FLPC FOOD LAW and POLICY CLINIC HARVARD LAW SCHOOL

Supporting Civil Rights at USDA: Opportunities to Reform the USDA Office of the Assistant Secretary for Civil Rights

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I. INTRODUCTION

For decades, the United States Department of Agriculture (USDA) has faced accusations of discrimination against women and racial and ethnic minorities in both its capacity as an employer and as a funder and administrator of federal programs. Historic lawsuits over issues like the USDA Farm Service Agency's discriminatory lending practices[1] and sex discrimination against female employees in the Forest Service have cost taxpayers billions of dollars,[2] yet the agency has continuously failed to establish meaningful changes to its policies and practices in order to rectify its poor record on combatting discrimination and harassment.[3] This failure is at least partially attributable to the structure, management, and operations of the Office of the Assistant Secretary for Civil Rights (OASCR), the office responsible for leading and overseeing the agency's civil rights programs. And, while ensuring equity and effectuating civil rights in USDA programs requires layers of interlocking strategies and a broader retooling (as communities and advocates have called for), this Issue Brief narrows in on the civil rights complaints process at OASCR, offering specific recommendations for the future operations of OASCR.

The transition to a new Presidential Administration presents an opportunity to make OASCR a more effective civil rights office. This Issue Brief has been written to support that effort; it describes OASCR's responsibilities with respect to handling discrimination complaints, its checkered past with civil rights enforcement, and several immediate actions the new Administration could take to improve OASCR's efficacy moving forward. Section II summarizes several decades' worth of findings concerning USDA's handling of civil rights in its programs and then turns to the modern OASCR and describes its procedures for handling discrimination complaints. Section III calls attention to OASCR's more recent shortcomings, including the lack of apparent progress under the Trump Administration. Finally, Section IV outlines several administrative actions that would improve civil rights enforcement at USDA, and Section V briefly summarizes next steps.

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1 This system requires farmers to get loans approved through notoriously biased county committees.

2 *See* Cong. Rsch. Serv., RS20430, The Pigford Cases: USDA Settlement of Discriminations Suits by Black Farmers (2013); Keepseagle v. Vilsack, 118 F.Supp.3d 98 (D.D.C. 2015); Donnelly v. Glickman, No. 4:95-cv-04389-DLJ (N.D. Cal. *filed* Dec. 8, 1995).

3 *See* Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, Mother Jones (May/June 2021); Catherine Boudreau, *Whistleblowers Describe Culture of Sexual Harassment, Reprisals at USDA,* Politico (Dec. 12, 2016), https://www.politico.com/story/2016/12/usda-whistleblowers-232145; Nathan Rosenberg & Bryce Wilson Stucki, *How USDA Distorted Data to Conceal Decades of Discrimination Against Farmers*, The Counter (June 26, 2019), https://thecounter.org/usda-black-farmers-discrimination-tom-vilsack-reparations-civil-rights/; Kathryn Joyce, *The Forest Service is Silencing Women*, Outside (Aug. 29, 2018), https://www.outsideonline.com/2334781/forest-service-silencing-women-harassment-discrimination; James G. Lewis, "New Faces, Same Old Values": A History of Discrimination in the Forest Service (2018), https://foresthistory.org/wp-content/uploads/2018/07/5-Lewis_New_Faces.pdf.

The contents of this Issue Brief were drafted, primarily, in November of 2020 in anticipation of the incoming Administration and in hopes that significant change would follow the transition. Since that time, the Biden Administration has committed to addressing equity across federal agencies.[4] The new Administration has assembled much of its USDA leadership team and similarly expressed its commitment to addressing equity in USDA programs.[5] Civil rights enforcement and accountability must be core components of this agenda. USDA's programs directly impact the lives and livelihoods of millions of people (food assistance recipients; agricultural and food industry workers; rural communities; agricultural producers; and federal employees and contractors), meaning the agency's patterns of discrimination and failures to remedy inequities harm millions across the country. Beyond the examples highlighted later in this Issue Brief, reported civil rights failures tied to USDA officials and/or funding include discrimination against meat processing employees and other agricultural workers;[6] dangerous and substandard housing funded by USDA's Rural Development agency;[7] non-responsiveness to discrimination complaints from recipients in nutrition assistance programs;[8] and harassment within the civil rights office itself.[9] Leadership by and fundamental reform of OASCR must be a key pillar of any meaningful path toward equity in USDA's policies and programs.

II. BACKGROUND

A. Civil Rights at USDA

USDA's history of discrimination is well documented; while it spans departments, agencies and constituencies, one of the more notorious examples is USDA discrimination against Black farmers. In 1965, the U.S. Commission on Civil Rights released a report finding that Black constituents "have been consistently denied access to many [USDA] services, provided with inferior services when served, and segregated in federally financed agricultural programs whose very task was to raise their standard of living."[10] The Commission further found that USDA had "failed to assume responsibility for assuring equal opportunity and equal treatment to all those entitled to benefit from its programs,"[11] and that such discriminatory practices extended to the agency's disparate treatment of its Black employees as well.[12] Later reports documented these issues in even greater depth. In 1982, the Commission's report titled "The Decline of Black Farming in America" concluded that USDA and its lending programs "have failed to integrate civil rights goals into program objectives and to use enforcement mechanisms to ensure that [B]lack farmers are provided equal opportunities in farm credit programs."[13] The material impact of these failures includes the decline in the number of Black farmers from 925,000 in 1920 to 18,000 in

4 Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

5 *See* Roxana Hegeman, *Black Farmers Unconvinced by Vilsack's 'Root Out Racism' Vow*, ABCNEWS (Feb. 9, 2021), https://abcnews.go.com/Politics/wireStory/black-farmers-unconvinced-vilsacks-root-racism-vow-75780129.

6 *See* David Pitt, *Worker Advocates File Meat Plants Discrimination Complaint*, Wash. Post (Jul. 9, 2021), https://www.washingtonpost.com/business/worker-advocates-file-meat-plants-discrimination-complaint/2020/07/09/15555388-c247-11ea-8908-68a2b9eae9e0_story.html

7 *See* Suzy Khimm, *Rates, roaches, mold: Under USDA's watch, some rural public housing is falling apart*, NBC NEWS (Sep. 23, 2019), https://www.nbcnews.com/politics/white-house/rats-roaches-mold-under-usda-s-watch-some-rural-public-n1057016.

8 *See* Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, *supra* note 3.

9 U.S. Off. of Special Counsel, Letter to the President re OSC File Nos. DI-16-2101 and DI-16-2552 (June 22, 2017), https://osc.gov/Documents/Public%20Files/FY17/DI-16-2101%20and%202552/DI-16-2101%20and%20DI-16-2552%20Letter%20to%20President.pdf.

10 U.S. Comm'n on Civil Rts., Equal Opportunity in Farm Programs 100 (1965), https://files.eric.ed.gov/fulltext/ED068206.pdf.

11 *Id.*

12 *See id.* at 82, 101, 109, 110.

13 U.S. Comm'n on Civil Rts., The Decline of Black Farming in America IV (1982) ("Letter of Transmittal"), https://files.eric.ed.gov/fulltext/ED222604.pdf.

1992 and a decline in Black-owned farmland from approximately 16 million acres to less than 3 million acres over the same period.[14] In 1990, the House Committee on Government Operations concurred with the Commission, finding USDA to be a principal cause of Black land loss.[15]

USDA's civil rights failures extend beyond Black farmers. Another prominent example is the U.S. Forest Service, which has been mired in controversy since the 1970s due to discrimination against racial minorities and women, including through workplace sexual harassment.[16] Lawsuits against the agency for discrimination in hiring and promotion, filed in the 1970s and 80s, culminated in consent decrees aimed at achieving parity in the workplace for women and Latinos, though neither were implemented successfully.[17]

In addition to the government reports and the lawsuits—and across the decades and inflection points described in this Issue Brief—communities and advocacy organizations have continuously decried USDA practices and called for significant change. From advocacy for representation at the local level by leaders during the Civil Rights Movement in the 1950s and 1960s,[18] to demonstrations by minority farmers in Washington through the 1990s and 2000s,[19] to the formation of formal organizations and coalitions to champion their policy goals,[20] communities impacted by USDA's legacy of discrimination have kept the pressure on the agency to improve. Changes to the civil rights complaint process are just one prong of the demand for a holistic strategy to address equity and improve civil rights programs at USDA.

Despite these numerous calls to action, many reports, internal and external, indicate that USDA's civil rights policies remained ineffective throughout the 1990s and early 2000s. In 1997, the agency's Civil Rights Action Team—appointed by Secretary Glickman under the Clinton Administration to address the agency's record of civil rights abuses—issued a report that included 92 recommendations to improve civil rights at the agency.[21] The report attributed many of USDA's civil rights failures to a "persistent state of chaos" caused by the agency's organizational issues and found that discrimination "continues to exist to a large degree unabated."[22] Around that time, the U.S. Commission on Civil Rights released a report on Title VI Enforcement—civil rights enforcement in programs receiving federal funding—that identified 55 recommendations for USDA to improve its civil rights program, with a focus on the decentralized and uncoordinated structure of the agency's civil rights activities.[23] In 2003, the Commission found little had changed.[24]

Other reviewing bodies issued similar findings with respect to the agency's record. A Senate Agriculture

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14 Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999); *see also* Pete Daniel, Dispossession (2013).

15 United States House of Representatives, Comm. on Gov't Operations, The Minority Farmer: A Disappearing American Resource-Has the Farmers Home Administration Been the Primary Catalyst? House Report Number 101-984 (1990).

16 While these controversies became litigious in the 1970s, discrimination in the agency has been prevalent since it moved to USDA in 1905.

