

SETTLEMENT FACT SHEET

In re Black Farmers Discrimination Litig.

February 23, 2010

On February 18, 2010, the U.S. Department of Justice (DOJ), acting as counsel for the U.S. Department of Agriculture (USDA), signed a Settlement Agreement with black farmers (Plaintiffs) who had sued USDA for decades of racial discrimination in *In re Black Farmers Discrimination Litig.*, the follow-on case to *Pigford v. Glickman*. **Immediate action by Congress is needed to effectuate this settlement. If \$1.15 billion is not appropriated by March 31, 2010, this Settlement Agreement may be voided.**

This fact sheet provides background on *In re Black Farmers Discrimination Litig.* and the terms of the Settlement Agreement, and is intended to provide quick answers for any farmers who might call Capitol Hill offices seeking information about the settlement or the claims process it creates.

BACKGROUND

- **What was *Pigford v. Glickman*?** – In 1997, a group of African-American farmers brought suit against USDA alleging racial discrimination in the administration of farm loan programs. On April 14, 1999, the U.S. District Court for the District of Columbia approved a settlement and entered a Consent Decree certifying the case as a class action. The Consent Decree set up a claims process to identify and compensate those farmers who were the victims of race discrimination by USDA between 1981 and 1996. Under the *Pigford* Consent Decree, farmers alleging discrimination could submit their claims to a neutral facilitator who would review the claim for eligibility and then forward it to a neutral adjudicator for resolution on the merits.
- **What went wrong in *Pigford*?** - More than 106,000 claimants attempted to participate in the *Pigford v. Glickman* claims resolution process. However, because of allegedly inadequate notice provided to the class, the vast majority of these claimants filed their requests after the Court-imposed filing deadline, and only 22,721 had their claims adjudicated on the merits. This meant that more than 84,000 potentially successful claimants were denied the opportunity to have their discrimination claim determined on the merits.
- **How did Congress fix the problem in the 2008 Farm Bill?** – Recognizing the injustice of foreclosing so many farmers who potentially suffered discrimination from the claims process, as part of the 2008 Farm Bill, Congress created a new cause of action whereby farmers previously denied participation in the *Pigford* claims resolution process could have their *Pigford* claims resolved by filing a new claim against USDA. More than 27,000 black farmers have already filed claims under this new cause of action in a case entitled *In re Black Farmers Discrimination Litig.*
- **What was the problem with this Farm Bill fix?** - Unlike *Pigford*, which was funded out of the Judgment Fund, Congress, presumably because of budget constraints, limited funding for *Pigford* claims in the Farm Bill to \$100 million, to be paid by the Commodity Credit Corporation. Many Members of Congress close to the Farm Bill negotiations have

acknowledged that this \$100 million is not even close to what is will be necessary to provide full relief to all *Pigford* claimants. In fact, several of these Members have described the \$100 million as a “down payment” on full relief, a reading supported by Congress’s stated intent that the Farm Bill be “liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each *Pigford* claim previously denied that determination.”

- **What was the President’s budget request for *Pigford*?** – To address the funding shortfall in the Farm Bill, President Obama included \$1.15 billion in additional funding (beyond the \$100 million in the Farm Bill) in his Fiscal Year 2010 and Fiscal Year 2011 budgets to fund a settlement of *In re Black Farmers Discrimination Litig.*
- **What is the status of the Court case?** – For two years, lawyers for the farmers and lawyers for the government have vigorously litigated *In re Black Farmers Discrimination Litig.*, and worked hard to negotiate a mutually acceptable Settlement Agreement. On February 18, 2010, the parties concluded this Settlement Agreement, which will resolve the Court case upon approval by the Court and funding by Congress.

