



December 7, 2012

Congressional Committees

Subject: *Civil Rights: Additional Actions in Pigford II Claims Process Could Reduce Risk of Improper Determinations*

On April 14, 1999, the U.S. District Court for the District of Columbia approved the settlement of *Pigford v. Glickman (Pigford I)*, a class action lawsuit brought against the U.S. Department of Agriculture (USDA) by African American farmers. In *Pigford I*, the farmers alleged that USDA had willfully discriminated against them and other African American farmers by (1) denying or delaying the processing of their applications for farm loans and benefit programs and (2) failing to properly investigate and resolve their discrimination complaints.¹ The settlement was estimated at the time to be worth at least \$2.25 billion, the largest civil rights settlement in U.S. history.² By the settlement's claim filing deadline, approximately 22,700 individuals had filed claims for relief under the settlement; however, about 74,000 additional individuals submitted requests to file late claims, about 97 percent of whom were not allowed to proceed under the settlement.³ After congressional hearings, Congress passed legislation—the 2008 Farm Bill—which permitted claimants who had submitted a late-filing request under *Pigford I* and had not received a final determination on the merits of their claims to bring a civil action in federal court to obtain such a determination.⁴ The legislation made available \$100 million for payment of successful claims.

After the legislation was enacted, 23 separate complaints were filed—together representing approximately 40,000 individual claims—which were subsequently consolidated into a single case commonly referred to as *Pigford II*.⁵ After nearly 2 years of litigation, a settlement agreement was reached providing that \$1.25 billion be made available for the resolution of claims, contingent upon congressional approval of \$1.15 billion in funding beyond the \$100 million made available by the 2008 Farm Bill. The parties to the *Pigford II* settlement were USDA, represented by the U.S. Department of Justice (DOJ), and the African American farmers, represented by Class Counsel.

¹See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

²*Id.* at 95.

³*Pigford I* Arbitrator, *Arbitrator's Ninth Report on the Late-Claim Petition Process* (Washington, D.C.: Nov. 30, 2005).

⁴Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209 (2008).

⁵*In re Black Farmers Discrimination Litig.*, 820 F. Supp. 2d 78 (D.D.C. 2011).

The Claims Resolution Act of 2010, enacted in December 2010, appropriated the \$1.15 billion and mandated that GAO evaluate the internal controls created to carry out the terms of the *Pigford II* settlement agreement and report at least twice during the claims adjudication process.⁶ On November 13 and 14, 2012, we provided a briefing to your offices in response to the first of these two reporting obligations. As agreed with your offices, this report formally transmits the November briefing, provides updates to that briefing, and satisfies the second reporting obligation. Our objectives were to examine: (1) the internal control created to identify and deny fraudulent or otherwise invalid claims under the settlement and (2) the extent to which the internal control design and operation provide reasonable assurance that fraudulent or otherwise invalid claims are identified and denied.

Scope and Methodology

To conduct our work, we examined the settlement agreement's legal framework; how it is being executed; and the views of the parties to the settlement agreement and those charged with carrying out its terms, among other things. We compared the internal control created to carry out the settlement with the federal standards for internal control.⁷ In addition, we conducted testing of a random sample of 150 claims drawn from those submitted as of June 4, 2012, to determine whether selected controls were operating as intended.⁸ We also discussed a draft of the briefing slides with USDA, DOJ, and the parties charged with carrying out the settlement's terms before the briefing, and incorporated their comments and suggested technical corrections, as appropriate.

We conducted this performance audit from April 2012 to December 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary

The parties charged with carrying out the terms of the *Pigford II* settlement agreement have created numerous internal control measures designed to balance various interests including accuracy, efficiency, and cost. Many of these measures serve to identify and deny fraudulent or otherwise invalid claims. For example, the parties conduct iterative reviews of each claim and identify potential fraud concerns. In addition, the parties told us that they plan to conduct final control measures after all claims are provisionally adjudicated and before payments are made. Those measures include identifying duplicate claims (to ensure no one is paid twice) and claims filed on behalf of the same farming operation (to ensure only one payment per farming operation) or same class member (to ensure only one payment per class member).

⁶Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070, 3071 (2010).

⁷GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: Nov. 1, 1999).

⁸We performed testing from June 7 to July 25, 2012. Controls applied after this time—such as final adjudications and those related to payment processing—are not reflected in our results.

In general, the internal control design provides reasonable assurance that fraudulent or otherwise invalid claims could be identified and denied; however, certain weaknesses in the control design could expose the claims process to risk of improper determinations. Some of these weaknesses are a result of constraints imposed by the terms of the settlement agreement, which were agreed to by the parties to the settlement agreement as fair, reasonable, and adequate. In addition, the terms were approved by the presiding judge, effectively ratified by Congress in the Claims Resolution Act of 2010⁹ and in some cases originated in *Pigford I* and were subsequently enacted in the 2008 Farm Bill. These design weaknesses, hence, cannot be modified by the implementing parties. For example, by the terms of the settlement agreement, most claims must be evaluated based solely on the information submitted by the claimants and, as a result, the adjudicator of these claims has no way of independently verifying that information. Another weakness is within the authority of the implementing parties to modify. Specifically, the Claims Administrator is responsible for determining class membership, including that claimants have not obtained prior judgments on their complaints. The Claims Administrator, however, has not established agreed upon procedures—beyond consulting two other settlement participant lists—for checking whether claimants already obtained judgments in judicial or administrative forums. Without such procedures, some individuals may improperly be found to be class members.