17 *See* Lewis, *supra* note 3; Emma Weisner, *Gendered Harassment in the U.S. Forest Service*, 3 Women Leading Change 73 (2018), https://journals.tulane.edu/ncs/article/view/1328/1186; Bob Egelko, *Forest Service Agrees to Hire More Latinos/Lawsuit Settlement Reached*, SFGATE (Oct. 25, 2002), https://www.sfgate.com/news/article/Forest-Service-agrees-to-hire-more-Latinos-2759783.php.

18 *See* Pete Daniel, *African American Farmers & Civil Rights*, 73 J. of S. History 3 (2007).

19 *See, e.g.*, *National Black Farmers Association Rally*, C-SPAN (Aug. 22, 2002), https://www.c-span.org/video/?172189-2/national-black-farmers-association-rally.

20 *See, e.g.*, *About*, Rural Coalition, https://www.ruralco.org/about (see also "Organizational Members"); *About Us*, USDA Coalition of Minority Employees, http://www.agcoalition.org/index.html.

21 Civil Rts. Action Team, Civil Rights at the United States Department of Agriculture (1997).

22 *Id.* at 47.

23 U.S. Comm'n on Civil Rts., Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs 250–324 (1996); *see* U.S. Comm'n on Civil Rts., Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. III vii (2003), https://www.usccr.gov/pubs/archives/10yr03.pdf; U.S. Comm'n on Civil Rts., Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. I (2003), https://www.usccr.gov/pubs/archives/10yr02/vol1/ch1.htm

24 U.S. Comm'n on Civil Rts., Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. III vii, *supra* note 23.

Committee hearing on Farming and Civil Rights held in September 2000—which included testimony from individual farmers and organizations like the National Black Farmers Association, Rural Coalition, the Federation of Southern Cooperatives, and the USDA Coalition of Minority Employees—exposed that issues with USDA's handling of discrimination complaints by minority farmers previously identified by the U.S. Government Accountability Office (GAO) and USDA's own Office of Inspector General (OIG) had not been corrected, due to a lack of accountability from USDA's top management to local officers.[25] In March of that year, OIG found that USDA had failed to correct the vast majority of deficiencies outlined in OIG's six prior audit reports.[26] Chief among its findings, OIG reported that the civil rights office continued to adhere to an inefficient complaint processing system, failed to treat complaints with due care, improperly closed program complaints, and had "done little to improve employee morale."[27] When GAO investigated, it found the complaints system in total disarray, with a significant backlog and no system to monitor the progress of complaints.[28] In fact, USDA had one of the worst records of all federal agencies examined by GAO in terms of timeliness of processing complaints.[29]

USDA's civil rights record led to several high-profile lawsuits. The most well-known, *Pigford v. Glickman* (filed in 1997), was a class action filed by Black farmers alleging that USDA willfully discriminated against them in denying or delaying their loan applications and that USDA failed to properly investigate and resolve their complaints.[30] Under the consent decree reached in the matter, 22,721 individuals participated in the claims process, 15,749 received some form of relief,[31] and "the federal government provided a total of approximately $1.06 billion in cash relief, estimated tax payments, and debt relief[.]"[32] However, the filing deadline excluded many would-be claimants from the process and so Congress, through a series of actions, extended the deadline and approved an additional $1.15 billion to settle outstanding claims.[33] An additional 34,000 claims were then filed and deemed eligible for resolution, with a bit more than half receiving relief.[34] Shortly after *Pigford* settled (1999), Native American farmers and ranchers filed their own lawsuit for similar discriminatory lending practices, in *Keepseagle v. Glickman*, as did Hispanic farmers and ranchers, in *Garcia v. Vilsack*, and women farmers and ranchers, in *Love v. Vilsack*.[35] The district court certified the class in *Keepseagle* and the case eventually settled for $760 million, with an individual claims process similar to that in *Pigford*.[36] While the district court did not certify the classes in *Garcia* and *Love*, USDA established a claims process that made $1.33 billion available to settle those discrimination claims.[37] Meanwhile, USDA faced yet another lawsuit alleging gender-based discrimination from its Forest Service employees, *Donnelly v. Glickman*, which ended in a consent decree and individual settlements in 2000.[38]

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25 CSPAN, *Farming and Civil Rights* at 4:10 (Sept. 12, 2000), www.c-span.org/video/?159192-1/farming-civil-rights.

26 U.S. Dep't of Agric., Off. of Inspector Gen., Office of Civil Rights Status of the Implementation of Recommendations Made in Prior Evaluations of Program Complaints 1 (2000), https://www.usda.gov/sites/default/files/60801-4-HQ.pdf.

27 *Id*.

28 CSPAN, *Farming and Civil Rights* at 16:14 (Sept. 12, 2000), www.c-span.org/video/?159192-1/farming-civil-rights.

29 *Id.* at 21:29.

30 Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999).

31 The consent decree set up two avenues for relief: Track A, a faster track process, through which a farmer could recover $50,000 in relief, and Track B, through which a farmer could recover actual damages but had to meet a higher standard of proof.

32 Cong. Rsch. Serv., The Pigford Cases: USDA Settlement of Discrimination Suit by Black Farmers 6–7 (2013).

33 *Id.* at 8.

34 *Id.*; Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

35 Stephen Carpenter, *The USDA Discrimination Case: Pigford, In re Black Farmers, Keepseagle, Garcia, and Love*, 17 Drake J. Agric. L. 1 (2012).

36 *Id.* at 21.

37 Jody Feder & Tadlock Cowan, Cong. Rsch. Serv., *Garcia v. Vilsack*: A Policy and Legal Analysis of a USDA Discrimination Case 7 (2013).

38 Emma Weisner, *Gendered Harassment in the U.S. Forest Service*, 3 Women Leading Change 73 (2018), https://journals.tulane.edu/ncs/article/view/1328/1186.

Despite these cases, there have not been significant improvements in the intervening years. Between 1999 and 2009, the Government Accountability Office (GAO) released at least ten reports that detailed USDA's continued failures to address the agency's civil rights responsibilities.[39] GAO found that USDA's struggle to improve its civil rights record "continued to be undermined by faulty reporting or data on discrimination complaints" and that attempts to rush complaint resolution to decrease the back-log jeopardized the integrity of the complaint review process.[40] USDA employees reported that during this era they were ordered by managers to disregard and even destroy civil rights files and complaints.[41] During the Bush Administration, over 14,000 civil rights complaints were filed, and more than half went without any review at all.[42] OASCR made only one finding of discrimination in this 8-year period.[43]

Many of these issues continued under the Obama Administration,[44] despite stated efforts at reform.[45] Although GAO found that the office made progress on several of its past recommendations,[46] the share of lending going to Black farmers continued to fall during the Obama Administration and reporting has shown similar disparities in recipients of the Trump Administration's trade and coronavirus aid.[47] For instance, 99.4% of the direct payments to farmers funneled through the Trump Administration's 2018 Market Facilitation Program—the largest part of the $12 billion aid package designed to offset producers' losses due to the trade war with China—went to white, non-Hispanic farm operators.[48] Despite the moratorium on acceleration and foreclosure proceedings mandated in the 2008 Farm Bill,[49] which bars USDA from carrying out such adverse actions against farmers with pending discrimination complaints, USDA officials continued to foreclose on Black farmers with outstanding complaints, many of which were never resolved on the merits.[50] Ongoing issues with complaint management during the Obama and Trump Administrations are discussed in more detail below.

B. Office of the Assistant Secretary for Civil Rights

Authorized in the 2002 Farm Bill, the Assistant Secretary for Civil Rights is responsible for ensuring USDA compliance with all civil rights and related laws, coordinating administration of civil rights laws and regulations for USDA program employees and participants, and ensuring that civil rights components are incorporated into USDA strategic planning initiatives.[51] The Assistant Secretary is appointed by the

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39 U.S. Dep't of Agric., Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_011689.pdf [hereinafter Civil Rights Backgrounder].

40 U.S. Gov't Accountability Off., GAO-08-755T, U.S. Department of Agriculture: Management of Civil Rights Efforts Continues to Be Deficient Despite Years of Attention 4–5 (2008), https://www.gao.gov/assets/130/120062.pdf.

41 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

42 Civil Rights Backgrounder, *supra* note 39.

43 *Id.*

44 *See, e.g.*, Examining Sexual Harassment and Gender Discrimination at the U.S. Department of Agriculture: Hearing Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. (2016).

45 Civil Rights Backgrounder, *supra* note 39.

46 U.S. Gov't Accountability Off., GAO-12-976R, U.S. Department of Agriculture: Progress Toward Implementing GAO's Civil Rights Recommendations (2012), https://www.gao.gov/assets/650/647696.pdf [hereinafter GAO-12-976R].

47 Rosenberg & Stucki, *Distorted Data*, *supra* note 3; Nathan Rosenberg & Bryce Wilson Stucki, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout to White Farmers*, The Counter (July 29, 2019), https://thecounter.org/usda-trump-trade-war-bailout-white-farmers-race/; Gosia Wozniacka, *Black Farmers Say They Were Dropped from the USDA's Food Box Program*, CivilEats (Dec. 1, 2020), https://civileats.com/2020/12/01/black-farmers-say-they-were-dropped-from-the-usdas-food-box-program/.

48 Rosenberg & Stucki, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout to White Farmers*, *supra* note 47. "The racial disparities are just as stark in states with sizable non-white farmer populations. In Mississippi, for example, where 38 percent of the population is black and 14 percent of farms have a black principal operator, according to the 2017 Census of Agriculture, only 1.4 percent of the $200 million distributed to farmers through the MFP went to black operators." *Id*.

49 Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, § 14002, 122 Stat. 923, 1442.

50 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

51 Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 10704, 116 Stat. 134, 518; 7 C.F.R. § 2.25; *see* GAO-12-976R *supra* note 46.

