

EXHIBIT 6

Civil Action No. 00-2445 (JR)

USDA Investigator's Standard Operating Procedure Manual

FSA Credit Discrimination

**Part I:
A Brief Historical Perspective
On Discrimination in
Farmer Credit Programs at USDA**

I. Introduction

This memorandum presents a short historical analysis of the way USDA has responded to the problem of discrimination in USDA farmer credit programs.

It makes three general arguments. First, discrimination has been a consistent feature of USDA farm credit programs since their inception over six decades ago. Second, discrimination issues have never been a priority at USDA. As a result, discrimination has continued. Third, and perhaps most disturbing, when discrimination has been raised as a problem within the Department, USDA has made a habit of promising immediate changes and then failing to follow through on these promises. The result has been a predictable cycle in which discrimination is an ignored problem at USDA; the issue is raised publicly by others; USDA acknowledges past discrimination and promises to do a better job in the future; and finally, the Department reverts to the normal pattern of discrimination.

II. The Cycle Begins: New Deal Farm Programs in the 1930s

The New Deal is seen by historians as a crucial turning point in United States agricultural policy. For the first time the government sought to intervene directly in the market on behalf of farmers. The most famous programs, beginning with the Agricultural Adjustment Act of 1933, sought to limit farm production and increase agricultural income. Although less well-known, another set of New Deal programs—the forerunners of the Farmers Home Administration and the present Farm Services Agency Farmer Loan Programs—sought to provide credit to struggling farmers.

A. Discrimination in Original USDA Programs

At the onset of the Great Depression, hundreds of thousands of African Americans still farmed in the South. Most were tenant farmers of one sort or another.

In theory, the Agricultural Adjustment Administration, which administered the original commodity programs, instructed landlords to divide benefits with their tenants in proportion to their share of the crop. In fact, tenants and sharecroppers seldom received

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cash as payment.¹ Landlords were allowed to collect debts, often at usurious interest rates, before distributing benefits.² Whether the tenant received anything at all depended on the charitableness of the landlord.³ Although many thousands of white tenant farmers were hurt by this policy, the effect was far harsher on black farmers.

The core of the problem was at the local level where the programs were administered by the Department of Agriculture's Extension Service County Farm Demonstration Agents and the Agricultural Conservation Committees.⁴

Blacks had little influence over the selection of these agents and committeemen, and these individuals, for the most part, represented the interest of the white large landowners. Their role was powerful; they determined, based on complex records and calculations, the allotment of cotton acreage and benefit payments to local farmers.⁵

Technical assistance and training for black tenants and sharecroppers was limited by the fact that landlords objected to black agents approaching families on their holdings. USDA acquiesced in these restrictions. As a USDA Extension Service publication explained, "Negro tenant farmers and croppers might best be received principally through the white agents working with the landlords and managers."⁶

USDA officials in Washington were aware of these issues. We know this for two reasons. First, farm protests erupted in several places.⁷ These movements received considerable national attention. Even President Roosevelt was concerned about them. Second, there was debate within the AAA at the national level regarding what to do.⁸ Ultimately those arguing on behalf of tenants lost the political argument in Washington.

Perhaps the main point to be drawn from the history of the early New Deal policies is to note that discrimination was present at the creation of modern farm programs. While the extent to which commodity programs continue to actively discriminate is open to

¹ David E. Conrad, The Forgotten Farmers: The Story of Sharecroppers in the New Deal 23-24, 66 (1965); Charles S. Johnson, Edwin R. Embree, and W.W. Alexander, The Collapse of Cotton Tenancy 52 (1935, 1972).

² Conrad, Forgotten Farmers, at 59, 66; Johnson, Collapse of Cotton Tenancy, at 50-54; Arthur F. Raper & Ira De A. Reid, Sharecroppers All 39-43 (1941, 1971).

³ Johnson, Collapse of Cotton Tenancy, at 60-61.

⁴ Gunnar Myrdal, An American Dilemma 258-59 (1944, 1962).

⁵ United States Commission on Civil Rights, The Decline of Black Farming in America 30-31 (1982).

⁶ Decline of Black Farming, at 33-34.

⁷ See generally, Donald H. Grubbs, Cry from the Cotton: The Southern Tenant Farmers' Union and the New Deal (1971) and Conrad, Forgotten Farmers.

⁸ Conrad, Forgotten Farmers, at 69.

discussion, it is clear that from the very beginning USDA programs systematically discriminated.⁹

B. Discrimination in New Deal Credit Programs

Similar discrimination is to be found in the less well known New Deal agricultural credit programs. These efforts, administered first by the Resettlement Administration and later by the Farm Security Administration, sought in particular to assist small farmers.¹⁰ They were the forerunners of the Farmers Home Administration and present day Farm Service Agency Farmer Credit programs.