Finally, at the time of our review, the internal control design was generally operating as intended to identify and deny fraudulent or otherwise invalid claims. However, the design has not yet been fully implemented, and we cannot determine whether the remainder of the design will operate as intended. For example, control measures yet to be implemented—either in full or in part—include (1) identification of duplicate claims and claims submitted on behalf of the same farming operation or the same class member and (2) verification of timeliness determinations.

For additional information on the results of our work, please see enclosure I, slides 17 through 29.

Conclusions

Identifying and denying fraudulent or otherwise invalid claims among tens of thousands of claims submitted is a daunting task. The parties charged with carrying out the terms of the *Pigford II* settlement have designed and operated a system of internal control that, in general, provides reasonable assurance of identifying and denying fraudulent or otherwise invalid claims. There is an absence, however, of agreed upon procedures to identify claimants who already obtained determinations on their complaints in judicial or administrative forums. Additionally, the settlement's internal control design has not been fully implemented, and its effectiveness is contingent upon the remaining control measures being fully and correctly carried out. We note that internal control need not provide absolute assurance and recognize that accuracy must be weighed against other interests including cost. However, reaching agreement on certain procedures and implementing the design fully to provide reasonable assurance in accurate claim determinations is important, especially where funds are limited, and improper awards reduce the amount available for those truly entitled to relief—those harmed by USDA discrimination.

⁹The Claims Resolution Act of 2010 made available \$1.15 billion, the use of which was to “be subject to the express terms of the” *Pigford II* settlement agreement. Pub. L. No. 111-291, § 201(a)(1), (b), (c).

Recommendations

We are making the following two recommendations:

- To improve the internal control design, we recommend that the Claims Administrator establish and document procedures to provide reasonable assurance of identifying claimants who obtained prior judgments on their discrimination complaints in judicial or administrative forums, including reaching agreement with USDA on the Claims Administrator's request that USDA check its records of judicial and administrative determinations.
- To help ensure that the design operates as intended to provide reasonable assurance of identifying and denying fraudulent or otherwise invalid claims, we recommend that the parties charged with carrying out the terms of the settlement agreement continue their efforts to fully and correctly implement the remainder of the internal control design, including measures to (1) identify duplicate claims and claims submitted on behalf of the same farming operation or the same class member and (2) verify timeliness determinations.

Agency Comments, Third-Party Views, and Our Evaluation

We provided a draft of this report to USDA, DOJ, and the parties charged with carrying out the terms of the settlement agreement, for their review and comment.

In written comments, which are reproduced in enclosure II, USDA disagreed with the inclusion of USDA in our first recommendation—regarding the Claims Administrator's procedures to provide reasonable assurance of identifying claimants who obtained prior judgments on their discrimination complaints in judicial or administrative forums. USDA stated that, under the terms of the *Pigford II* settlement agreement, USDA is not required to take any action other than to give loan information during the claims process. USDA also stated that our recommendation gives "the appearance that USDA has failed/neglected to work with the Claims Administrator on this issue," which USDA said is not the case. In addition, USDA said the Claims Administrator has alternative methods to search for judicial records, and USDA is currently considering whether it is legally able to provide records of administrative decisions to the Claims Administrator. USDA also noted that the Claims Administrator could make a Freedom of Information Act (FOIA) request for the records. In response to these and earlier oral comments from USDA, we modified our recommendation to make clear that it is the Claims Administrator's duty to establish the indicated procedures, which include reaching an agreement on whether USDA will assist the Claims Administrator with its request. However, whether the Claims Administrator obtains administrative records from USDA as a result of its current request, or as a result of a future FOIA request, USDA involvement is still required. USDA subsequently informed us in an e-mail that it would provide the Claims Administrator with information on administrative decisions, but that the Claims Administrator would need to obtain information on judicial decisions. USDA indicated, and the Claims Administrator agreed, that the parties would meet to discuss USDA's involvement in early December 2012. These actions pave the way toward implementation of our first recommendation. In order to fully implement the recommendation, we continue to expect the Claims Administrator to establish and document the indicated procedures.

USDA also disagreed with our use of the phrase “USDA’s history of discrimination.” USDA stated that it never conceded liability regarding the discrimination alleged in either the *Pigford I* or *Pigford II* settlements. USDA suggested adding the word “alleged” before the phrase. We did not make this change because we attribute the phrase to the judicial opinions approving the *Pigford I* and *Pigford II* settlements, not to any concession of liability by USDA.

Finally, USDA stated that “the *Standards for Internal Control in the Federal Government* were not considered during settlement negotiations” and that “the settlement terms need not meet these standards.” The *Standards for Internal Control in the Federal Government* defines the minimum level of quality acceptable for internal control in federal government, and parallel standards apply to private industry. These standards provide the basis for evaluating internal control and are therefore the appropriate criteria by which to evaluate the internal control in the *Pigford II* settlement, as we were mandated to do under the Claims Resolution Act of 2010.

USDA, DOJ, and the parties charged with carrying out the terms of the settlement agreement all provided additional information and/or technical comments, which we incorporated as appropriate.