President with Senate confirmation.[52]

USDA established OASCR in 2003, supplanting the prior civil rights office, which had undergone numerous reorganizations and periods of dormancy since its beginnings in 1965.[53] Principal among its responsibilities, the Office ensures USDA compliance with civil rights and equal employment opportunity laws.[54] OASCR has a staff of approximately 130 employees and currently consists of four primary offices:[55]

- The **Center for Civil Rights Enforcement** is responsible for investigating and adjudicating employment and program discrimination complaints.[56]
- The **Conflict Complaints Division** is responsible for managing and processing conflicts of interest and highly sensitive Equal Employment Opportunity (EEO) complaints.[57]
- The **Center for Civil Rights Operations** is charged with proactive prevention of unlawful discrimination, which includes overseeing, through its Mission Area Liaison Division, USDA's Special Emphasis Programs that target minorities and other specific groups (e.g., Women, African Americans, Persons with Disabilities, LGBTQ individuals) and the Limited English Proficiency (LEP) Program.[58] This office also handles Alternative Dispute Resolution. Through its other divisions, the Center for Civil Rights Operations is responsible for designing and implementing policies that prevent discrimination at USDA, monitoring compliance of USDA offices with civil rights policy (including compliance with settlement agreements) and training, and managing OASCR data and records.[59]
- The **Program Planning and Accountability Division** includes OASCR's human resources division, and provides other business support like procurement, operations, and financial services.[60]

As detailed above, USDA's fraught history with discrimination has been coupled with an ineffective discrimination complaints process that has all but guaranteed that meritorious employee and program complaints go unaddressed. The remainder of this section provides background on the employee complaint process, the program complaint process, and OASCR's relationship with USDA's Office of General Counsel in order to set up the remaining sections, which outline current concerns with OASCR's complaint resolution process and recommendations OASCR should adopt in light of those concerns.

1. OASCR Employee Discrimination Complaint Process

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that

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52 Comm. on Homeland Security & Gov. Affairs, U.S. Sen., Policy and Supporting Positions 13 (2016). Secretary Perdue, however, circumvented the Senate confirmation process by appointing Naomi Earp to the "deputy" assistant secretary position. *See* Catherine Boudreau, *Perdue appoints 3 to other post after slow-going Senate confirmation process*, Politico (Jan. 28, 2019), https://subscriber.politicopro.com/article/2019/01/perdue-appoints-3-to-other-posts-after-slow-going-senate-confirmation-process-2574668.

53 GAO-12-976R, *supra* note 4651, at 6.

54 *About OASCR*, U.S. Dep't of Agric., https://www.usda.gov/oascr/about-oascr (last visited Nov. 27, 2020).

55 *OASCR Leadership and Organization*, U.S. Dep't of Agric., https://www.usda.gov/oascr/leadership (last visited Nov. 15, 2020); U.S. Dep't of Agric., 2021 USDA Explanatory Note–Executive Operations: Office of Civil Rights (2021), https://www.usda.gov/sites/default/files/documents/eo-ocr-fy2021-congressional-justification.pdf.

56 *Center for Civil Rights Enforcement*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-enforcement.

57 *Conflict Complaints Division*, U.S. Dep't of Agric., https://www.usda.gov/oascr/conflict-complaints-division.

58 *Mission Area Liaison Division*, U.S. Dep't of Agric., https://www.usda.gov/oascr/mission-area-liaison-division (last visited Mar. 21, 2021); U.S. Dep't of Agric., DR 4230-002, Special Emphasis Programs (2009), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4230-002%5B1%5D_0.pdf

59 *Center for Civil Rights Operations*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-operations (last visited Feb. 24, 2021).

60 *Program Planning and Accountability Division*, U.S. Dep't of Agric., https://www.usda.gov/oascr/program-planning-and-accountability-division (last visited Feb. 24, 2021).

forbid discrimination against a job applicant or an employee because of the individual's race, color, religion, sex, gender identity, sexual orientation, national origin, age, disability, or genetic information.[61] Federal agencies must be equal opportunity employers and comply with the EEOC's regulations and instructions.[62] Pursuant to those regulations, every federal agency must adopt a "program to promote equal opportunity and to identify and eliminate discriminatory practices and policies," including by "provid[ing] for the prompt, fair and impartial processing of complaints in accordance with [EEOC regulations] and the instructions contained in the Commission's Management Directives."[63] The Management Directives provide federal agencies with policies, procedures, and guidance for processing employment discrimination complaints under 29 C.F.R. Part 1614.[64] Each agency must also appoint an Equal Employment Opportunity (EEO) Director to carry out EEO functions and mandates.[65] USDA regulations designate the Assistant Secretary for Civil Rights as EEO Director and delegate the Assistant Secretary the authority to oversee and manage all aspects of the agency's EEO program.[66]

The process for USDA employees and applicants to file EEO complaints is outlined on OASCR's website and in USDA Departmental Regulation 4300-007, which reflect USDA's implementation of the EEOC regulations at 29 C.F.R. § 1614 and relevant Management Directives.[67] If a complaint is not resolved through the informal process and proceeds to a formal complaint, OASCR's Center for Civil Rights Enforcement reviews, investigates, and adjudicates the matter.[68] While OASCR may, and does,[69] contract out the investigation (use contracted employees or contract with another agency), OASCR is ultimately responsible for the content and timeliness of the investigation.[70] However, if a complaint involves an individual so as to create a conflict of interest for the civil rights office, the Conflict Complaints division will oversee that case.[71] A complainant may appeal any of OASCR's final actions on the complaint (e.g., dismissal, final order post-hearing) to the EEOC or file a civil action in federal court.[72]

2. OASCR Program Discrimination Complaint Process

OASCR is tasked with enforcing several different federal civil rights statutes that prohibit discrimination in programs receiving federal funding.[73] Additionally, Department regulations prohibit discrimination in any program or activity conducted by USDA.[74] Beyond leading USDA's civil rights programs, OASCR

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61 29 C.F.R. § 1601.1.

62 Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969) (Equal Employment Opportunity in the Federal Government); *see* Exec. Order No. 12106, 44 Fed. Reg. 1053 (Dec. 28, 1978) (Transfer of Certain Equal Employment Enforcement Functions) (transferring relevant authority to the Equal Employment Opportunity Commission).

63 29 C.F.R. § 1614.102(a).

64 U.S. Equal Emp. Opportunity Comm'n, Management Directive 110 (2015), https://www.eeoc.gov/federal-sector/management-directive/chapter-1#_Toc425745116 [hereinafter EEOC Management Directive 110].

65 29 C.F.R. § 1614.102(b)(4).

66 7 C.F.R. § 2.25(a)(16).

67 *See Filing a Discrimination Complaint as a USDA Employee*, U.S. Dep't of Agric., https://www.usda.gov/oascr/filing-discrimination-complaint-usda-employee (last visited Nov. 27, 2020); U.S. Dep't of Agric., DR 4300-007, Processing Equal Employment Opportunity (EEO) Complaints of Discrimination (2016), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR-4300-007%20Processing%20Equal%20Employment%20Opportunity.pdf [hereinafter DR 4300-007].

68 *Center for Civil Rights Enforcement*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-enforcement (last visited Nov. 25, 2020).

69 Kathryn Joyce, *The Forest Service is Silencing Women*, Outside (Aug. 29, 2018), https://www.outsideonline.com/2334781/forest-service-silencing-women-harassment-discrimination.

70 EEOC Management Directive 110, *supra* note 64 (Ch. 5: Conducting the Investigation).

71 *Conflict Complaints Division,* U.S. Dep't of Agric., https://www.usda.gov/oascr/conflict-complaints-division (last visited nov.15, 2020).

72 29 C.F.R. § 1614.110.

73 7 C.F.R. § 2.25; *see Department of Agriculture Grant-Related Materials*, Dep't of Justice, https://www.justice.gov/crt/department-agriculture-grant-related-materials (last visited Nov. 28, 2020). Statutes include Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681); the Age Discrimination Act of 1975 (42 U.S.C. § 6102); the Food Stamp Act of 1977 (7 U.S.C. § 2020(c)); Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)); and the Equal Credit Opportunity Act (15 U.S.C. § 1691).

74 7 C.F.R. § 15d.3; *see* Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture, 79 Fed. Reg. 41406-01, 41406 (Jul. 16, 2014) (explaining that regulations under 7 C.F.R. Part 15d reflect USDA's adoption of the principles reflected in civil rights legislation in direct USDA programs and activities).

investigates and adjudicates discrimination complaints for USDA's direct and financed programs and activities.[75]

A USDA customer who believes they, or a specific class of individuals, have been subjected to discrimination based on race may file a program discrimination complaint with OASCR.[76] The procedures for filing and proceeding with a claim are outlined in 7 C.F.R. Pt. 15–15e, OASCR's website, and Departmental Manual 4330-001.[77] Once a complaint is successfully filed, the Programs Complaint Division (PCD) of the Center for Civil Rights Enforcement will accept the complaint for investigation, dismiss the complaint on jurisdictional grounds, or refer the complaint to the proper agency.[78] If accepted, PCD will forward the results of its investigations to the Program Adjudication Division (PAD) for final determination.[79] At adjudication, PAD will review the investigator's report and, if discrimination is found, the office may attempt to settle the complaint or take other remedial action.[80] If a recipient program or applicant found to be in violation refuses or fails to remedy the discrimination, USDA may suspend, terminate, or refuse to grant or to continue federal financial assistance.[81]

C. OASCR Relationship with the USDA Office of the General Counsel

Like other federal agencies, USDA has an Office of the General Counsel (OGC). OGC serves as legal advisor to USDA and provides all legal services for the agency's activities.[82] The General Counsel reports directly to the Secretary.[83] OGC headquarters has five divisions, including one devoted to Civil Rights, Labor and Employment Law.[84] While OASCR is authorized to coordinate with other outside agencies (i.e., the Department of Justice and the Department of Health and Human Services) on civil rights matters in their respective jurisdictions, those matters involving litigation or administrative enforcement actions are coordinated by OGC.[85]

When it comes to employee complaints, however, EEOC's Management Directive 110 requires clear separation between OASCR's EEO complaint program and USDA's defensive function, meaning the work of OGC, to avoid conflicts of interest.[86] The Directive requires "a firewall between the EEO function [(the work of OASCR)] and the agency's defensive function [(the work of OGC)]."[87] Such a firewall is necessary to "ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible."[88] It also directs

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75 7 C.F.R. § 2.25.