The New Deal lending programs ultimately provided hundreds of thousands of farmers with credit.¹¹ The rural rehabilitation loan program, the most extensive of these efforts, was explicitly intended to provide credit to "low-income farmers, including owner-operators, tenants, sharecroppers, and farm laborers."¹² The loans averaged a few hundred dollars.

Even though the standard rural rehabilitation loan program was "consciously intended to serve higher-risk client families," it discriminated against African American farmers.¹³ County and district supervisors tended to choose the safest credit risks in their selection of recipients and to discriminate against black applicants.¹⁴

Historian Sidney Baldwin's study of these programs concluded that white low-income farm families had a two to one advantage over a black family in obtaining a standard loan. The odds against a black family ranged from three-to-one in Tennessee to seven-to-

⁹ For a discussion of continued discrimination in commodity farm programs see Kenneth A. Cook, et al, Looks Like America? Women, Minorities and USDA's Farmer Committees (1995), John W. Harman, Minorities and Women on Farm Committees (1995) (GAO/RCED-95-113R); D.J. Miller & Associates, Producer Participation and EEO Process Study (1996). The Producer Participation Study concludes that minority and female farmers participate less in FSA commodity programs than white male farmers. It suggests that the origin of this disparity may be found in the manner in which FSA administers the programs and in the lack of public knowledge about FSA programs. Further, the study concluded that white males have higher program yields than minority and women farmers. This disparity held even after controlling for the size of the farm. It recommends that FSA and Congress consider whether the 1985 Program Yield Determinations, which still control program yields, incorporated a pattern of discrimination that continues to affect farmers.

¹⁰ Decline of Black Farming, at 73.

¹¹ Sidney Baldwin, Poverty and Politics: The Rise and Decline of the Farm Security Administration 201 (1968). By the end of 1946, 893,000 farm families had received rural rehabilitation loans.

¹² Baldwin, Poverty and Politics, at 200; Decline of Black Farming, at 36, 72 (citing Richard Sterner, The Negro's Share 298 (1943) and A Brief History of Farmers Home Administration (1980)).

¹³ Baldwin, Poverty and Politics, at 200.

¹⁴ Baldwin, Poverty and Politics, at 254.

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one in Mississippi.¹⁵ While blacks constituted 37 percent of all low-income farm families in the South, they received only 23 percent of the standard rehabilitation loans.¹⁶

Other credit programs also failed to serve farmers on an equitable basis. The tenant purchase program, which provided loans to tenants, sharecroppers, and farm laborers to enable them to become owners of family-sized farms, was also administered in a discriminatory way. While blacks comprised approximately 35 percent of all tenants in the South, they received only 21 percent of the tenant-purchase loans.¹⁷

At the local level, discrimination in USDA credit programs was intentional. State and county committees, which were responsible for receiving loan applications and providing advice regarding the establishment of upper and lower tenant purchase loan limits, did not have black members.¹⁸

At the higher levels, USDA officials certainly knew of the ongoing discrimination and consciously chose to ignore it. Sidney Baldwin observes:

Especially in matter of race, the leaders of the FSA [Farm Security Agency] were careful. In their allocation of loan and grant funds, in their personnel appointments[s], in their cooperative and group enterprises, in their resettlement projects, and in their public information activities they adhered consistently to southern attitudes and practices regarding race.¹⁹

The early New Deal credit programs were transferred into the newly created Farmers Home Administration in 1946. While less has been written about discrimination at FmHA in the two decades after World War II, it is probably safe to assume that FmHA officials continued to consciously avoid any actions that might have seemed to suggest a policy of racial equality. That policy was brought into question in the wake of the Civil Rights movement.

¹⁵ Baldwin, Poverty and Politics, at 201.

¹⁶ Decline of Black Farming, at 37.

¹⁷ Decline of Black Farming, at 37.

¹⁸ Myrdal, American Dilemma, at 274-75.

¹⁹ Baldwin, Poverty and Politics, at 279.

III. 1960s: U.S. Civil Rights Commission Raises Discrimination As an Issue

Attention to discrimination in USDA programs, particularly in USDA credit programs, renewed in the 1960s. A 1965 U.S. Civil Rights Commission study of the role of USDA in helping black farmers noted that while USDA had been

instrumental in raising the economic, educational, and social levels of thousands of farm and rural families . . . a quarter of a million Negro families stand as a glaring exception to this picture of progress.²⁰

The 1965 report documented specific findings of discrimination in USDA's Farmers Home Administration and other USDA services. The Commission's in-depth analysis of FmHA data from thirteen southern counties revealed that in

terms of the size of loans, purposes for which loans were used, and technical assistance, FmHA did not provide services to black farmers comparable to those provided to similarly situated whites.²¹

It further concluded that the technical assistance rendered to black farmers by FmHA in the form of loans and technical assistance was "consistently different from that furnished to whites in the same economic class."²²