We are sending copies of this report to the Secretary of Agriculture, the Attorney General of the United States, the parties charged with carrying out the terms of the *Pigford II* settlement agreement, the appropriate congressional committees, and other interested parties. This report also is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have questions concerning this report, please contact me at (202) 512-3841 or garciadiazd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Susan Quinlan, Assistant Director; Kevin Bray; Darryl Chang; Debra Cottrell; Alison O’Neill; Mark Ramage; Emmy Rhine; Tind Shepper Ryan; Kiki Theodoropoulos; and Monique Williams.



Daniel Garcia-Diaz
Acting Director, Natural Resources and Environment

Enclosures (2)

List of Committees

The Honorable Debbie Stabenow
Chairman
The Honorable Pat Roberts
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Max Baucus
Chairman
The Honorable Orrin G. Hatch
Ranking Member
Committee on Finance
United States Senate

The Honorable Frank Lucas
Chairman
The Honorable Collin C. Peterson
Ranking Member
Committee on Agriculture
House of Representatives

The Honorable Dave Camp
Chairman
The Honorable Sander M. Levin
Ranking Member
Committee on Ways and Means
House of Representatives



Pigford II Settlement

**Briefing to Congressional Committees
November 2012**

For more information, contact Daniel Garcia-Diaz, (202) 512-3841 or garciadiazd@gao.gov

Page 1

Introduction

- On April 14, 1999, the U.S. District Court for the District of Columbia approved the settlement of *Pigford v. Glickman (Pigford I)*, a class action lawsuit brought against the U.S. Department of Agriculture (USDA) by African American farmers who alleged USDA had willfully discriminated against them and other African American farmers by denying or delaying the processing of their applications for farm loans and benefit programs and failing to properly investigate and resolve their discrimination complaints.¹
- By the settlement's claim filing deadline of October 12, 1999, approximately 22,700 individuals had filed claims for relief; however, about 74,000 additional individuals submitted requests to file late claims, about 97 percent of whom were not allowed to proceed under the *Pigford I* settlement.²
- After congressional hearings, Congress included a provision in the 2008 Farm Bill that permitted claimants who had submitted a late-filing request under *Pigford I* but who had not received a final determination to bring a civil action in federal court to obtain such a determination.³

¹See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

²*Pigford I* Arbitrator, *Arbitrator's Ninth Report on the Late-Claim Petition Process* (Washington, D.C.: Nov. 30, 2005).

³Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209 (2008).

Introduction (cont'd)

- The 2008 Farm Bill made available \$100 million for payment of successful claims.
- After the legislation was enacted, 23 separate complaints were filed—together representing approximately 40,000 individual claims—which were subsequently consolidated into a single case commonly referred to as *Pigford II*.⁴
- After nearly 2 years of litigation, a settlement agreement was reached providing that \$1.25 billion be made available for the resolution of claims, contingent upon congressional approval of \$1.15 billion in funding beyond the \$100 million already set aside.
- The parties to the *Pigford II* settlement were USDA, represented by the U.S. Department of Justice (DOJ), and the African American farmers, represented by Class Counsel.
- The Claims Resolution Act of 2010, enacted in December 2010, appropriated the \$1.15 billion and mandated that GAO evaluate the internal controls created to carry out the terms of the new settlement and report at least twice during the claims adjudication process.⁵

⁴*In re Black Farmers Discrimination Litig.*, 820 F. Supp. 2d 78 (D.D.C. 2011).

⁵Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070, 3071 (2010).

Objectives

This briefing responds to the first of two reporting obligations for GAO during the *Pigford II* claims adjudication process, as mandated by the Claims Resolution Act of 2010.⁶ Our objectives were to examine the following:

- (1) the internal control created to identify and deny fraudulent or otherwise invalid claims under the settlement, and
- (2) the extent to which the internal control design and operation provide reasonable assurance that fraudulent or otherwise invalid claims are identified and denied.

⁶We plan to respond to the second reporting obligation in December 2012.

Scope and Methodology

To determine the internal control created, we examined

- the legal framework prescribing the creation and implementation of internal control under the settlement by identifying, obtaining, and reviewing governing authorities including the 2008 Farm Bill, the Claims Resolution Act of 2010, the presiding judge’s orders and opinions, and the judicially approved settlement agreement;
- how the settlement’s legal framework is being executed by the parties charged with carrying out its terms—such as the designated Claims Administrator and Class Counsel—by identifying, obtaining, and reviewing the internal control policies and procedures created by those parties; and
- the views of the parties to the settlement agreement and the parties charged with carrying out its terms on the creation and application of the settlement’s internal control by identifying, contacting, and interviewing those parties.

Scope and Methodology (cont'd)

To examine the internal control design and operation, we

- compared the internal control created to identify and deny fraudulent or otherwise invalid claims⁷ with the standards for internal control prescribed in the *Standards for Internal Control in the Federal Government*,⁸ and
- conducted testing of a random sample of 150 claims drawn from those submitted as of June 4, 2012, to determine whether selected controls were operating as intended.⁹

We conducted this review from April 2012 to November 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁷Our review did not include an examination of fraud perpetrated on claimants. According to the settlement's court-appointed Ombudsman, however, all complaints of fraud his office has received pertain to fraud perpetrated on, not by, claimants.

⁸GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 1, 1999).

⁹We performed testing from June 7 to July 25, 2012. Controls applied after this time—such as final adjudications and those related to payment processing—are not reflected in our results.