76 7 C.F.R. § 15.6 (Title VI complaint process). OASCR regulations for enforcing prohibitions on sex and handicap discrimination adopt the Title VI complaint procedures. *See* 7 C.F.R §§ 15a.605, 15b.42. Age discrimination complaints are governed by 7 C.F.R. § 15c.7 and follow a similar process. Discrimination complaints against USDA directly are covered under 7 C.F.R. § 15d.5 and also have a similar process.

77 *How to File a Program Discrimination Complaint*, U.S. Dep't of Agric., https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint (last visited Oct. 31, 2020); U.S. Dep't of Agric., Departmental Manual 4330-001 Procedures for Processing Discrimination Complaints & Conducting Civil Rights Compliance Reviews in USDA Conducted Programs & Activities (2001).

78 *Center for Civil Rights Enforcement*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-enforcement (last visited Nov. 25, 2020).

79 *Id*.

80 *How to File a Program Discrimination Complaint*, U.S. Dep't of Agric., *supra* note 77.

81 7 C.F.R. § 15.8(a).

82 7 C.F.R. § 2.31.

83 U.S. Dep't of Agric., 2021 USDA Explanatory Notes – Office of the General Counsel (2020), https://www.usda.gov/sites/default/files/documents/eo-ogc-fy2021-congressional-justification.pdf.

84 *Id.*

85 7 C.F.R. § 2.25.

86 EEOC Management Directive 110, *supra* note 64. Pursuant to 29 C.F.R. § 1614.102, OASCR is required to process complaints in accordance with "the instructions contained in the [EEOC's] Management Directives."

87 EEOC Management Directive 110, *supra* note 64.

88 *Id*.

that the EEO Director—in this case, OASCR—"be provided with sufficient legal resources so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office."[89] EEOC requires, "at a minimum, [that] the agency representative in EEO complaints [(the OGC attorney)] may not conduct legal sufficiency reviews of EEO matters."[90] The directive further specifies that rotating people within the same office to perform these functions, such that associates within the same office represent the agency in the complaint process and perform the legal sufficiency review, does not achieve the requisite impartiality.[91] As discussed in more detail below, USDA has not adhered to this strict separation in practice.

Congress recently reinforced the principle behind the Directive in the National Defense Authorization Act for FY 2021.[92] The law amended The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 to include a requirement that each Federal agency "establish a model [EEO] Program that is not under the control, either structurally or practically, of the agency's Office of Human Capital or Office of the General Counsel (or the equivalent)," in addition to securing against conflicts of interest and ensuring fairness and the efficient and fair resolution of complaints.[93] Congress, by incorporating this and other provisions of the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 into the law, clearly recognized the corrupting impact OGC involvement has on EEO activities.

III. Ongoing Concerns with OASCR Complaint Processes

The new Administration should prioritize reform of OASCR's discrimination complaint oversight functions in order to better address and remedy USDA's fraught civil rights record. As detailed in the paragraphs that follow, OASCR failed to live up to its mission even under an Administration that publicly focused attention on remedying past wrongs. Problems have persisted in both the employee discrimination complaint and program discrimination complaint processes, undermining USDA's ability to make progress on civil rights.

A. Concerns with the Employee Discrimination Complaint Process

In government reports, congressional hearings, media accounts, and interviews, USDA employees, as recently as 2019, describe an agency where senior managers can harass junior employees with little fear of accountability.[94] The U.S. Forest Service (an agency within USDA), for example, has faced scrutiny for its handling of complaints concerning sexual harassment and assault, an issue that Congress held special hearings to address in 2016.[95] Female employees within the Service indicated that the pervasiveness of sexual harassment had not significantly improved in the two years following that hearing,[96] and an OIG audit released in 2018 confirmed that the complaint process could still be

89 *Id.*

90 *Id.*

91 *Id.*

92 National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1137, H.R. 6395—516.

93 *Id.* (Sec. 401. Processing and Resolution of Complaints).

94 *See* Elizabeth Flock & Joshua Barajas, *They reported sexual harassment. Then the retaliation began*, PBS NewsHour (Mar. 1, 2018), www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began; U.S. Dep't of Agric., Office of Inspector Gen., Assessment of the State of Oversight Work in the Area of Sexual Harassment and Misconduct in the Federal Government (2019), https://www.usda.gov/sites/default/files/documents/shmreport.pdf.

95 Flock & Barajas, *supra* note 94.

96 *Id.*

further improved.[97] On March 18, 2018, the chief of the U.S. Forest Service resigned after reports emerged that he was being investigated for sexual misconduct and female employees came forward describing widespread harassment.[98]

Similar allegations of mishandling employee complaints have been made about OASCR.[99] Such accusations against OASCR leadership are especially concerning given OASCR's responsibility for adjudicating harassment and discrimination complaints. After reviewing whistleblower claims filed under the Obama Administration and USDA's own reporting, the Office of Special Counsel (OSC)—an independent federal investigative and prosecutorial agency—took the rare step of sending President Obama a letter concluding that "OASCR has been seriously mismanaged, thereby compromising the civil rights of USDA employees."[100] In support of this conclusion, OSC explained:

> OASCR is tasked with protecting the civil rights of all USDA employees. As such, this office should set the standard not only for processing claims, but also for creating an environment free of discrimination. Rather than leading this effort, the report confirmed that OASCR has an unusually high number of complaints filed against its own leadership. In addition, almost half of these complaints were not acted on in a timely manner, and even when they were addressed within the legally mandated period, they were processed in a manner that violated agency regulations.[101]

OSC communicated to President Trump in 2017 that problems with OASCR's complaint process persisted through 2015 and 2016.[102] It is unclear whether or how USDA held anyone in OASCR accountable for the complaints filed. As illustrated below, it seems unlikely that further corrective action has been taken since.

Even outside of these more scandalous situations, the integrity of the EEO complaint process has come into question. Whistleblowers report that officials at OASCR deliberately slow-walk complaints, while some complaints "simply vanish from the system."[103] This often results in an employee being unable to refile complaints because the 45-day deadline has passed.[104] Some managers reportedly even encourage OASCR employees to weaken complaint cases.[105] Employees who have filed EEO complaints describe experiencing retaliation in the form of job transfers, demotions, and blocked promotions.[106] These practices have served to intimidate and discourage USDA employees from filing EEO complaints. Gayle Petersen, an employee at USDA's civil rights office, wrote in her written testimony for a 2016 congressional hearing that as a result of oppressive conditions and abuse of power at the office, USDA employees do not trust the complaint process, causing many to decide that

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97 U.S. Dep't of Agric., Office of Inspector Gen., Forest Service Initiatives to Address Workplace Misconduct—Interim Report, Audit Report 08601-0008-41(1) (2018), https://www.usda.gov/sites/default/files/08601-0008-41%281%29.pdf.

98 Stephanie Ebbs, *Sexual Harassment Issues Not Over for Forest Service After Chief's Resignation*, ABCNews (Mar. 10, 2018), https://abcnews.go.com/US/sexual-harassment-issues-forest-service-chiefs-resignation/story?id=53609162.

99 Catherine Boudreau, *How a Black History Event at USDA Became a 'Me Too' Moment*, Politico (Feb. 22, 2018), https://www.politico.com/story/2018/02/22/agriculture-metoo-black-history-421649.

100 U.S. Off. of Special Counsel, Letter to the President re OSC File Nos. DI-14-2558, DI-14-4627, and DI-15-0001 (May 18, 2015), https://republicans-oversight.house.gov/wp-content/uploads/2016/12/2015-05-18-OSC-to-Pres.-Obama-re-USDA-OASCR.pdf.

101 *Id.*

102 U.S. Off. of Special Counsel, Letter to the President re OSC File Nos. DI-16-2101 and DI-16-2552 (June 22, 2017), https://osc.gov/Documents/Public%20Files/FY17/DI-16-2101%20and%202552/DI-16-2101%20and%20DI-16-2552%20Letter%20to%20President.pdf.

103 Joyce, *supra* note 69.

104 *Id.*

105 *Id.*

106 *Id.*; Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, *supra* note 3.

the financial and emotional toll of filing a complaint is not worth it.[107]

Whistleblowers claim that many of these issues stem from OASCR staff facilitating the improper involvement of USDA's OGC in the EEO process. While OASCR is meant to protect and defend the rights of those who have experienced discrimination at the hands of USDA employees, OGC defends the Department in legal proceedings. Under the EEOC's Management Directive 110—discussed above—there should be clear separation between USDA's defensive function (OGC) and investigative function (OASCR) in order to avoid conflicts of interest.[108] However, in practice, OGC frequently reviews and resolves discrimination complaints received by the department.[109] Current and former employees, including former Assistant Secretary for Civil Rights Joe Leonard,[110] cite OGC's involvement in all stages of the complaint process as an ongoing problem.

