2445 (D.D.C.); *Love v. Glickman*, No. 00-2502 (D.D.C.); *In re Black Farmers Discrimination Litigation* ("*Pigford II*"), No. 08-mc-0511 (D.D.C.). Also, in 1990, Congress created a program specially designed to provide outreach and technical assistance to minority farmers and then permanently funded the program in 2018. In 1998, Congress suspended statutes of limitations for Equal Credit Opportunity Act claims; in 2002, it created an Office of the Assistant Secretary for Civil Rights at USDA to ensure better compliance with civil rights laws; in 2010, it provided $1.25 billion to ensure that *Pigford II* claimants received settlement payments; and in 2014, it created a permanent Office of Tribal Relations at USDA.

Given these past remedial measures, it is unclear what remains to be addressed under Section 22007. In defending Section 1005, the Department was required to produce recent evidence that the government had a compelling interest in remedying discrimination on its lending programs. *See Holman*, 2021 U.S. Dist. LEXIS 127334, at *17. Notably, the Department was unable to produce *any* studies to this effect. Its most recent actual study was a 2011 report prepared by Jackson Lewis LLP, titled "Civil Rights Assessment" (Mar. 31, 2011), but that report stopped short of persuading any reviewing court. The JL Report failed to assess the full economic shortcomings of the prior remedial measures or provide any insight into what has happened in the over a decade since it had been issued. Rather, it just offered the conclusory and insufficient conclusion that socially disadvantaged groups "continued to experience discrimination with respect to the requirements, availability, and timing of FSA loans." Likewise, the Department failed to satisfy its burden by relying on a 2021 Government Accountability Office report that commented on long-existing "concerns about discrimination in credit markets" and surmised that minority farmers continued to have less access to credit.

The Department's inability to produce recent evidence of unaddressed acts of discrimination underscores a real need to identify who, precisely, should be a recipient of Section 22007 funds. Prior to the issuance of funds, the Department should freshen up its assessments of who has been victimized by its lending programs that has not already received compensation.

Once the Department identifies what shortfalls remain, then it can then begin to target Section 22007's funds to actual victims. This will enable the Department to do so without resorting to a crude racial preference. In the process of making its evaluation, the Department must assess why each of the measures cited above were insufficient and conclude who, precisely, needs to be made whole and why. In short, the Department must identify (1) actual victims of discrimination (2) for whom the extraordinary efforts taken to date were insufficient.

Otherwise, Section 22007 may become substitute for Section 1005. It cannot assume that certain people are victims of discrimination based on the color of their skin, ethnicity, or sex. To

avoid this outcome and ensure that the funds go to victims of discrimination, we therefore propose the following steps to effectuate these criteria.

First, to be eligible, a person must have proven in a court of law or administrative forum that they were actual victims of discrimination in the Department of Agriculture's farm lending programs. It is, after all, already illegal for the Department to discriminate based on race, sex, or other protected characteristic, and has been for some time. *See, e.g.*, U.S. Const. amend XIV, § 1; 42 U.S.C. § 2000d *et seq*.; 42 U.S.C. § 2000e *et seq*. A victim can be expected to have registered a complaint, and alerted the appropriate governmental entity charged with enforcement. In many cases, they may have already and been denied because they cannot substantiate their claim, in which case they should also be denied Section 22007 funds. Likewise, the Department should exclude any person who failed to register a timely complaint from financial assistance.

The Department should review its own employment files as part of making its eligibility determination. Any instance involving discrimination in farm lending means that the Department's employees engaged in unlawful behavior. *See Faust*, 519 F. Supp. 3d at 476 ("The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop."). Any responsible employees should have suffered immediate employment consequences. The failure of the Department to address the discrimination internally, where the burden of establishing a violation is far lower than in an actual court, should suffice to prove that the person was not an actual victim under the proposed rule. We hasten to add that if the Department finds that any of its agents or employees have engaged in unlawful discrimination, then it should trigger a sanction of immediate loss of employment and the initiation of civil and/or criminal proceedings. Discrimination simply cannot be tolerated, particularly in an agency like the Department with such a long history of racial discrimination. If the Department was not willing to take drastic steps to sanction its own employees, then the Department should consider that as to be conclusive proof that the claim was baseless.

Second, the Department must ensure that persons who already obtained a prior remedy do not receive a windfall. The Department should require a verification from the person as to whether they have requested relief of any form in the past, and what the result was. For those who have received any prior relief, the Department must place a burden of proof to provide verification of a quantifiable harm and explain why the prior settlement is inadequate. Conclusory statements should be rejected out of hand. Then, before awarding additional funds, the Department should (1) make quantifiable findings as to the actual harm suffered by the individual (2) assess whether the person received a prior settlement and then (3) if it determines that the prior finding was inadequate, articulate in clear and objective written language the basis for its reasoning (4) as well as why any additional amounts will achieve a just and final result. Any person who was eligible for funds and did not affirmatively seek them should be barred.

Third, the Department should exclude some broad claims of discrimination altogether. Section 22007 only makes funds available to those who were discriminated against in farm lending programs. Section 22007 be a solution for systemic racism, or the historic mistreatment of various races. It is not intended offer financial assistance to those who were not eligible for Covid relief

funds or were excluded from some form of farm subsidy unrelated to their race—justifications advanced in defense of Section 1005—or excluded from any other form of governmental funds not based on a protected characteristic. The Department should make clear its narrow applicability by expressly excluding these impermissible justifications.

Structural constitutional limits

The Department may only utilize third-party entities to administer the program to the extent it comports with the Constitution's structural limits. There are latent constitutional concerns that surround the enlistment nongovernmental entities to administer $2.2 billion dollars in taxpayer funds. The Department must ensure that the role of these entities comports with the private nondelegation doctrine, the Due Process Clause, and the limits imposed by the Vesting Clauses of the Constitution.

Only the Department or some other governmental entity should issue the payments. The third-party entity should not have authority to determine if a person is a victim of discrimination. The Department must exclude the entity from the process of setting qualification standards for Section 22007 funds. A third-party entity cannot be in the position of setting the criteria for the spending of public dollars, a quintessentially legislative function. Nor can the third-party entity be in the position of deciding who qualifies for the funds, a quintessentially executive function.

The Department must account for the fact that the usage of third-party entities holds massive potential for abuse. It is critical that the entities selected be honest and neutral brokers with a demonstrated ability to responsibly govern the disbursement of $2.2 billion in taxpayer funds. The Department should select the entity in a fully transparent process. The Department should require that an entity must have no history of political or issue advocacy. The Department should require that the entity itself agree to submit to the same degree of public transparency as any governmental agency so the public can fully exercise a watchdog function over the expenditure of these funds. The Department should require the entity exclude from eligibility any person who has donated or made a financial contribution to the entity or is a member or an employee or related to one.

The Department should require the entity to impose upon itself a rigorous series of ethical standards to avoid self-dealing on behalf of itself or its employees. The Department should require that the entity make its standards and decisions publicly available, subject to appropriate redaction of personal information. The entity must agree to be held to those standards. Furthermore, the Department should require that the entity not profit from this role. Last, the Department should require the entity to submit to regular accounting available for public inspection. These are the minimum guarantees necessary to ensure a modicum of public trust in this unprecedented delegation of public authority to spend public funds.

On behalf of SLF, we thank you for the opportunity to be heard in this process. We urge the Department to consider our proposals and fully incorporate them in full. Thank you for the opportunity to submit comments

Yours in Freedom,

Southeastern Legal Foundation