As had been the case under the original New Deal agricultural credit programs, USDA in 1965 "failed to assume responsibility for assuring equal opportunity and equal treatment to all those entitled to benefit from its programs." Instead the "prevailing practice," according to the 1965 report, was to "follow local patterns of racial segregation and discrimination in providing assistance."²³

The 1965 report apparently prompted little action at USDA. A year later, a brief follow-up 1966 U.S. Civil Rights Commission report focusing on Georgia looked at the same issues and concluded that "many differentials remain."²⁴ A second study, also focusing on Georgia, found that "discriminatory treatment is observed in the withholding of loans and other agricultural services to Negro farmers."²⁵ Later, in 1968, a U.S. Civil Rights Commission hearing in Alabama also found no significant improvement. In 1970, the United States Civil Rights Commission released another follow-up report. It concluded that:

²⁰ United States Commission on Civil Rights, Equal Opportunity in Farm Programs 9 (1965).

²¹ Equal Opportunity in Farm Programs, at 57-82.

²² Equal Opportunity in Farm Programs, at 106.

²³ Equal Opportunity in Farm Programs, at 100.

²⁴ United States Commission on Civil Rights, Progress in Implementing Civil Rights Policies in Selected Agricultural Programs in the State of Georgia 14 (May 1966).

²⁵ Georgia State Advisory Committee to the U.S. Commission on Civil Rights, Equal Opportunity in Federally Assisted Agricultural Program in Georgia 33 (1967).

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The cause and effect relation between lawless, discriminatory agriculture programs in the black poverty cycle with its attendant social disorders cannot be fixed scientifically. There are many subjective human factors involved. But is public record that black Alabama farmers receive proportionately fewer and smaller FHA loans than whites. . . . Given these handicaps, the greenest of black thumbs can harvest little from life.²⁶

The failure of USDA to respond to these problems certainly contributed to the dramatic decline in the number of black farmers during the period. From 1959 to 1969, for example, the number of black commercial farm operators in the South declined by 84.1 percent.²⁷ In contrast, white-operated commercial farms declined by 26.3 percent during the same time.

Significant attention to civil rights issues in USDA credit programs subsided again for several years. Discrimination continued; and USDA was certainly aware of it. In some notable cases discrimination concerns were presented to USDA directly. In 1980 an administrative complaint was filed with the FmHA Office of Equal Opportunity (OEO) on behalf of black farmers in North Carolina. An investigation by OEO confirmed that there were numerous equal opportunity violations in the state.²⁸

USDA's 1981 well-publicized study, A Time to Choose, which addressed the structure of agriculture issues, also noted that credit programs were needed to help small farmers and racial minorities gain access to the land.²⁹

In general, however, USDA remained unwilling to make a significant effort to eliminate discrimination at FmHA. It took a major new report to raise USDA interest in the issue.

IV. 1982 United States Civil Rights Commission Report

In 1982 the U.S. Civil Rights Commission released a detailed and well-publicized report, The Decline of Black Farming in America. It is perhaps the single best study of credit discrimination at USDA. The Report reached at least three important substantive conclusions.

First, the Commission report emphasized the importance of FmHA programs to minority farmers:

To prevent the complete disappearance of blacks as farm operators, it will be necessary for the Farmers Home Administration to establish, and strive towards,

²⁶ United States Commission on Civil Rights, Cycle to Nowhere 2 (1970).

²⁷ Decline of Black Farming, at 40.

²⁸ Decline of Black Farming, at 86-87 (citing USCCR staff review of USDA/OEO compliance review file, "FmHA-7600-Gates and Hertford counties, North Carolina - Special Projects," April 23, 1981).

²⁹ United States Department of Agriculture, A Time to Choose, 119-23 (1981).

more ambitious goals. While civil rights goals and enforcement cannot overcome all of the disadvantages that weigh against black farmers, these efforts, although meager in the overall context of American agriculture, nevertheless may contribute significantly to the lives of black farm operators.³⁰

FmHA thus "has the potential for providing the immediate assistance so urgently needed by black farm operators to prevent the further loss of their land."³¹

Second, the Commission concluded that there were significant and chronic discrimination problems at FmHA. Despite their disproportionate need, black farmers received only 2.5 percent of the dollar amount loaned in 1981 for farm credit. The study also concluded that FmHA,

far from accomplishing its original purpose . . . has failed to advance, and in some cases may have hindered the effort of black small farm operators to remain a viable force in agriculture.³²

These discrimination problems made civil rights enforcement "particularly important to ensure that FmHA provides equal opportunity for minority farmers."³³

Third, the Commission found that FmHA lacked systematic and effective procedures for ensuring civil rights enforcement.³⁴

Enforcement is dispersed at various levels of USDA administration, without clear lines of authority and accountability. Internal investigations seldom find noncompliance; sanctions are rarely applied . . . there is little evidence to follow up to confirm that needed action has been taken to correct violations where they have been found; complaint resolution appears to be ineffective and untimely.³⁵

USDA's response to the 1982 Civil Rights Commission report suggested, at first, that improvements might soon be made.