USDA's poor civil rights record is unacceptable regardless of its impact on USDA's effectiveness, however, the poor record also has demonstrated a negative effect on USDA staff. Research indicates that employee perceptions of fairness are critical to the successful implementation of management reforms.[111] Without a strong perception of procedural fairness and justice among employees—the belief that organizational decision-making processes are fair and are "consistent, accurate, unbiased, and open to voice and input"[112]—employee motivation, turnover rates of qualified employees, and performance all suffer.[113] A study looking at perceived procedural justice in four different federal agencies between 2002 and 2012 found that USDA employees and managers consistently reported among the lowest levels of procedural justice.[114] Only the Department of Interior, an agency rocked by repeated harassment, discrimination, and corruption scandals during this period, reported lower rates of procedural justice, and by 2012, the two agencies' rates were roughly equivalent.[115] USDA's performance will continue to be hampered until it ends its tacit acceptance of discrimination and harassment.

B. Concerns with the Participant Discrimination Complaint Process

Current and former USDA employees report similar problems with the customer program discrimination complaints process. First, the complaint process is difficult for applicants to navigate on their own and the OASCR website, as recently as December 2020, provides incredibly limited guidance, thus causing would-be complainants to rely on individual agency representatives to provide them with sufficient information for understanding the process.[116] Then, once a case is filed, complainants face a system that has been described as a complaint "closing machine," with OASCR coming up with "every little knick and corner they could find as a reason to close a complaint [o]r not accept them to begin with."[117] In the rare instance when OASCR has found a complaint has merit, USDA's own reporting shows that

107 Boudreau, *Whistleblowers*, *supra* note 3.

108 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

109 *See id*.

110 *See id.*; Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, *supra* note 3.

111 Colquitt et al., *Justice at the millennium, a decade later: A meta-analytic test of social exchange and affect-based perspectives*, 98 J. OF APPLIED PSYCH. 199 (2013).

112 *Id.*

113 Ellen V. Rubin & Stephen E. Weinberg, *Does Changing the Rules Really Matter? Assessing Procedural Justice Perceptions Under Civil Service Reform*, 26 J. OF PUBLIC ADMIN. RSCH. & THEORY 129 (2016), https://doi.org/10.1093/jopart/muu048.

114 *Id.*

115 *Id.*; *see, e.g.*, Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, NYTIMES (Sep. 10, 2008), https://www.nytimes.com/2008/09/11/washington/11royalty.html.

116 *See OASCR Complaint Resolution*, U.S. DEP'T OF AGRIC., https://www.usda.gov/oascr/complaint-resolution (last visited Nov. 27, 2020).

117 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

the department did not sanction the offending officials.[118] Past civil rights reports show the department failed to take action against any of its employees in response to discrimination complaints brought by USDA "customers" between FY 2010 and FY 2012, and again in FY 2016, even when USDA employees were found to be at fault.[119]

OGC's involvement in the complaint process has been cited as another challenge negatively impacting the fair investigation and adjudication of program complaints. While the EEOC directive described above requires a firewall between OGC and OASCR for EEO complaints, the justification extends to program complaints as well. As the defensive arm of USDA, OGC oversight and influence in the complaint process risks skewing OASCR's objective investigation and evaluation of a complaint in favor of USDA's preferred outcome. This influence has been cited as a significant concern among employees. In GAO reports published in 2008 and 2009, USDA stakeholders noted OGC involvement in complaint cases.[120] Current and former employees report that OGC is "heavily involved in the civil rights office," and that OGC will figure out ways to deny or close complaints even when they are compelling.[121] Former Assistant Secretary Joe Leonard described OGC as "pushing to control the civil rights office" during his tenure and felt confident enough to "guarantee" that OGC continues to make the majority of OASCR's discrimination decisions.[122]

The integrity of OASCR's program complaint process is critical for ensuring that USDA programs equitably support its constituents and do not further entrench generations of flagrant civil rights violations. Given the practical constraints to filing a civil action in court (including cost and other barriers),[123] this process is in many cases the only opportunity for redress available to farmers and other program customers. The latest data publicly available shows that the average processing time of USDA program complaints was 989 days, over two and a half years from the date of formal filing and up by over 200 days from 2016.[124] The average processing time of program complaints filed with the Farm Service Agency—i.e., USDA's lending and financing arm—was 2,293 days, or over six years, an increase of over 1000 days since 2016.[125] Although resolution speed should not be prioritized at the expense of thorough review,[126] leaving complaints unresolved for lengthy time periods means that individuals with meritorious complaints may be missing out on much needed USDA support, thus perpetuating the agency's civil rights failings.

C. Concerns with OASCR Management Under the Trump Administration

In keeping with the patterns described above, OASCR made no discernable progress under the Trump Administration. During that time, several key leaders of the office's enforcement activities lacked any

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118 *Id*.

119 U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2016 (2017); U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2012 (2013); U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2010 (2011).

120 U.S. Gov't Accountability Off., U.S. Dep't of Agric.: Recommendations & Options Available to the New Administration & Congress to Address Long-Standing Civil Rights Issues (2009), https://www.gao.gov/assets/130/122370.pdf; U.S. Gov't Accountability Off., U.S. Dep't of Agric.: Recommendations & Options to Address Management Deficiencies in the Office of the Assistant Secretary for Civil Rights (2008), https://www.gao.gov/assets/130/122370.pdf

121 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

122 *Id*.

123 Such constraints include limits on time and resources, as well as lack of access to affordable legal services in rural communities nationwide. *See* Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, Am. Bar Ass'n (July 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/access_justice_rural_america/.

124 U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2019 (2020) (Table 5); U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2016 (2017) (Table 1-1).

125 *Id*.

126 A focus on quickly resolving complaints may, and has, lead to resolving complaints on technicalities or finding ways to misrepresent complaint data. *See* Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

experience managing or working in a federal civil rights program prior to assuming their positions.[127] In FY 2018, EEOC reversed OASCR's decisions on EEO complaints at a rate 50 percent higher than the federal average, while OASCR made zero findings of discrimination out of 521 employee complaints that same year.[128] It was also discovered that systems in place to receive complaints concerning discrimination in USDA programs went unmonitored by OASCR, meaning tens of thousands of program complaints had gone unaddressed.[129] While, for a brief period, OGC did not have access to OASCR's internal employee complaint system, access was restored in the Administration's final year, thus enabling OGC attorneys to review the files of cases alleging discrimination by employees.[130]

Unfortunately, a full analysis of OASCR management under the Trump Administration is difficult to develop, due to USDA's lack of transparency. Still, Black farmers and farmers of color, USDA employees, and civil rights groups reported ongoing discrimination and harassment, indicating that these deficiencies have continued, if not worsened, under the Trump Administration.[131] The FY 2019 Report of Civil Rights Complaints also showed a significant increase, noted above, in the average processing time for all program complaints, and particularly complaints against the Farm Service Agency. Rep. Marcia Fudge also shared, during an Oversight Hearing in November 2019, that "there have been significant declines in the number of employees in the Office of Civil Rights from fiscal year 2016 to fiscal year 2019" and that out of 300 employee complaints filed in 2019 there had been only 2 findings of wrongdoing.[132]

IV. Potential Actions

The new Administration should take immediate steps to rectify the longstanding issues described in the preceding sections to improve OASCR's efficacy in fulfilling its civil rights mandate. This Section first identifies opportunities to improve integrity in OASCR's processes and governance for all discrimination complaints, and then turns to several recommendations specific to program complaints.

A. Establish and Maintain Clear Division Between OGC and OASCR for All Civil Rights Complaints

OGC's involvement in processing complaints against USDA and its programs presents a conflict of interest that threatens the impartiality of OASCR's investigative and adjudicatory functions. In the case of employee complaints, EEOC Management Directive 110 unambiguously disallows OGC involvement in the complaint resolution process and requires a firewall between the two agencies,[133] and Congress recently reinforced its demand for such separation.[134] Similar restrictions are necessary for program complaints to ensure fairness and equity and to restore participant confidence in the program complaint resolution process. USDA should adopt the following measures, each of which should be achievable

127 Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, *supra* note 3.

128 *Id.*

129 *Id.*

130 *Id.*

131 *See, e.g.*, Letter from Over 70 Black Farmers, Advocates, Researchers, & Organizations to Sen. Elizabeth Warren re: Justice for Black Farmers (Aug. 31, 2019), https://www.agriculturaljusticeproject.org/media/uploads/2019/09/19/Justice_for_Black_farmers_letter_2019.pdf; Joyce, *supra* note 69; Kathryn Joyce, Nathan Rosenberg, & Bryce Stucki, *The "Machine that Eats Up Black Farmland"*, *supra* note 3.

132 *Fudge: Earp 'Isn't the Right Person' for USDA Civil Rights Post*, Hadstrom Report (Dec. 5, 2019), https://panetta.house.gov/media/in-the-news/fudge-earp-isn-t-right-person-usda-civil-rights-post. At least some of this decline was likely due to departmental reorganization.

133 EEOC Management Directive 110, *supra* note 64.

134 National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1137, H.R. 6395—516.

without notice-and-comment:[135]

- Immediately revoke OGC access to OASCR's internal complaint system (iComplaints), and establish a firewall between the OASCR and OGC, restricting access to information about complaints and pre-complaints.
- Restrict all OGC involvement in complaint processing, including the drafting and finalization of Final Agency Decisions.
- Maintain clear codes of conduct limiting communications between agency employees for both employee and program complaints.
- Bar current and former OGC employees from working in OASCR's Center for Civil Rights Enforcement, at least for several years.
- Review OASCR staffing and ensure that the office is staffed with sufficient attorneys to eliminate improper reliance on OGC attorneys for legal review.
- Appoint career and political leaders with experience managing the full scope of a federal civil rights program to leadership of OASCR.