Summary

- The parties charged with carrying out the terms of the *Pigford II* settlement agreement have created numerous internal control measures designed to balance various interests including accuracy, efficiency, and cost. Many of these measures serve to identify and deny fraudulent or otherwise invalid claims.
- In general, the internal control design provides reasonable assurance that fraudulent or otherwise invalid claims could be identified and denied; however, certain weaknesses in the control design could expose the claims process to risk of improper determinations. In addition, at the time of our review, the internal control design was generally operating as intended to identify and deny fraudulent or otherwise invalid claims; however, the design has not yet been fully implemented, and we cannot determine whether the remainder of the design will operate as intended.

Background

Claims Process

To obtain relief under the settlement, a claimant is to take the following steps:

- **Obtain a claim form.** Claimant contacts Claims Administrator via telephone, e-mail, or mail. Claims Administrator obtains preliminary information to determine whether claimant may be a class member, as only such persons are to receive a claim form. Claims Administrator sends claim form and information about how Class Counsel can help with completing claim form.
- **Choose between tracks A and B.** Like *Pigford I*, *Pigford II* provides both a “fast-track” adjudication process (Track A) and a track for higher payments to claimants who go through a more rigorous review and documentation process (Track B).¹⁰

¹⁰Under Track A, successful claimants may obtain a cash payment of up to \$50,000, tax relief, and debt relief (i.e., reductions or forgiveness of certain qualifying USDA loans). Under Track B, successful claimants may obtain a cash payment of up to \$250,000. Payments will be made after all claims are decided, with the actual amounts subject to the total appropriation cap of \$1.25 billion—less the costs of administering the settlement and attorneys’ fees and expenses—and dependent on the number of successful claims, among other constraints.

Background

Claims Process (cont'd)

- **Submit a timely and complete claim.** Claimant, or Class Counsel on claimant's behalf, files claim with Claims Administrator who determines whether the claim was submitted by May 11, 2012,¹¹ with all required information and documentation.
- **Be a class member.** Claims Administrator determines whether claimant (1) sent a written late-filing request to participate in *Pigford I* on or after October 13, 1999, and by June 18, 2008, to one of five named officials in *Pigford I* and (2) did not already obtain a determination on the merits of his or her discrimination complaint.
- **Establish relevant elements.** Adjudicators review each claim and decide whether it establishes, to the required standard of proof, the relevant elements for relief.

¹¹On September 14, 2012, the presiding judge approved an extension of the claim filing deadline for specified groups of claimants. The order allows claimants that meet certain criteria to have their claims deemed timely if submitted within 30 days of being sent the claim form by the Claims Administrator.

Background

Implementing Parties' Roles and Responsibilities

The settlement agreement defines the roles and responsibilities of the following parties charged with carrying out its terms:

Role	Responsibilities
Lead Class Counsel	Coordinate and direct activities of all other Class Counsel in assisting class members in completing claims. Numerous other duties include, subject to court approval, retaining and dismissing Claims Administrator and Track A and B Neutrals.
Claims Administrator	Receives potential class members' claims. Determines whether claims are timely, complete, and meet class definition. Assigns claims to Neutrals for adjudication, among other duties.
Track A and B Neutrals	Adjudicate whether claims establish relevant elements of required standard of proof. In addition, the Track A Neutral retained a firm to serve as the Initial Track A Reviewer and issue recommended decisions on whether the relevant elements of each Track A claim are established to the Track A Neutral who then reviews the claim anew.
Ombudsman	Addresses concerns of class members and the public about settlement implementation. Makes periodic written reports and recommendations on settlement implementation to the court.

Background

Tracks A and B: Standards of Proof and Claim Elements

Track A claimants must establish by “substantial evidence”¹² each of the following elements:

1. they are African American;
2. within the period from Jan. 1, 1981, to Dec. 31, 1996, they farmed or attempted to farm; owned, leased, or attempted to own or lease farmland; and applied or attempted to apply for participation in a USDA farm credit or program benefit;
3. if they submitted a written application for a loan or program benefit, they were denied participation; were approved for a lesser amount than requested; were burdened by restrictive conditions; did not receive appropriate loan service from USDA; or participation was provided late;

¹²Such evidence that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from that conclusion.

Background

Tracks A and B: Standards of Proof and Claim Elements (cont'd)

4. if they attempted to submit an application for a loan or program benefit, they made a bona fide effort to apply, and USDA actively discouraged the application;
5. they suffered economic loss as a result of USDA's treatment; and
6. they complained of discrimination to a federal official on or before July 1, 1997.

Track B claimants must establish by a "preponderance of the evidence"¹³ that they:

1. meet the same elements required under Track A except they must have applied (not merely attempted to apply) for a loan (not a program benefit);
2. were treated less favorably by USDA than a similarly situated white farmer; and
3. they must prove their actual damages.

¹³Such relevant evidence as is necessary to prove something is more likely true than not true.

Background

Tracks A and B: Evidentiary Requirements

To establish the relevant elements, Track A and B claimants are to:

Track A	Track B
1. answer all questions in the claim form regarding the required elements (requiring some yes or no responses and some explanations and clarifications);	
2. declare, under penalty of perjury, that each of the statements made in the claim form is true and correct; and	
3. submit a form requesting and authorizing USDA to provide information about the claimant's farm loan program loans to the Claims Administrator, if seeking debt relief in addition to cash payment and tax relief.	3. submit independent, documentary evidence for every required element, except that two of the elements (regarding the complaint of discrimination and the similarly situated white farmer) may be supported with a sworn written statement by an individual who is not a member of the claimant's family describing his or her personal knowledge of the claimant's complaint of discrimination or a specific white farmer in the claimant's circumstances who was treated more favorably than the claimant by USDA.