The Director of FmHA's Equal Opportunity Staff noted that he did not disagree with the 1982 report's analysis of FmHA's civil rights enforcement and stated frankly that his office is "in no position to enforce compliance with civil rights laws."³⁶

A year after the 1982 report, however, USDA had yet to respond to its contents. The Chair of the Commission then wrote to the USDA Secretary charging that USDA had not

³⁰ Decline of Black Farming, at 181.

³¹ Decline of Black Farming, at 71; see also Decline of Black Farming, at 84.

³² Decline of Black Farming, at 134.

³³ Decline of Black Farming, at 134.

³⁴ Decline of Black Farming, at 186-87.

³⁵ Decline of Black Farming, at 179-80.

³⁶ Decline of Black Farming, at 151 and n. 53.

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addressed the concerns expressed in the report. The Secretary responded that he shared the concerns of the Commission and recognized that the department had an obligation to ensure that programs are administered in a non-discriminatory manner. A Task Force was then appointed by the Secretary. The Task Force was to perform an examination of the policies and programs of USDA in light of the concerns raised in the 1982 Commission report.

In general, the Task Force concluded that while there had been discrimination problems in the past, the Department had already effectively addressed the issue. The Task Force observed:

[w]e acknowledge the temporary difficulties in departmental civil rights enforcement procedures but can assure the Commission and the public that these difficulties have been addressed, that enforcement procedures are in place and are being refined for improving effectiveness internally and in program delivery oversight.³⁷

The promise held out by the 1983 Task Force, however, proved optimistic. In 1987, the Office of Inspector General "found that USDA and FmHA had not established and enforced adequate controls for reviewing or testing for possible discrimination in direct assistance . . . programs."³⁸ In 1988 the USDA's Office of Advocacy and Enterprise (OAE) found that in Mississippi the state office was failing to effectively monitor civil rights compliance. Civil Rights training was not provided to all county staff. There was a lack of training and lack of knowledge of complaint processing and counseling.³⁹

Despite the promises of the Task Force and continuing evidence that discrimination problems were still prevalent at FmHA, there was little evidence of a new effort at USDA to eliminate discrimination. At the time of the 1982 report, the rate of decline of black-operated farms in the United States was 2.5 times the rate of decline for white-operated farms.⁴⁰

³⁷ Decline of Minority Farming in the United States, Hearings of the Committee on Government Operations, House of Representatives, 101st Cong., 2nd Sess., July 25, 1990, testimony of David H. Harris, Jr., at 45-46 (quoting Task Force).

³⁸ Monitoring of FmHA Loan Programs for Potential Race Discrimination, Audit No. 04099-253, at 2-3 (July 29, 1987).

³⁹ Fact Sheet, Office of Advocacy and Enterprise, in Hearings, Minority Farming, at 7.

⁴⁰ Decline of Black Farming, at 181-82.

V. 1990 House Government Operations Committee Hearings and Report

The issue of discrimination in FmHA programs again remained somewhat dormant for a number of years. In 1990, however, the House Government Operations Committee held hearings and strongly criticized both the delivery of program benefits to minority farmers and the government's civil rights efforts.

Extensive testimony before the committee suggested that in terms of discrimination in its programs as well as its civil rights complaint procedures and compliance efforts, the situation at FmHA had not improved since 1982.⁴¹ Some noted that the discriminatory acts and practices seem to have changed little from the U.S. Civil Rights Commission reports dating back to the 1960s.⁴² Others observed that they found no evidence that FmHA was acting in good faith to remedy the problem.⁴³ The House Government Operations Committee eventually released a scathing report that concluded that FmHA had "been a catalyst in the decline of minority farming."⁴⁴

Several USDA officials testified in the 1990 hearings. In the face of extensive testimony that discrimination problems at FmHA had not improved since 1982, these officials were unable to claim that discrimination was not a problem at USDA. Instead, USDA officials acknowledged the discrimination and promised to do a better job in the future. The Acting Director of OAE admitted in testimony before Congress, for example, that FmHA was "frequently in noncompliance with civil right requirements at the local level."⁴⁵ The Secretary of Agriculture, when discussing the issue with a member of Congress, explained that discrimination is a recognized problem and that USDA was working on it internally.

The problem has not been addressed, however. In 1991, an Office of Advocacy and Enterprise official acknowledged that USDA had been "part of the pattern and practice of institutional discrimination."⁴⁶ After 1990, discrimination at FmHA again dropped from public consciousness.⁴⁷

⁴¹ Hearings, *Minority Farming*, at 9-158.