To give the changes lasting power, the new Administration should formalize them by revising Departmental Regulation 4300-007 (DR 4300-007), "Processing Equal Employment Opportunity (EEO) Complaints of Discrimination."[136] This regulation provides the rules and guidelines for USDA processing of employment discrimination complaints by USDA employees and applicants.[137] DR 4300-007 currently does not establish any clear delineation between OASCR and OGC. The regulation is due to be updated in 2021, providing a timely window for incorporating the recommendations noted above in formal USDA policy.[138] An appropriate division between OASCR and OGC in the resolution of program complaints, as opposed to EEO complaints, could also be formalized through revising Departmental Manual Procedures for Processing Discrimination Complaints and Conducting Civil Rights Compliance Reviews in USDA Conducted Programs and Activities.[139]

B. Establish a Civil Rights Ombudsperson

In several of its reports, GAO recommended that USDA "explore establishing an ombudsman office to address customer and employee concerns about civil rights."[140] Part of its rationale was that external ombudsmen "help agencies be more responsive to the public through impartial and independent investigation of citizens' complaints, including those of people who believe their concerns have not been

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135 Similar changes have historically been made without notice and comment, with the agency describing the change as one of "internal management." Each of these recommendations is best characterized either as relating to agency management or as a rule of agency organization, procedure, or practice and thus is exempt from the APA's notice requirement. *See* 5 U.S.C. § 553; *see, e.g.*, Revision of Delegations of Authority, 79 Fed. Reg. 44101-01 (July 30, 2014) (same justification).

136 Though the word "Regulation" appears in its name, the rules are internal to agency processes and not subject to notice-and-comment rulemaking.

137 DR 4300-007, *supra* note 67, at 1–2.

138 *See* U.S. Dep't of Agric., Departmental Regulation 0100-01 Departmental Directives System (2018), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%200100-001_Departmental_Directives_System.pdf.

139 U.S. Dep't of Agric., Departmental Manual 4330-001 (2001).

140 U.S. Gov't Accountability Off., U.S. Dep't of Agric.: Recommendations & Options Available to the New Administration & Congress to Address Long-Standing Civil Rights Issues 4 (2009), https://www.gao.gov/assets/130/122370.pdf.

dealt with fairly and fully through normal channels."[141] Further, GAO noted that a workplace ombudsman could provide an alternative to dealing with "employees' workplace conflicts and other organizational climate issues."[142] Noting that USDA "faces concerns of fairness and equity from both customers and employees," GAO concluded that "[an] USDA ombudsman who is independent, impartial, fully capable of conducting meaningful investigations and who can maintain confidentiality could assist in resolving these civil rights concerns."[143]

In April 2009, OASCR looked further into the idea of establishing an ombudsman office.[144] According to GAO, OASCR reached out to the Ombudsman Association and other federal agencies that employ the ombudsman model, and concluded that an ombudsman would be helpful.[145] However, in 2012, the Assistant Secretary for Civil Rights opted not to pursue the ombudsman office further; he decided that OASCR's recent improvements—which included "increased staffing, use of Lean Six Sigma, development of standard operating procedures, and timely processing of complaints"—obviated the need for the change.[146] USDA did create an ombudsperson position pursuant to the *Keepseagle* settlement,[147] but that position was not specific to the OASCR complaints process and the office "sunset" (closed) in April 2019.[148]

Although OASCR's processes became more efficient between 2008 and 2012, the procedural changes did not address the underlying justifications for establishing an ombudsperson office. GAO's recommendation stemmed from concerns regarding organizational climate and perceptions of equity and fairness in the complaint resolution process, not just improving efficiencies. The demand to address equity concerns in the complaint process is even more paramount, given the emergence of information about the various improprieties in the way employee complaints at OASCR and the Forest Service were being handled (see Section III above). Such problems continued under the Trump Administration, so it is unlikely OASCR has improved its reputation as a fair, objective arbiter of employee and program complaints. The new Administration should look at the research and recommendation that was completed by OASCR back in 2009 to support establishing an ombudsperson and take immediate steps to create such an office either in OASCR or outside of the OASCR structure. If housed at OASCR, the ombudsperson and their office must operate with substantial autonomy and independence to be effective. USDA should also consult with the USDA Coalition of Minority Employees and minority-led farmer groups, to design the scope of the office, which could also "assist individuals in navigating [OASCR] programs" as contemplated in Section 104 of the proposed Justice for Black Farmers Act.[149] These consultations could occur in tandem with efforts to establish the OASCR Advisory Council, described below.

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141 *Id.* at 13.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 18.

146 *Id.*

147 The *Keepseagle* settlement provided for the creation of an USDA Ombudsperson "to address issues relating to Native American farmers and ranchers, as well as other socially disadvantaged farmers or ranchers," for a period of five years. Settlement Agreement, No. 1:99CV03119 (Dkt. 576-1) (Nov. 1, 2010). The role primarily focused on helping socially disadvantaged farmers and ranchers access USDA programs.

148 *USDA Ombudsperson Office Expands to Help Women and Hispanic Farmers and Ranchers Resolve Access Issues to USDA Programs*, U.S. Dep't of Agric. (Jan. 5, 2017), https://www.usda.gov/media/press-releases/2017/01/05/usda-ombudsperson-office-expands-help-women-and-hispanic-farmers; *Office of the Ombudsperson*, U.S. Dep't of Agric., https://www.usda.gov/our-agency/staff-offices/office-ombudsperson (last visited Nov. 27, 2020). While a justification for the closure was not readily available from USDA, it seems the office closed due to the expiration of the *Keepseagle* programmatic change agreement and the end of the *Love* and *Garcia* claims process.

149 Justice for Black Farmers Act of 2020, § 104(a). Under the Act, the Ombudsman would also provide recommendations to the Secretary on whom to award grants for providing technical assistance to farmers and ranchers in filing civil rights complaints under the grants program in Section 104(g).

The consensus view seems to be that the Administrative Dispute Resolution Act authorizes USDA/OASCR to establish an ombudsperson with respect to workplace complaints.[150] On program complaints, USDA may have the inherent authority to do so under the Secretary's management authority; the research OASCR performed back in 2009 could confirm this. The presumed authority is supported by the fact that USDA created the externally-facing Office of the Ombudsperson under the *Keepseagle* settlement without any additional authorization from Congress, specific appropriations, or rulemaking.[151] However, some have opined that legislative action may be desirable to support the autonomy and credibility of the office.[152] The new Administration should revisit the 2009 analysis to determine the scope of authority to create the office and take steps to do so.

C. Ensure that Compliance Review is Sufficiently Autonomous from OASCR's Adjudication Divisions to Guard Against Conflicts of Interest

OASCR's Compliance Division has the critical job of monitoring and ensuring that USDA offices comply with civil rights policy, including adopting policies or taking actions required in civil rights settlement agreements and final agency decisions.[153] Although this office sits outside of the Center for Civil Rights Enforcement, the Employment Adjudication Division and Program Adjudication Division (each in Enforcement) both retain authority to monitor compliance with settlements and final agency decisions.[154] In certain situations—i.e., complaints against OASCR and decisions remanded from the EEOC—these divisions effectively wind up conducting compliance on themselves, an obvious conflict. To ensure meaningful accountability, review of the Adjudication Divisions' compliance must sit with the Compliance Division in the Center for Civil Rights Operations.

D. Establish an Advisory Committee of Marginalized Program Participants, Representative Organizations, and Employees to Consult on OASCR Procedures and Priorities

To help OASCR set priorities and procedures aligned with the needs of its most impacted constituents, USDA should create an advisory committee to consult on and guide OASCR's reform efforts. Members of the committee should be selected in consultation with groups representing BIPOC and women farmers, such as the Rural Coalition and its members; USDA employees; and civil rights organizations. In line with calls from Black farmers and Black farmer advocates, such a committee would "evaluate [OASCR] and issue recommendations aimed at transforming the agency into one that addresses discrimination[.]"[155] Establishing such a body would bring additional public accountability and transparency to OASCR beyond just the reporting of complaint data.

The Secretary could establish the advisory committee under and in accordance with the Federal Advisory Committee Act (FACA). Under FACA regulations, USDA may establish a discretionary advisory committee without a Congressional directive following consultation with the Committee Management Secretariat (U.S. General Services Administration), notice to the public in the Federal Register, and

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150 5 U.S.C. § 571; Howard Gadlin & Samantha Levine, Stranger in a Strange World (2008), https://www.ombudsassociation.org/assets/docs/OmbudsInFederalGovt-ACResolution.pdf; U.S. Gov't Accountability Off., Human Capital: The Role of Ombudsmen in Dispute Resolution (2001), https://www.gao.gov/new.items/d01466.pdf.

151 The authors searched the Federal Register website, past Agriculture Appropriations bills, and Congress.gov.

152 Gadlin & Levine, *supra* note 150.

153 *Center for Civil Rights Operations*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-operations (last visited Feb. 24, 2021).

154 *Center for Civil Rights Enforcement*, U.S. Dep't of Agric., https://www.usda.gov/oascr/center-civil-rights-enforcement (last visited Feb. 24, 2021).

155 Letter from over 70 Black farmers, advocates, researchers, and organizations to Sen. Elizabeth Warren (Aug. 31, 2019), https://www.agriculturaljusticeproject.org/media/uploads/2019/09/19/Justice_for_Black_farmers_letter_2019.pdf.

the filing of the advisory committee's charter.[156] Additionally, the committee must be "essential to the conduct of agency business and [may be established only] when the information to be obtained is not already available through another advisory committee or source within the Federal Government."[157]

To meet FACA's mandate, USDA will need to define the advisory committee's objectives in a way that clearly distinguishes it from other advisory committees. Currently, USDA has an Advisory Committee on Minority Farmers (ACMF), established by statute via the 2008 Farm Bill.[158] The purpose of that committee is to advise the Secretary of Agriculture on implementation of Section 2501 programs (outreach and assistance for socially disadvantaged farmers and ranchers—i.e., those belonging a group whose members have been subjected to racial or ethnic prejudice), "methods of maximizing the participation of minority farmers and ranchers in [USDA] programs," and "[c]ivil rights activities within [USDA], as such activities relate to participants in such programs."[159] A review of past meeting agendas and media concerning ACMF indicates that its focus is on USDA programs and not the operations of OASCR.[160] Still, in defining the new committee's role and objectives, USDA should take care to distinguish its function from the civil rights activities of ACMF to ensure FACA compliance.