Background

Overview of Internal Control

As discussed in the *Standards for Internal Control in the Federal Government*, internal control

- comprises the plans, methods, and procedures used by entities to meet their missions, goals, and objectives;
- is not one event, but a series of actions and activities that occur throughout an entity's operations on an ongoing basis;
- serves as the first line of defense in safeguarding assets and preventing and detecting errors and fraud;
- should be designed to provide reasonable assurance regarding prevention of or prompt detection of unauthorized acquisition, use, or disposition of an entity's assets; and
- should be designed and implemented based on the related cost and benefits.

Background

Overview of Internal Control (cont'd)

Internal Control Standards

The federal government and private industry have developed five standards for designing and implementing internal control.¹⁴ The standards define the minimum level of quality acceptable for internal control and provide the basis against which internal control is to be evaluated.

Standard	Description
Control Environment	Management and employees should establish and maintain an environment throughout the organization that sets a positive and supportive attitude toward internal control and conscientious management.
Risk Assessment	Internal control should provide for an assessment of the risks the agency faces from both external and internal sources.
Control Activities	Internal control activities help ensure that management's directives are carried out. The control activities should be effective and efficient in accomplishing the agency's control objectives.
Information and Communications	Information should be recorded and communicated to management and others within the entity who need it and in a form and within a time frame that enables them to carry out their responsibilities.
Monitoring	Internal control monitoring should assess the quality of performance over time and ensure that the findings of audits and other reviews are promptly resolved.

¹⁴See the federal standards (described above) in GAO/AIMD-00-21.3.1; see the private industry standards (organized within the same five categories with similar definitions) in Committee of Sponsoring Organizations of the Treadway Commission, *Internal Control - Integrated Framework* (September 1992). Page 15

Background

Overview of Internal Control (cont'd)

Internal Control Deficiencies

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect and correct impairments of effectiveness or efficiency of operations.

- A deficiency in design exists when (1) a control necessary to meet the control objective is missing or (2) an existing control is not properly designed so that, even if the control operates as designed, the control objective is not met.
- A deficiency in operation exists when a properly designed control does not operate as designed, or when the person performing the control does not possess the necessary authority or qualifications to perform the control effectively.

Objective 1: *Pigford II* Internal Control

Many Measures Aim to Identify Invalid Claims

The parties charged with carrying out the terms of the settlement agreement have created numerous internal control measures designed to balance various interests including accuracy, efficiency, and cost. Many of these serve to identify and deny fraudulent or otherwise invalid claims, including:

- ***Restrictions on claim form access.*** Only persons whom the Claims Administrator determines may be a class member based on a review of preliminary information are to receive a claim form (as of September 28, 2012, the Claims Administrator reported receiving requests for 199,216 claim forms and that 89,057 had been sent out).
- ***Reviews for timeliness, completeness, and class membership prior to adjudication.*** Before a claim may be reviewed to determine whether the required elements have been established, the Claims Administrator assesses whether the claim is timely, complete, and submitted by or on behalf of a class member. A claim may be denied as invalid on any one of these grounds.

Objective 1: *Pigford II* Internal Control

Many Measures Aim to Identify Invalid Claims (cont'd)

- ***Iterative reviews of whether elements are established.*** Track A claims, subject to a lower standard of proof, are each assessed multiple times. First, the Initial Track A Reviewer conducts two independent reviews of each claim and issues a recommended decision. Next, a Track A Neutral reviews the claim anew and renders a decision. If that decision is a denial, the claim is reviewed again by a different Track A Neutral. The Track B Neutral told us that it is conducting two independent reviews of each claim.
- ***Identification of potential fraud concerns.*** The Initial Track A Reviewer and the Track A and B Neutrals may mark claims as potential fraud concerns, sometimes indicated by similar patterns across claims, such as similar allegations, structure, or handwriting.¹⁵ For example, as of October 23, 2012, the Track A Neutral and Initial Track A Reviewer identified about 3,180 claims with potential fraud concerns. These claims were referred to the parties to the settlement agreement for concurrence on how to resolve them, which may include subsequent referral to the appropriate law enforcement agency for investigation.

¹⁵According to the Track A Neutral and USDA officials, some perceived patterns may not in fact be fraudulent and instead may result from appropriate circumstances. For example, similarities across claims may be attributable to a single individual assisting several claimants in completing their claim forms.

Objective 1: *Pigford II* Internal Control

Many Measures Aim to Identify Invalid Claims (cont'd)

- **Authority to request additional information from claimants.** Track A and B Neutrals may request additional documentation or evidence from claimants where the neutral suspects fraud or determines such information would be necessary or helpful to determine the claim validity (21 such requests had been made as of September 18, 2012, according to the Track A and B Neutrals).
- **Consideration of material beyond that provided by Track B claimants where Track B Neutral determines a fraud concern exists.** Under the terms of the settlement agreement, the Track B Neutral may consider any information or material that the Track B Neutral deems appropriate (in contrast to constraints imposed on the Track A Neutral who may consider only material submitted by the claimant, as discussed below). The Track B Neutral told us it will utilize this authority by taking into account standard information sources—such as those accessed via web searches—where the Track B Neutral determines there is reason to suspect a potentially fraudulent claim. Track B claims with fraud concerns will be referred to the parties to the settlement agreement for guidance on how to resolve them, which may include subsequent referral to the appropriate law enforcement agency for investigation.