⁴² Hearings, *Minority Farming*, at 19.

⁴³ Hearings, *Minority Farming*, at 8.

⁴⁴ *The Minority Farmer: A Disappearing American Resource: Has the Farmers Home Administration Been the Primary Catalyst?* House Committee on Government Operations, H.R. 101-984, 101st Cong., 2nd Sess., 1990, at 41.

⁴⁵ Hearings, *Minority Farming*, at 9, 39, and 252.

⁴⁶ William C. Payne, Jr., *The Rural Sociologist*, Winter 1991, at 16 (Deputy Associate Director for Equal Opportunity, OAE).

⁴⁷ In 1994 FSA commissioned a study on discrimination in USDA agricultural programs. It was made final in 1996. Although this study runs through three volumes and includes hundreds of pages of statistics, it does not analyze FmHA or FSA Farmer Credit Programs or analyze the discrimination complaint procedures. It is difficult to understand why, after decades of

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VI. The Present Situation

A spate of publicity concerning discrimination in USDA lending programs brought attention to the issue again in 1996 and 1997.

USDA officials have again been forced to acknowledge the discrimination problems of the past, and in some cases the present. One official observed that the "[w]e recognize that there have been instances of discrimination in responding to requests for our services in the past, and we deplore it."⁴⁸ The Secretary commented that:

We have a real opportunity to make positive change in the area of civil rights enforcement at USDA and to ensure that both our employees and customers are treated fairly and with dignity. . . . I am committed to bringing about that change.⁴⁹

The crucial test will be whether or not the Department follows through on these promises.

VII. Conclusion

The way USDA deals with the issue of discrimination in its programs tends to follow a rough pattern. First, the USDA programs are designed and implemented in a discriminatory way. The discrimination raises little attention or concern within USDA itself.

Second, there is a public outcry or credible study that brings attention to the unfairness of USDA programs. USDA is thus forced to publicly confront the issue.

Third, USDA reluctantly acknowledges the past failures of its programs, but notes that the situation is different now, and promises to do better in the future.

Fourth, USDA actually does little to prevent discrimination in its programs. USDA continues to discriminate, and after a time this ongoing discrimination leads to another round of public outcry. USDA officials continue the cycle by again acknowledging problems and promising that the future will be different.

Breaking this cycle will be difficult. It will be impossible unless the Department is committed to creating an aggressive, efficient, and well-funded discrimination complaint program. Discrimination at USDA will likely not stop until the Department takes

evidence of discrimination in credit programs, a USDA effort to study discrimination ignores this part of USDA farm programs. D.J. Miller & Associates, Inc., Producer Participation and EEO Process Study for the Farm Service Agency of the U.S. Department of Agriculture.

⁴⁸ Mary Beausoleil, U.S. Farm Agency Acknowledges Bias: Black Groups Plans Protest in Washington, Richmond Times, Nov. 30, 1996, City Edition (quoting Grant Buntrock).

⁴⁹ USDA Press Release No. 0651.96, "Glickman Announces Civil Rights Listening Sessions, Civil Rights Action Members," December 31, 1996.

seriously the difficult task of identifying discrimination when it occurs and providing farmers with a realistic avenue to seek redress.

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Payne: If blacks left agriculture at the same rate as whites over the last 70 years, there would still be over 300,000 black farmers. Even with larger share of tenants, . . . "surely not" the case that neutral economic factors account for the difference. Institutional discrimination "has played a significant part in the disparities which some Black and other minority groups experience in agriculture programs." ⁵⁰

1996 Resources

Resources for Civil Rights Enforcement in USDA have remained static or have dropped since 1981.⁵¹

⁵⁰ Payne at 17

⁵¹ Payne at 18

Bibliography

David E. Conrad, *The Forgotten Farmers* (1965).

Myrdal.

William C. Payne, Jr. *The Rural Sociologist*, Winter 1991 at 16 (Deputy Associate Director for Equal Opportunity, OAE, USDA)

Find

American Negro Reference Book, John P. Davis, Beale essay, *the Negro in American Agriculture* 1976

Sterner, *The Negro's Share*

A Time to Choose, Structure of Agriculture.

B. USDA Farm Programs in Context: the Decline of Farming by People of Color

In 1920, there were nearly one million black-operated farms, comprising one-seventh of all farms. By 1978 only about 6 percent of that number remained.⁵² Thus, while displacement from the land looms as a threat to all small farmers, land loss has occurred more severely among black farmers. Almost 94 percent of the farms operated by blacks have been lost since 1920, while the number of white-operated farms decline about 56 percent during the same period.⁵³

Thus, between 1930 and 1935 the total number of black farmers decline by 8 percent in the South, while white farmers increased by 11 percent.⁵⁴

⁵² Decline at 1-2.

⁵³ Decline at 2.