THE SETTLEMENT

TIMELINE

- **What happens next in the Court case?** – By April 5, 2010, the Plaintiffs and the Government must jointly submit to the Court a Motion for Preliminary Approval of the Settlement Agreement. In granting this motion, the Court will authorize that Notice of this class action settlement be sent to all prospective members of the class.
- **When will the Court give final approval to the settlement?** – We anticipate the Court will have a hearing to give final approval to the Settlement Agreement several months after Notice is sent – likely July or August of 2010.
- **When is the Claim Deadline?** – The Claim Deadline – *i.e.*, the date by which all claims must be submitted to be considered in the claims process – is 180 days from final approval of the Settlement Agreement by the Court. We anticipate this Claim Deadline will be in January or February of 2011.
- **When will meritorious claimants receive their checks?** – Under the settlement, no claimants will be paid until all claims are paid. We anticipate that the first checks will likely be distributed approximately one year from the Claim Deadline – *i.e.*, around January or February of 2012.

CLAIMS PROCESS

- **Who is a class member?** – The proposed Settlement Agreement provides that to be a class member eligible for relief, a claimant must show (1) that he or she filed a “late-filing request” to participate in *Pigford v. Glickman*, and (2) that he or she did not receive a determination on the merits of that claim.

- **How does a claimant start the claims process?** – The settlement sets out a claims process and provides for the hiring of a Claims Administrator and Neutrals to effectuate that process. Once the settlement is approved, claimants may submit a claim for relief by completing a Claim Form and submitting that document, and certain other materials, to the Claims Administrator by the Claim Deadline. The claimant must designate on the Claim Form whether he or she wants to proceed under “Track A” or “Track B.” The selection of Track A is final; a claimant who selects Track B can change his or her election to Track A within a short period after the Claim Deadline.
- **Does a claimant need a lawyer to submit a claim?** – No, but the Settlement Agreement provides that Class Counsel will represent all Track A claimants at no additional cost to the Class through the claims process. Claimants electing Track B may retain counsel on a contingent basis, under fee arrangements approved by the Court.
- **How does “Track A” work?** – Under Track A, a claimant must prove by a preponderance of the evidence that he or she is a class member, and must prove by substantial evidence (a lesser standard of proof) that he or she was discriminated against by USDA. Evidence submitted under Track A is subject to a relatively low standard of admissibility. If a Track A claimant is successful on a credit claim, that claimant is eligible for \$50,000 in liquidated damages, a payment in recognition of outstanding debt owed to USDA, and a tax payment worth 25% of his or her total award. If a Track A Claimant is successful on a non-credit claim, that claimant is eligible for a \$3,000 liquidated damages award.
- **How does “Track B” work?** – Under Track B, a claimant must prove by a preponderance of the evidence both that he or she is a class member and that he or she was discriminated against in the administration of a USDA loan program. Evidence submitted under Track B is subject to a relatively high standard of admissibility. Each “Track B” claimant is eligible for an award equal to his or her actual damages up to \$250,000, subject to a reduction based on an aggregate cap on all “Track B” damages of \$100 million. Track B claimants may use an expert to help quantify their actual damages.
- **How are payments to claimants calculated?** – If enough money is provided by Congress to pay all claims awards in full, each claimant is entitled to the full Track A or Track B award for which they are eligible. If Congress provides insufficient funds to pay all claims in full, all Track A and Track B awards are subject to reduction based on the date of the *Pigford* late-filing request and the amount of money available to pay awards.
- **Who makes the decision on whether a claim is meritorious?** – A Claims Administrator will determine whether a claimant is a class member. An independent Neutral will determine whether the claimant was discriminated against.
- **Is the Government opposing class member claims?** – No. As part of the Settlement Agreement, the Government has agreed not to oppose farmer claims in the claims process.
- **Can a decision be appealed?** – No. Once a decision has been made by the Claims Administrator or Neutral, that decision is final and may not be appealed.

FUNDING

- **How much money does the settlement provide?** – The settlement assumes that \$1.25 billion will be provided for relief to *Pigford* claimants – \$100 million from the 2008 Farm Bill plus \$1.15 billion in newly appropriated money. If Congress provides more than \$1.15 billion in additional funding, the Government may void the settlement. If Congress provides less than \$1.15 billion in additional funding, the Plaintiffs may void the settlement.
- **Is \$1.25 billion enough money to provide everyone full relief?** – We don't know for sure. Our hope is that \$1.25 billion will be enough money to provide full relief to all claimants, but some estimates have suggested as much as \$2.7 billion will be needed. If \$1.25 billion is not enough money to provide full relief to all meritorious claimants, awards may be reduced based upon date of the *Pigford* late-filing request and the amount of funding available.
- **How soon is the money needed?** – Under the terms of the Settlement Agreement, the Plaintiffs may void the settlement if Congress does not provide the additional \$1.15 billion by March 31, 2010.