Objective 1: *Pigford II* Internal Control

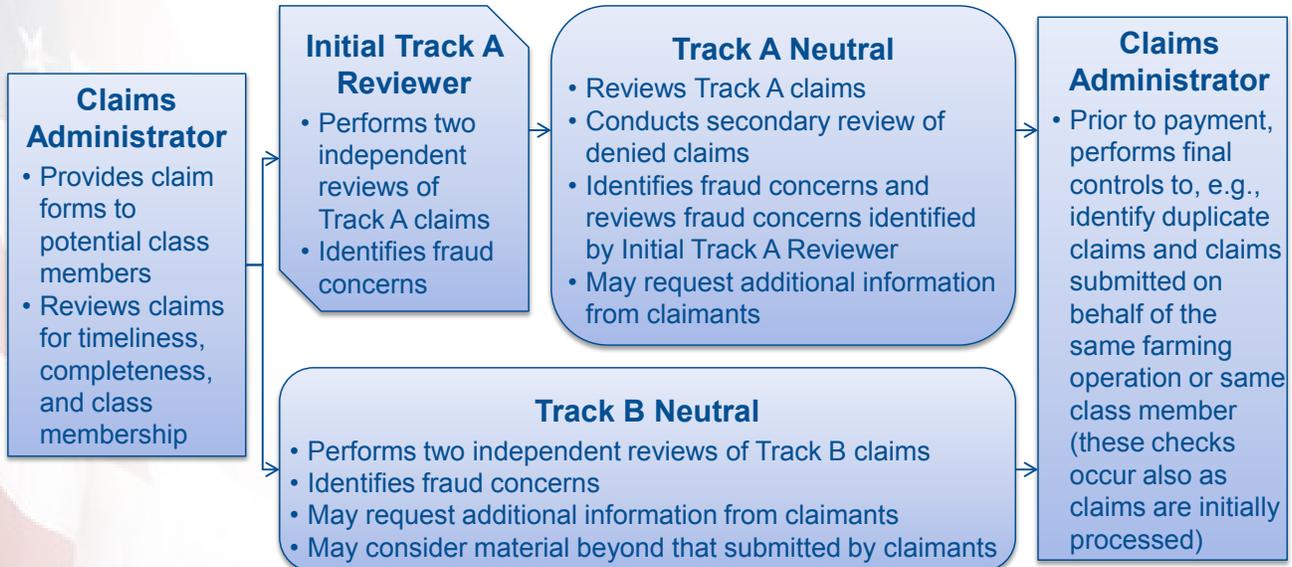
Many Measures Aim to Identify Invalid Claims (cont'd)

- ***Final control measures after all claims are provisionally adjudicated.*** No payments will be made until all claims have first been provisionally adjudicated, and final control measures are taken. Those measures include identifying duplicate claims (to ensure no one is paid twice) and claims filed on behalf of the same farming operation (to ensure only one payment per farming operation) or the same deceased or physically or mentally limited class member (to ensure only one payment per class member).

Objective 1: *Pigford II* Internal Control

Many Measures Aim to Identify Invalid Claims (cont'd)

Selected Internal Control Measures Throughout Course of Claims Process



Source: GAO analysis of information provided by the parties charged with carrying out the terms of the *Pigford II* settlement, including the Claims Administrator, Initial Track A Reviewer, and Track A and B Neutrals.

Objective 2: Design and Operation

The Design Generally Provides Reasonable Assurance, but Certain Weaknesses May Increase Risk

The internal control design generally provides reasonable assurance that fraudulent or otherwise invalid claims can be identified and denied, but certain weaknesses could expose the claims process to risk of improper determinations.

- The design addresses the five standards for internal control. For example, the implementing parties described and GAO observed the following:
 - a positive and supportive attitude toward accurately evaluating claims;
 - assessment of the claim form's risk of eliciting inadequate information, leading to revision of the claim form prior to the claim filing period;
 - numerous control activities aimed at detecting invalid claims;
 - regular communication and information sharing within and among the implementing parties, such as weekly meetings by the Claims Administrator, Initial Track A Reviewer, and Track A Neutral; and
 - ongoing monitoring of control measures, such as statistical evaluations of Track A Neutral adjudications by an external organization and efforts to review and act on these evaluations.

Objective 2: Design and Operation

The Design Generally Provides Reasonable Assurance, but Certain Weaknesses May Increase Risk (cont'd)

- We identified certain weaknesses in the internal control design that may allow fraudulent or otherwise invalid claims to go unidentified.
 - Some weaknesses are a result of constraints imposed by the terms of the settlement agreement, which were agreed to by the parties to the settlement agreement as fair, reasonable, and adequate. In addition, the terms were approved by the presiding judge, effectively ratified by Congress in the Claims Resolution Act of 2010¹⁶ and, in some cases, originated in *Pigford I* and were subsequently enacted in the 2008 Farm Bill. These design weaknesses, hence, cannot be modified by the implementing parties.
 - Another weakness is within the authority of the implementing parties to modify.