⁵⁴ Decline at 34

EXHIBIT 7

Civil Action No. 00-2445 (JR)

Discrimination in Agricultural Lending

by Stephen Carpenter

Many farms in the United States are operated by people of color and women.¹ While a significant portion of the country's nearly two million family farmers face poverty and dispossession, women and nonwhite farmers are much more likely than white male farmers to have small operations, limited assets, and a low income.² Discrimination in agricultural lending, therefore, can turn the difficult struggle to stay on the land into an acute crisis.³ At present several different possible strategies may be used on behalf of a farmer who has been a victim of discrimination. In this article I present one possible way to approach these cases.

I. Importance of Credit and of Farm Service Agency

A combination of three factors makes the

Farm Service Agency (FSA)—an agency in the U.S. Department of Agriculture (USDA)—an especially important focus for discrimination in farm lending.

First, in ways that may not be obvious to those unfamiliar with agriculture, credit is the lifeblood of family farming. Successful farms must have access to timely credit in adequate amounts at fair terms. Virtually every farmer uses short-term operating credit to purchase production inputs.⁴ Seed and fertilizer, for example, are typically bought in the spring on credit, and the debt is repaid after harvest. Machinery and cattle are often bought and paid for over several years. A modestly sized family farm, in which family living expenses are less than \$20,000, might typically borrow \$40,000–50,000 per year solely for operating debt. Machinery, equipment, and

¹ U.S. Department of Agriculture (USDA) data suggest that at least 6 percent of farmers are nonwhite, and at least 9 percent are women, although these numbers are almost certainly understated. See U.S. DEP'T OF AGRIC., *THE ECONOMIC WELL-BEING OF FARM OPERATOR HOUSEHOLDS* 9 (1993); Janet Perry, *Small Farms in the U.S.*, AGRIC. OUTLOOK, May 1998, at 22, 24; 1 U.S. DEP'T OF AGRIC., *1997 CENSUS OF AGRICULTURE, SUMMARY AND STATE DATA*, pt. 51, tbls. 16–17 (1999); JUDITH Z. KALBACHER, U.S. DEP'T OF AGRIC., *A PROFILE OF FEMALE FARMERS IN AMERICA* 2 (1985).

² Perry, *supra* note 1, at 24.

³ Farm households are twice as likely as the population as a whole to live in poverty. These households contribute 20 percent of all agricultural production in the country. See Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1089–92 (Apr. 1996); U.S. DEP'T OF AGRIC., *AGRICULTURE FACT BOOK 1997* 26 (1997) (available at www.usda.gov/news/pubs/fbook97/contents.htm) (including all family income, about 40 percent of farmers had income under \$25,000; 20 percent under \$10,000).

⁴ NATIONAL COMM'N ON SMALL FARMS, U.S. DEP'T OF AGRIC., *A Time to Act* 36 (1998) (available at solomon.reeusda.gov/agsys/smallfarm/report.htm); Perry, *supra* note 1, at 24.

Stephen Carpenter is a staff attorney with the Farmers' Legal Action Group Inc., 46 East 4th St., Suite 1301, St. Paul, MN 55101; 651.223.5400; scarpenter@flaginc.org. For a longer version of this article, go to www.flaginc.org/pubs.htm.

real estate debt add to this figure. Without credit of this type, farmers simply cannot continue to operate. So sensitive is the economic fate of a struggling farm to the availability of credit that if credit is granted but made or serviced in a discriminatory way, the discrimination can create an insurmountable barrier for the maintenance of a successful farm. Compounding this problem is that credit in rural areas is generally in relatively short supply and is especially difficult to obtain for family-sized farms.⁵ That discrimination in credit is frequently pointed to as a major difficulty for farmers of color and women farmers is therefore no surprise.⁶

Second, smaller-scale farmers—and farmers of color and women farmers overwhelmingly operate small farms—are much more likely to rely on FSA for lending.⁷ By statute FSA is required to lend only to family farmers. Unlike virtually every other agency in USDA, therefore, FSA farm loan programs are targeted to farmers that need the assistance. In contrast, many lenders generally are reluctant to lend to family-sized farms at all. Consequently FSA tends to function as the lender of last resort for family farmers and as the only credit alternative for many producers.⁸

Third, USDA in general and FSA in particular have discriminated against some farmers for decades. In the last two years discrimination at FSA has gained considerable press attention. Numerous officials, including the Secretary of Agriculture, have acknowledged discrimination as a problem in the agency.⁹ The discrimination, however, has been long-standing and especially vigorous, and the recent administration is not the first to promise that discrimination within the department was at an end. The problem is compounded by USDA's slowness in setting forth reasonable procedures and safeguards to ensure that its operations are carried out fairly. Arguably USDA has been the least accountable of all federal departments in its dealings with the public.