ATTORNEYS' FEES AND IMPLEMENTATION COSTS

- **How much of the appropriated funds will be spent on implementation costs?** – Under the Settlement Agreement, implementation costs are capped at \$35 million. Implementation costs, under the Settlement Agreement are the costs of retaining a Claims Administrator and Neutrals, providing notice to the Class and other such costs incurred to implement the Settlement Agreement.
- **How much of the appropriated funds will be spent on attorneys' fees?** – Under the Settlement Agreement, between 4.1% and 7.4% of the appropriated funds (minus implementation costs) will be spent on attorney's fees, as determined by the Court. This equates to between \$49 million and \$89 million in fees. This fee payment covers both Common Benefit Fees and Track B Fees.
- **How are attorneys for Track A claimants compensated?** – Track A claimants are permitted to select from among approximately 30 different law firms ("Class Counsel") to represent them at no cost. These law firms are compensated from Common Benefit Fees. A Track A claimant who opts not to use Class Counsel may use a lawyer of his or her choosing, but must pay that lawyer a contingency fee from the Claimant's award of up to 2%, as determined by the Court.
- **How are Track B attorneys compensated?** – All attorneys for Track B claimants are compensated on a contingency basis from the claimant's award. Track B Fees may not exceed 8%, as determined by the Court.
- **When are attorneys' fees paid?** – Except for a small payment for interim fees after final approval of the Settlement Agreement, all attorneys' fees are paid simultaneously with payment of the claimants' awards.

- **Are there any interim payments?** – The Settlement Agreement authorizes up to \$20 million in interim payments to Class Counsel for the benefit of the Class, to be used for implementation costs. This money is needed to hire Claims Administrators and Neutrals, to provide Notice to the class, and to provide other services needed to start the claims process. There is also provision for a small payment of interim attorneys’ fees, after Final Approval of the Agreement, from this \$20 million interim payment.
- **Can a claimant proceed through the claims process without a lawyer?** – Yes, but given the complexity of the claims process and settlement, retaining a lawyer is strongly advised.

ANTI-FRAUD PROTECTIONS

The Plaintiffs and Government have woven into the Settlement Agreement a number of provisions aimed at decreasing fraud:

- 1) *Signature under Penalty of Perjury* – Each claimant is required to sign his or her Claim Form under penalty of perjury attesting to his or her belief that the information on the Claim Form is true and correct.
- 2) *Signature of Attorney* – If a claimant has an attorney, that attorney must sign the Claim Form attesting to his or her belief that the claimant’s submission is true and correct.
- 3) *Representation by Class Counsel* – The Agreement is designed with the expectation that most claimants will submit claims using Class Counsel, who are trained to identify meritorious claims and help root out fraudulent ones.
- 4) *Claims Process* – To receive an award, a claim must pass a rigorous review by the Claims Administrator and a Neutral. These officials will be trained to identify and reject claims that do not appear truthful.
- 5) *Modest Attorney’s Fees* – Attorney’s fees are set at modest levels, and Track B fees are paid on contingency. This disincentivizes attorneys from submitting frivolous claims.
- 6) *Caps on Track B Damages* – Track B awards are capped at \$250,000 per award, and \$100 million for all awards. This ensures that no one claimant can swallow the entire appropriation with his or her award.
- 7) *Admissibility requirements* – Evidence submitted in support of Track B must meet the rigorous standards of the Federal Rules of Evidence.
- 8) *Transparency* – The Claims Administrator and Class Counsel are required to make regular and thorough reports to the Secretary and the Court about progress and payments in the claims process. This transparency will allow public scrutiny of the claims process, which will minimize the risk of fraud.