¹⁶The Claims Resolution Act of 2010 made available \$1.15 billion, the use of which was to "be subject to the express terms of the" *Pigford II* settlement agreement. Pub. L. No. 111-291, § 201(a)(1), (b), (c).

Objective 2: Design and Operation

The Design Generally Provides Reasonable Assurance, but Certain Weaknesses May Increase Risk (cont'd)

Weaknesses Constrained by Terms of Settlement Agreement

Absence of procedures for Track A Neutral to consider information other than that submitted by claimant.

- Under the *Standards for Internal Control in the Federal Government*, control activities include verification.
- The Track A Neutral's determination must be based solely on the materials submitted by the claimant and, as a result, the Track A Neutral has no way of independently verifying the information provided by claimants. Under the settlement agreement, Track A claimants are to establish their claims by "substantial evidence," which requires that they answer all relevant questions in the claim form and declare that their statements are true and correct but not that they submit any supporting documentation.
- As stated in the judicial opinions approving *Pigford I* and *Pigford II*, the lenient standard of proof for Track A claims is in recognition of USDA's history of discrimination and class members' lack of documentation—attributable in part to the passage of time and USDA's not processing complaints in a timely manner.

Objective 2: Design and Operation

The Design Generally Provides Reasonable Assurance, but Certain Weaknesses May Increase Risk (cont'd)

Weaknesses Constrained by Terms (cont'd)

Absence of procedures for opposing Track A or B claims or reviewing the Claims Administrator's or Track A or B Neutrals' determinations.

- *Standards for Internal Control in the Federal Government* states that internal control includes monitoring and review.
- Under the terms of the settlement agreement, the opposing party—USDA and its counsel, DOJ—has no role in the claims determination process, and the Ombudsman has no authority to reexamine the Claims Administrator's or Track A or B Neutral's determinations.¹⁷ As a result, two mechanisms of monitoring and review are absent.
- According to the parties to the settlement agreement, these terms were chosen to reduce cost and accelerate the rate of claim determinations and payments.¹⁸

¹⁷In *Pigford I*, the government responded to every claim filed, and the *Pigford I* Monitor had the authority to direct claim reexamination and did so for half of the 5,848 claims that were the subject of a petition for reexamination. For a full discussion of the *Pigford I* Monitor, see GAO, *Pigford Settlement: The Role of the Court-Appointed Monitor*, GAO-06-469R (Washington, D.C.: Mar. 17, 2006).

¹⁸In *Pigford I*, USDA incurred significant cost opposing claims (more than \$48 million in administrative and staff salaries and expenses alone from 1999 to 2009, according to USDA), and the adjudication process lasted more than a decade.

Objective 2: Design and Operation

The Design Generally Provides Reasonable Assurance, but Certain Weaknesses May Increase Risk (cont'd)

Weakness within Authority of Implementing Parties to Modify

Absence of agreed upon procedures to identify claimants who already obtained determinations on their complaints in judicial or administrative forums.

- Under the *Standards for Internal Control in the Federal Government*, control activities should effectively accomplish control objectives.
- The Claims Administrator is responsible for determining class membership, including that claimants have not obtained prior judgments on their complaints. To satisfy this requirement, it checks whether claimants appear in certain records—indicating they obtained judgments in, or opted out of, *Pigford I*—and plans to check the participant lists of two other settlements. It also asked USDA to check its records of judicial and administrative determinations. USDA has not yet responded to the request.
- Because no agreement has been reached on these procedures, we cannot know whether the control design will provide reasonable assurance of identifying claimants who already obtained judgments in judicial or administrative forums²⁰ and some claimants may, therefore, improperly be found to be class members.

¹⁹According to Lead Class Counsel, the proportion of *Pigford II* claimants that obtained determinations in judicial or administrative forums is likely small. Page 26

Objective 2: Design and Operation

Internal Control Generally Operated as Designed, but Not Fully Implemented

At the time of our review, the internal control design was generally operating as intended to identify and deny fraudulent or otherwise invalid claims. The design, however, has not yet been fully implemented, and we cannot determine whether the remainder of the design will operate as intended.

- Our testing of a random sample of 150 claims drawn from the 37,275 claims that had been submitted as of June 4, 2012 found, for example, that:
 - The Claims Administrator consistently and accurately recorded in the claims database²⁰ whether:²¹
 - there were missing pieces of required information or documentation to determine completeness of the claims;
 - the claimants appear in certain records from *Pigford I*—indicating they submitted late-filing requests to participate in *Pigford I*—or had submitted adequate independent evidence of late-filing requests to determine the first requirement of class membership; and

²⁰The claims database is a web-based platform that tracks records, documents, adjudication decisions, correspondence, and other information related to implementation of the settlement.

²¹We found no exceptions in our testing of these claims. Because our sample is based on random selections, the resulting estimates are subject to sampling error. We are 95 percent confident that the actual error rate is less than or equal to 2 percent.