The combination of these factors—the dependence of farmers on credit, the particular dependence of family sized farms on FSA, and the deep and long-standing level of discrimination in FSA—continues to squeeze women farmers and farmers of color into poverty and off the land.¹⁰ For a farm family, dispossession means not only the end of employment but also the loss of a home, a place in the community, and, in many cases, a family heritage.¹¹

⁵ Bob Collender & Dan Milkove, *Proposals for Increasing Rural Access to Credit*, AGRIC. OUTLOOK, Oct. 1995, at 18; NATIONAL COMM'N ON SMALL FARMS, *supra* note 4, at 36; Perry, *supra* note 1, at 24.

⁶ Kalbacher, *supra* note 1, at 1, 45; Theodore E. Downing, *The Crisis in American Indian and non-Indian Farming*, 2 AGRIC. & HUMAN VALUES 18, 23 (Summer 1985); ROBERT A. HOPPE ET AL., U.S. DEP'T OF AGRIC., SOCIAL AND ECONOMIC ENVIRONMENT OF BLACK FARMERS (1986).

⁷ Kalbacher, *supra* note 1, at 3.

⁸ The Farm Service Agency (FSA) generally lends to smaller operations. Charles Dodson & Steve Koenig, *The Major Farm Lenders: A Look at their Clientele*, AGRIC. OUTLOOK, Dec. 1994, at 24. Small farms are roughly three times as likely as large farms to owe their debt to FSA. Perry, *supra* note 1, at 24 (nearly one-fourth of small farm debt from FSA); *Bankers Increase Their Share*, FARM J., Nov. 1995, at 8 (FSA has 6–8 percent of farm debt).

⁹ Testimony of Secretary Dan Glickman, U.S. Department of Agriculture, Before the House Committee on Agriculture, July 17, 1997 <www.usda.gov/da/test717.htm>.

¹⁰ CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE USDA (1997); U.S. COMM'N ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* 71–134 (1982); HOUSE COMM. ON GOV'T OPERATIONS, *THE MINORITY FARMER: A DISAPPEARING RESOURCE*, H.R. DOC. No. 101-984 (1980); Judy Kalbacher & Doug Rhoades, *Profiling Black Farmers in the U.S.*, AGRIC. OUTLOOK, Dec. 1993.

¹¹ FREDERICK H. BUTTEL ET AL., *THE SOCIOLOGY OF AGRICULTURE* 153–54 (1990); William D. Heffernan & Judith Bortner, *Impact of the Farm Crisis on Rural Families and Communities*, 6 RURAL SOCIOLOGIST 160 (1987). Low-income farmers also tend to fare poorly in the larger labor market; see ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., *LIMITED OPPORTUNITY FARM HOUSEHOLDS IN 1988*, at 8 (1993).

II. FSA Regulations—and Common Forms of Discrimination

FSA lending is governed by a lengthy set of regulations.¹² In many cases the regulations create safeguards and benefits for farmer borrowers. Despite those safeguards, discrimination is often found within the details of the way in which farmers are dealt with by FSA. The following are a sampling of some of the most common forms of discrimination at FSA.

A. Discouraged Written Application

Farmers are often discouraged from making loan applications. For example, farmers are told that they should not waste their time applying because FSA is out of lending money. In fact, FSA is often out of money. However, FSA regulations say that when money becomes available, it will be provided on a first-come, first-served basis to eligible applicants, and the date of the written application determines the farmer's place in line.¹³

B. Loan Denials

Many farmers are wrongly denied loans by FSA. Three difficulties are perhaps most prominent. First, FSA often incorrectly calculates the farmer's repayment ability—that is, whether the farmer is likely to be able to make the scheduled payments on the loan. Second, eligibility rules require the applicant to have "sufficient applicable education and/or on-the-job training" and "managerial ability." Third, farmers must be creditworthy. FSA regulations set out a specific definition of creditworthiness, but in practice this definition is sometimes ignored by the agency.

C. Cash-Flow Rules

Many of the important decisions that FSA makes about farmers' rights are based on a cash flow. Cash flows project projected net income by adding anticipated

income, subtracting the family's and the operation's anticipated expenses, and projecting how much, if any, income will be left over.¹⁴

D. Release of Income

Farmers typically grant FSA a security interest in the types of property that they sell to make a living.¹⁵ In a financial crisis, selling that security may be the only way for a farmer to live. FSA is required by statute to release a certain portion of a farmer's security—for example, a dairy farmer's milk check—if the farmer needs the money for essential family living or farm-operating expenses. FSA must continue to make such releases until the farmer's loan is accelerated. Farmers also have the right to revise the planned use of their farm income and collateral. Further, in some limited conditions, the sale of security property can be approved after the fact.