E. Actions to Reform USDA Program Participant Complaint System[161]

1. Expand the Moratorium on Foreclosures while a Civil Rights Complaint is Outstanding

Past Administrations seeking to improve USDA's civil rights performance have made moratoriums on USDA loan accelerations and foreclosures a centerpiece of their reform efforts.[162] Congress has followed suit: the 2008 Farm Bill established a moratorium on acceleration and foreclosure proceedings instituted by USDA against any farmer or rancher with a pending discrimination complaint that is accepted by USDA as valid.[163] The moratorium is reflected in USDA regulations and the Farm Service Agency's General Program Administration Handbook.[164] It applies to USDA direct and guaranteed real estate loans (including conservation loans and farm ownership loans),[165] operating loans,[166] and emergency loans.[167]

Despite the law on the books, recent advocacy led by Black farmers and their allies, including through the proposed Justice for Black Farmers Act, calls for a moratorium on foreclosures during the period in which a civil rights complaint is outstanding with OASCR.[168] The call for supplemental action is

156 41 C.F.R. §§ 102-3.60, 102-3.65, 102-3.70; *see generally* 41 C.F.R. Part 102-3 Federal Advisory Committee Management.

157 41 C.R.R § 102-3.20.

158 *See* 7 U.S.C. § 2279.

159 *See* U.S. Dep't of Agric., Advisory Committee on Minority Farmers Charter (2019), https://www.usda.gov/sites/default/files/documents/ACMF%20Charter%20as%20filed%2011.6.19.pdf.

160 *See, e.g.*, *Advisory Committee on Minority Farmers*, U.S. Dep't of Agric., https://www.usda.gov/partnerships/advisory-committee-on-minority-farmers (last visited Dec. 2, 2020); *Meeting of Advisory Committee on Minority Farmers part of teleconference*, Vegetable Growers News (July 17, 2020), https://vegetablegrowersnews.com/news/meeting-of-advisory-committee-on-minority-farmers-part-of-teleconference/.

161 Section IV.F of this Issue Brief was co-authored by Quinton Robinson (Policy Advisor, Rural Coalition).

162 Civil Rights Backgrounder, *supra* note 39; Marcia Merry, *LaRouche-Bevel helped win stay on farm foreclosures*, EIR Nat'l (Mar. 19, 1993), https://larouchepub.com/eiw/public/1993/eirv20n12-19930319/eirv20n12-19930319_062-larouche_bevel_helped_win_stay_o.pdf.

163 7 U.S.C. § 1981a.

164 7 C.F.R.§ 766.358; U.S. Dep't of Agric., Farm Serv. Agency, General Program Administration (1-FLP (Revision 1)) 3-6 (2020), https://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a204.pdf.

165 7 U.S.C. §§ 1922 et seq.

166 7 U.S.C. §§ 1941 et seq.

167 7 U.S.C. §§ 1961 et seq.

168 *See Addressing Discrimination and Ensuring Equity for Farmers of Color*, Warren Democrats, https://elizabethwarren.com/plans/equity-farmers-of-color (lasted visited Nov. 30, 2020); *Booker, Warren, Gillibrand Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy*, Cory Booker (Nov. 19, 2020), https://www.booker.senate.gov/news/press/-booker-warren-gillibrand-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy.

likely due, in part, to reports indicating that USDA continued to foreclose on properties with pending discrimination complaints despite the moratorium.[169] Additionally, department data shows that USDA "foreclosed on [B]lack-owned farms at a higher rate than on any other racial group between 2006 and 2016" and that "the agency was more than six times as likely to foreclose on a [B]lack farmer than a white one."[170]

The demand for further action is likely also due to the narrow parameters of the 2008 provision; the moratorium only applies when there is a claim that is "accepted by the Department as valid." This language means that the protection only goes into effect following the intake and acceptance process which can take 10 to 20—and, more recently, closer to 25—days. The gap risks swallowing meritorious complaints and emboldening loan officers to act swiftly before the moratorium is imposed.

The new Administration should broaden the scope of the moratorium and extend the moratorium to encompass situations that do not meet the specifications of the current interpretation of the 2008 law. The Secretary has broad authority in overseeing USDA loans and has implemented similar moratoriums without additional Congressional action or formal rulemaking.[171]

Additionally, the new Administration should work to ensure that communication between OASCR and Farm Service Agency (FSA) facilitate enforcement of the moratorium. The current Farm Service Agency General Program Administration Handbook provides that an FSA State Office will mark an account that may be eligible for the moratorium after being notified by the Office of Civil Rights or the Guaranteed Loan Servicing and Inventory Property Management Branch "that the borrower has an accepted complaint," with an effective date as the date the complaint was received by the Office of Adjudication.[172] The new Administration should prioritize reviewing and updating the relevant communication channels and procedures to ensure that accounts are indeed being flagged in every eligible case.

2. Designate Certain Complaints as Eligible for Fast-Track Proceedings and/or Prima Facie Findings of Discrimination

Discrimination is harmful in any circumstance, but it can be particularly devastating for a farmer whose livelihood depends on receiving a loan or USDA services during a short window of time in preparation for a crop season. One discriminatory, adverse decision can result in the loss of land or a farm that has been in a family for generations. In certain circumstances, then, it may be appropriate to fast-track resolution of complaints so that resolution may come soon enough to circumvent the potentially long-lasting and destructive impact of the discriminatory action.[173] It may also be appropriate to shift the evidentiary burden to the accused party—i.e., adopt a presumption that discrimination took place—when certain conduct by a USDA official that could erode faith in the integrity of the civil rights process appears in the factual record.

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169 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

170 *Id.*

171 *See* U.S. Dep't of Agric., Farm Serv. Agency, Direct Loan Servicing for Women and Hispanic Claimants in Conjunction with USDA's Initiative to Settle Outstanding Group Actions (2011), https://www.fsa.usda.gov/Internet/FSA_Notice/flp_587.pdf (outlining the moratorium on accelerations and foreclosures for women and Hispanic farmers, beyond those to which the 2008 Farm Bill applied); *see Farmers Impacted by COVID-19 Now Eligible to Defer FSA Loan Payments*, NSAC (May 28, 2020); Marcia Merry Baker, *Secretary Espy Stayed Farm Foreclosures*, EIR (Sep. 21, 2007), https://larouchepub.com/eiw/public/2007/eirv34n37-20070921/17_737.pdf.

172 U.S. Dep't of Agric., Farm Serv. Agency, 1-FLP (Revision 1), *supra* note 164, at 3–6.

173 USDA already recognizes that an adverse decision can have ruinous effects, which is part of the reason why the National Appeals Division, described further below, hears appeals within a 45-day window from filing.

In consultation with the appropriate oversight bodies (e.g., the proposed Civil Rights Ombudsperson and proposed Advisory Committee), OASCR should review, select, and implement systems for designating complaints for fast-track treatment. Complaints that would make sense for fast-track treatment—when supported by affidavit—could include those with allegations of a decision to unlawfully strip or otherwise deny a farmer of his or her "good faith" borrower status; that a loan officer has been influenced by a third party for the purpose of harming or taking over the farmer's business operations; and/or that a loan officer made a harmful error or mistake during loan making or servicing, particularly where swift resolution could materially impact the farmer's upcoming season. Additionally, OASCR could identify situations where a presumption of discrimination is appropriate in order to discourage subversive and abusive practices by officials representing USDA programs.[174]

3. Create a Complaints Task Force to Quickly Review All Pending Program Complaints

At the beginning of the Obama Administration, Secretary Vilsack established a Program Complaints Task Force to review the 14,000 complaints that went unaddressed under the Bush Administration.[175] Former Director of USDA's civil rights program Lloyd Wright led this task force.[176] Under Mr. Wright's leadership, the Task Force identified around 4,000 discrimination complaints, many of which came from Black farmers, that had merit.[177] Mr. Wright has since expressed, however, that the Department failed to adequately support Congressional action to ensure those complaints would be addressed.[178] At the time, discriminatory lending claims premised on the Equal Credit Opportunity Act had a two-year statute of limitations, which had expired in many cases.[179] Despite advocacy in Congress (and success in the House) to extend the statute of limitations on those claims, the Senate, despite being Democrat-led, failed to pass the extension.[180] Mr. Wright attributed this failure, in part, to USDA's lack of advocacy with key Senate decision makers at the time.[181]

The new Administration should again form a task force to review outstanding program discrimination complaints, coupled with a plan to ensure that complaints are evaluated and resolved equitably, addressing potentially meritorious claims quickly and on the merits. Fortunately, the Dodd-Frank Act extended the statute of limitations on discriminatory lending claims to five years, thus providing more flexibility than USDA faced in 2009.[182] Still, the most recent data shows that the complaints against the Farm Service Agency have an average processing time of 2,293 days, which is over six years, indicating that some complaints still are not being resolved on the merits and that the longer statute of limitations is allowing complaints to sit without resolution.[183] The task force should set up a triage system to ensure that the oldest complaints relative to the applicable statute of limitations are reviewed first so complainants do not lose their opportunity for redress. For complaints where the statute of limitations has run, OASCR should still conduct a review to ascertain the number of complaints in this situation and either work with policymakers to establish an extension or explore alternative remedies

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174 For instance, a presumption could be appropriate when the responsible management official (the individual accused of the discriminatory action) accuses a participant of misusing the civil rights process for personal gain.