Objective 2: Design and Operation

Internal Control Generally Operated as Designed, but Not Fully Implemented (cont'd)

- the claimants appear in other records from *Pigford I*—indicating they obtained judgments on their complaints in, or opted out of, *Pigford I*—to determine the second requirement of class membership.²²
- The Claims Administrator consistently and accurately recorded in the claims database the claim submission dates for an estimated 95 percent of claims in order to determine timeliness. For an estimated 5 percent of claims, however, the submission dates were incorrectly recorded.²³ According to the Claims Administrator, the final control measures will include verification of a sample of timeliness determinations by comparing actual with recorded submission dates.
- The Initial Track A Reviewer consistently performed two independent reviews of Track A claims, and the Track A Neutral consistently adjudicated claims after the Initial Track A Reviewer.²⁴

²²The Claims Administrator has not, however, completed other steps, as discussed above.

²³We found 6 exceptions in our testing of 126 claims. We are 95 percent confident that the actual error rate is less than or equal to 9 percent. For the remaining claims, we could not evaluate the control due to illegible or not visible submission dates.

²⁴These estimates are based on 115 and 99 of the claims in our sample, respectively, for which there were no exceptions. We are 95 percent confident that the actual error rate for each does not exceed 3 percent. For the remaining claims, we could not evaluate these controls because 5 claims were not Track A claims, 20 claims had not been routed to the Initial Track A Reviewer for reasons such as incompleteness, the Initial Track A Reviewer had not yet begun review of 10 claims, and the Track A Neutral had not yet begun adjudication of 16 claims.

Objective 2: Design and Operation

Internal Control Generally Operated as Designed, but Not Fully Implemented (cont'd)

- The settlement's internal control design has not yet been fully implemented because the adjudication process is ongoing. Therefore, we cannot know whether certain future control measures will operate as intended.
 - Although internal control may be well designed, its effectiveness may be impaired if not fully or correctly implemented.
 - Control measures yet to be implemented under the *Pigford II* settlement, either in full or in part, include (1) identification of duplicate claims and claims submitted on behalf of the same farming operation or the same class member and (2) verification of timeliness determinations.
 - If the remaining control measures are not fully and correctly implemented, the internal control design cannot be expected to operate as intended in providing reasonable assurance that fraudulent or otherwise invalid claims will be identified and denied.

Enclosure II: Comments from the U.S. Department of Agriculture



United States
Department of
Agriculture

Office of the
General
Counsel

Washington,
D.C.
20250-1400

November 20, 2012

Daniel Garcia-Diaz
Acting Director
Natural Resources and Environment
United States Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Garcia-Diaz:

Thank you for forwarding a copy of the proposed report entitled *Pigford II Settlement: Additional Actions Could Reduce Risk of Improper Determinations* (GAO-13-69R) on October 31, 2012, and for providing GAO's email dated November 5, 2012, which separately listed some modifications made by GAO to the October 31st proposed report. In addition to USDA's oral comments provided on November 1, 2012, and USDA's written reply provided on November 8, 2012; please find our final written comments below:

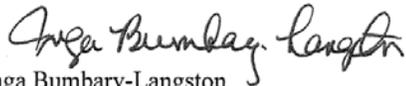
- From the October 31, 2012 proposed report, at Slide 24, third bullet: Although the Court may have used the phrase "USDA's history of discrimination" in its judicial opinions, USDA never conceded liability regarding the discrimination alleged in either the Pigford I Consent Decree or the Pigford II Settlement Agreement. USDA previously proposed that the word "alleged" be inserted before the phrase "USDA's history of discrimination." USDA disagrees with the wording of this finding, and again requests that GAO insert the word "alleged" before the phrase "USDA's history of discrimination."
- From the November 5, 2012 e-mailed modifications, referencing Slide 26, second bullet: Regarding GAO's statement that "USDA has not yet responded, but told us the Claims Administrator is able to search judicial –though not administrative—records...", USDA notes that according to USDA Departmental Regulation 3450, Sec. 1.4(a), the Claims Administrator can make a FOIA request for public inspection and copying of "(1) [f]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." Thus, USDA proposes amending that phrase to state "USDA has not yet responded to the Claims Administrator's request, but told us the Claims Administrator may have the ability to search both judicial and administrative records."
- From the November 5, 2012 e-mailed modifications, referencing Slide 32, first recommendation: USDA disagrees with the last part of this recommendation, which recommends the Claims Administrator reach an "agreement with USDA on the Claims Administrator's request that USDA check its records of judicial and administrative determinations." Under the terms of the Pigford II Settlement Agreement, USDA is not required to take any action other than to give loan information during the claims process.

Daniel Garcia-Diaz
Page 2

GAO's recommendation gives the appearance that USDA has failed/neglected to work with the Claims Administrator on this issue, which is not the case. The Claims Administrator has alternative methods to search for judicial records, which do not include USDA's involvement and USDA is currently considering whether it is legally able to provide records of administrative decisions to the Claims Administrator.

In addition, USDA maintains that the *Standards for Internal Control in the Federal Government* were not considered during settlement negotiations; and asserts that the settlement terms need not meet these standards.

Sincerely Yours,



Inga Bumbarly-Langston
Deputy General Counsel

(361398)

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to www.gao.gov and select "E-mail Updates."

Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <http://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

Connect with GAO

Connect with GAO on [Facebook](#), [Flickr](#), [Twitter](#), and [YouTube](#). Subscribe to our [RSS Feeds](#) or [E-mail Updates](#). Listen to our [Podcasts](#). Visit GAO on the web at www.gao.gov.

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Website: www.gao.gov/fraudnet/fraudnet.htm

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548

Public Affairs

Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548