E. Primary Loan Servicing

If a farmer is unable to make a loan payment, FSA regulations provide for a complicated but powerful set of loan-restructuring possibilities.¹⁶ Restructuring can include changing the timing of payments, changing the interest rate on the loan, deferring the loan payments, reducing interest rates, or writing down part of the debt.¹⁷ FSA determines a farmer's eligibility for a write-down in part by comparing the amount of money FSA would receive in a foreclosure with the amount of money FSA would receive if the loan were restructured to allow the farmer to pay the most that he or she could afford. A net recovery value formula is designed to calculate the amount of money that FSA could realistically expect to collect on the debt through legal foreclosure and liquidation procedures.¹⁸ In order to be eligible for certain kinds of loan servicing the

¹² See FARMERS' LEGAL ACTION GROUP, FARMERS' GUIDE TO FMHA (4th ed. 1990).

¹³ 7 C.F.R. § 1910.3(a) (1999).

¹⁴ *Id.* pt. 1924.

¹⁵ *Id.* pt. 1962.

¹⁶ Randi Ilyse Roth, The Government Changes the Rules Mid-Game: An Explanation of the Credit Provisions of the FAIR Act, 11 Farmers' L. Action Rpt., No. 2, at 3-25 (1996).

¹⁷ 7 C.F.R. § 1951.909(e) (1999).

¹⁸ 7 U.S.C. § 2001(c)(2); 7 C.F.R. § 1951.909(f) (1999).

farmer must have acted in good faith.¹⁹ The delinquency on the loan must be due to circumstances that are beyond the borrower's control and result in reducing the farmer's ability to operate with a positive cash flow.²⁰ Both standards are sometimes applied in a discriminatory way.

E. No Assistance from FSA

FSA regulations provide that the county office should give assistance to farmers as they try to figure out what program or programs will best meet their needs. For example, FSA offices are to help farmers transfer their raw cash-flow information to make sure that the application will work. Further, FSA should supply information about FSA services to all who make inquiries, explain the types of assistance available whenever what type of loan or grant will meet the applicant's needs is not clear to the applicant, and provide whatever assistance is necessary to complete the application.²¹

G. Delays in Loan Decision Making

Many farmers believe that systematic discrimination takes place in the timing of loan decisions and processing. Approving applications late is a way that a county office employee could sabotage minority farmers' operations while still approving the loan. FSA has specific time frames within which it must make loan decisions.²² Many farmers believe that lenders discriminate by delaying consideration of a loan or the dispersal of loan funds.

H. Underfunded Loan Requests

Farmers often apply for a specific

amount of operating money, are approved for the loan, but ultimately receive a smaller loan than was requested and which they were eligible to receive.

I. Lack of Notice

In a variety of settings—for example, upon default—FSA regulations require the agency to notify farmers of certain rights. FSA sometimes fails to carry out this notice.

III. The Equal Credit Opportunity Act in Farm Lending

The Equal Credit Opportunity Act (ECOA) makes it unlawful for any creditor to discriminate on a prohibited basis against an applicant with respect to any aspect of a credit transaction.²³ According to ECOA's interpreting regulations, to "[d]iscriminate against an applicant means to treat an applicant less favorably than other applicants."²⁴

Prohibited bases are race, color, religion, sex, marital status, age (provided the applicant has the capacity to contract), the applicant's receipt of income from any public assistance program, and the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes ECOA.²⁵

ECOA has a two-year statute of limitation that applies from the date of violation.²⁶ In recognition of the ineffectual character of USDA's discrimination-compliant procedure Congress authorized a limited waiver of this statute of limitation. The crucial point in the waiver is that the farmer must have filed a discrimination complaint with USDA. As a result, the

¹⁹ 7 C.F.R. § 1951.906 (1999).

²⁰ *Id.* § 1951.909(c)(1).

²¹ *Id.* § 1910.1(a), .3(c), .4(b).

²² *Id.* § 1910.4(i)(1).

²³ Equal Credit Opportunity Act of 1974 (ECOA), Pub. L. No. 93-495, tit. V, 88 Stat. 1500 (codified at 15 U.S.C. §§ 1691-1691f (1999)); Regulation B, 12 C.F.R. § 202.4 (1999).

²⁴ Regulation B, 12 C.F.R. § 202.2(n) (1999). The Federal Reserve Board issued regulations and an official staff commentary interpreting ECOA. 15 U.S.C. § 1691b; Regulation B, 12 C.F.R. pt. 202, Appendix D—Issuance of Staff Interpretations (1999). A violation of Regulation B, as these regulations are called, creates a basis of liability under ECOA. *Cragin v. First Fed. Sav. & Loan Ass'n*, 498 F. Supp. 379, 382 (D. Nev. 1980).

²⁵ 15 U.S.C. § 1691(a); Regulation B, 12 C.F.R. § 202.2(z) (1999).

²⁶ For a discussion of the statute of limitation see RITA GORDON PEREIRA, *CREDIT DISCRIMINATION 196-98* (1998).