175 Civil Rights Backgrounder, *supra* note 39.

176 *Id.*.; Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

177 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

178 *Id.*

179 *Id.*; *see* 15 U.S.C. § 1691e(f) (2010).

180 Rosenberg & Stucki, *Distorted Data*, *supra* note 3.

181 *Id.*

182 15 U.S.C. § 1691e(f).

183 U.S. Dep't of Agric., Report of Civil Rights Complaints, Resolutions, & Actions FY 2019 (2020) (Table 5).

that may be provided such claimants in lieu of a settlement.[184]

4. Report Findings of Discrimination by USDA's National Appeals Division to Congress and the Proposed Civil Rights Ombudsperson

A USDA program participant or applicant that receives an adverse decision from certain USDA agencies (e.g., the Farm Service Agency) can seek review of that decision by a hearing officer of USDA's National Appeals Division (NAD).[185] That review does not include adjudicating claims of discrimination.[186] Discrimination claims are, instead, filed pursuant to the processes outlined in Section II.B, above.

The NAD hearing process offers some comparative advantages to the program discrimination complaint process that may make it more common for participants to file claims in that context instead of in the civil rights context. Once a participant timely requests a hearing on an adverse decision through NAD, a hearing must take place within 45 days.[187] This window provides greater opportunity for a participant to receive a revised decision that will materially impact their situation, such as receiving access to needed loans or other equitable relief.[188] By contrast, the discrimination claim process generally extends much longer and, thus, such complaints offer less promise of rectifying injustice during the time of most acute need. Would-be complainants with potentially meritorious complaints may be deterred by the futility of such a filing. Thus, NAD hearing officers may see instances of program discrimination that OASCR officials do not, making NAD an untapped source of additional oversight and transparency in USDA program activities.

One step the Administration could take to better engage NAD is to require that it collect and report data related to allegations of discrimination to Congress and other oversight bodies, such as the proposed Civil Right Ombudsperson and/or Advisory Committee described above. This data should be relatively easy to collect because, according to NAD's Guide, hearing officers should already be recording when allegations of discrimination arise.[189] This data will offer another perspective on the incidence of discrimination in connection to adverse actions by certain USDA programs, rounding out civil rights analysis. USDA could also explore establishing a more formal process for coordinating referrals, or even fast-tracking complaints, from NAD to OASCR where a NAD hearing uncovers an instance of discrimination. Currently, it appears that NAD officials simply inform a participant that they should pursue their discrimination complaint through OASCR, without any direct coordination between NAD and OASCR.[190]

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184 *Cf.* U.S. Dep't of Justice, Statute of Limitations & Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Department of Agriculture (1998) (explaining that the United States cannot waive the statute of limitations of ECOA claims in litigation or in the administrative process).

185 7 U.S.C. § 6991; 7 C.F.R. §§ 11.1, 11.2.

186 7 C.F.R. § 11.1; *see also* Nat'l Appeals Div., The National Appeals Division Guide 2 (2008), https://www.nad.usda.gov/sites/default/files/pictures/nad-guide-oct-2008.pdf ("NAD . . . does not adjudicate discrimination complaints or equal employment disputes.").

187 7 C.F.R. § 11.8(c)(1).

188 *See* 7 C.F.R. § 11.9.

189 Nat'l Appeals Div., The National Appeals Division Guide 52 (2008), https://www.nad.usda.gov/sites/default/files/pictures/nad-guide-oct-2008.pdf.

190 *See* Nat'l Appeals Div., The National Appeals Division Guide 48, 56 (2008), https://www.nad.usda.gov/sites/default/files/pictures/nad-guide-oct-2008.pdf; Nat'l Appeals Div., The National Appeals Division Correspondence Manual 10 (2007), https://www.nad.usda.gov/sites/default/files/pictures/nad-correspondence-manual-oct-2007.pdf.

5. Strengthen Investigator Training & Resources to Ensure Fair Adjudication of Program Complaints

The success of a program complaint depends, in part, on the information available to, and efforts and expertise of, the investigator assigned to the complaint. Poor understanding of the law can lead investigators to more heavily rely on the accounts and legal interpretations of other USDA employees or the responsible management official over participants, compromising the impartiality required for proper investigation and, ultimately, adjudication. Additionally, where it is not plain that a decision was made based on discriminatory intent, a decision favorable to the participant may turn on the efforts and ability of the investigator to pull together circumstantial evidence supporting such an inference as well as a robust investigative record on the questions of disparate treatment and impact (i.e., looking across similarly situated individuals).

To ensure its investigators develop a robust and impartial record, OASCR should invest in training investigators on the law and legal principles that underpin the claims they are investigating and train and encourage investigators to develop robust investigative records.[191] These trainings should also be available for program participants, their representatives, and other advocates to attend to support broad understanding of the legal issues at hand and inform the public of how they may assist investigators in assembling the investigative record. OASCR should continue to invest in tools and resources for its investigators to develop evidence of disparate treatment and impact, and update the agency's Departmental Manual Procedures for Processing Discrimination Complaints and Conducting Civil Rights Compliance Reviews in USDA Conducted Programs and Activities to address the ongoing concerns with investigation handling.[192]

6. Immediately Publish Reports on Civil Rights Program Complaints

The 2008 Farm Bill requires USDA to issue an annual report on the number and status of civil rights complaints against the agency, including program complaints, and publish the report on USDA's website.[193] The Secretary has delegated the authority to "prepare, submit, and make publicly available" these reports to OASCR.[194] Despite the requirement, OASCR has only published full program complaint reports for fiscal years 2010, 2012, 2016, and 2019.[195] Further, while copies of these reports may be retrieved if one uses the USDA website's search engine, OASCR's website does not provide a mechanism for readily locating or viewing the reports, other than that for FY 2019, despite having a designated page to host them.[196] Without a clear home, the information in these reports is unnecessarily challenging for members of the public to find and review.

OASCR should immediately work to publish the requisite civil rights reports for fiscal years 2017–2020. While those reports are being drafted, OASCR should make the raw data publicly available in an easily accessible format. To help the public understand and evaluate OASCR's complaint adjudication operations, OASCR should publish—in addition to the average age of complaints—data indicating (1) how many complaints have been or will be closed due to the statute of limitations, (2) how many

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191 Trainings are already a part of the agency's civil rights programs.

192 U.S. Dep't of Agric., Departmental Manual 4330-001 (2001).

193 Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 14010, 122 Stat. 923, 1447.

194 7 C.F.R. § 2.25(a)(22).

195 *See* U.S. Dep't of Agric., usda.gov (search "Report of Civil Rights Complaints").

196 *See Reports*, U.S. Dep't of Agric., https://www.usda.gov/oascr/reports.

complaints have been or will be closed due to technical filing errors, and (3) how many complaints are filed but not accepted. These data points will help the public and OASCR better assess what proportion of complaints OASCR is resolving on the merits of the claim itself, rather than procedural technicalities. To obtain a full picture of USDA's civil rights activities, OASCR should also publish this data on all USDA civil rights programs (i.e., complaints filed with the agencies that do not reach OASCR).

V. Next Steps

Since the transition to the Biden Administration, new appointees have assumed office, Secretary Vilsack was reappointed to his position at the helm of USDA, and Congress passed the American Rescue Plan, which, within the $5 billion provided to support farmers of color ($4 billion for loan forgiveness and $1 billion for land access, outreach, education, and other assistance), includes a set-aside for at least $5 million in the latter bucket to support one or more equity commissions to address racial equity at USDA.[197] The new Administration has voiced a commitment to racial equity and appointed Dr. Dewayne Goldmon as USDA's Senior Advisor for Racial Equity,[198] while minority farmers—particularly Black farmers—continue to, rightfully, hold the attention of Congress.[199] Additionally, due to the COVID-19 pandemic, USDA announced temporary suspensions on collections, foreclosures, and similar activities on farm loans.[200]

Progress on equity cannot be achieved without investment in transparency, accountability, and integrity in all OASCR operations and activities. This commitment must be shared across leadership and permeate decision making at every level, from the establishing of policy to the processing of individual program and employment complaints. OASCR can and must ensure that USDA is a workplace free of discrimination in all forms and hold itself and its leaders accountable when they fail to live up to this mandate. The recommendations laid out in this Issue Brief offer the first steps towards that proposed future of USDA.

197 *See* American Rescue Plan Act of 2021, H.R. 1319, § 1006.

198 *USDA Announces Dr. Dewayne Goldmon as Senior Advisor, Racial Equity, and Andy Green as Senior Advisor, Fair and Competitive Markets*, U.S. Dep't of Agric. (Mar. 1, 2021), https://www.usda.gov/media/press-releases/2021/03/01/usda-announces-dr-dewayne-goldmon-senior-advisor-racial-equity-and.

199 *A Hearing to Review the State of Black Farmers in the U.S.*, House Agric. Comm. (Mar. 25, 2021), https://agriculture.house.gov/calendar/eventsingle.aspx?EventID=2141. Black farmer advocacy groups organized a separate press briefing with Sens. Reverend Raphael Warnock, Cory Booker, and Elizabeth Warren to speak on Congressional actions. *Black Farmers Press Event*, Acres of Ancestry (Mar. 22, 2021), https://acresofancestry.org/media-advisory-for-black-farmers-press-event/.

200 *USDA Temporarily Suspends Debt Collections, Foreclosures and Other Activities on Farm Loans for Several Thousand Distressed Borrowers Due to Coronavirus*, U.S. Dep't of Agric. (Jan. 27, 2021), https://www.usda.gov/media/press-releases/2021/01/27/usda-temporarily-suspends-debt-collections-foreclosures-and-other.