

effective less than 30 days after publication in the **Federal Register**.

Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. The shipping season for *M. domestica* apple varieties from Japan is in progress. Making this rule effective immediately will allow interested producers and others in the marketing chain to benefit during this year's shipping season. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

#### **Executive Order 12866 and Regulatory Flexibility Act**

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Allowing imports of all varieties of *M. domestica* apples from Japan into the United States is expected to have minimal economic impact on U.S. entities, large or small. Although the Fuji apple is the most common variety grown in Japan, it constituted only 0.1 percent of U.S. apple imports in 2008. Allowing entry of other *M. domestica* varieties is expected to change the quantity of apple imports from Japan only minimally. The wide price differential between apples grown in Japan and in the United States suggests that apples imported from Japan are not a close substitute for the principal U.S.-grown apple varieties.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### **Executive Order 12988**

This final rule allows all varieties of *M. domestica* apples to be imported into the United States from Japan. State and local laws and regulations regarding the importation of *M. domestica* apples under this rule will be preempted while the fruit is in foreign commerce. Fresh

fruits are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### **Paperwork Reduction Act**

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### **List of Subjects in 7 CFR Part 319**

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

■ Accordingly, we are amending 7 CFR part 319 as follows:

#### **PART 319—FOREIGN QUARANTINE NOTICES**

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Section 319.56–27 is amended as follows:

■ a. By revising the section heading and the introductory text to read as set forth below.

■ b. In paragraphs (b) and (c), by removing the words “Fuji variety” each time they occur.

■ c. In paragraphs (b) and (c), by removing the word “agency” each time it occurs and adding the word “organization” in its place.

#### **§ 319.56–27 Apples From Japan and the Republic of Korea.**

Any variety of *Malus domestica* apples may be imported into the United States from Japan, and Fuji variety apples may be imported into the United States from the Republic of Korea, only in accordance with this section and all other applicable provisions of this subpart.

\* \* \* \* \*

Done in Washington, DC, this 18th day of October 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010–26750 Filed 10–21–10; 8:45 am]

**BILLING CODE 3410–34–P**

## **FEDERAL HOUSING FINANCE AGENCY**

### **12 CFR Part 1203**

## **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

### **Office of Federal Housing Enterprise Oversight**

### **12 CFR Part 1705**

**RIN 2590–AA29**

## **Equal Access to Justice Act Implementation**

**AGENCY:** Federal Housing Finance Agency; Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Final rule.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is issuing a final regulation that establishes procedures for the submission and consideration of applications for awards of fees and other expenses by prevailing parties in adjudications against FHFA.

**DATES:** The final regulation is effective November 22, 2010.

#### **FOR FURTHER INFORMATION CONTACT:**

Janice A. Kullman, Associate General Counsel, telephone (202) 414–8970 (not a toll-free number); Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

##### *A. Establishment of the Federal Housing Finance Agency*

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act) and the Federal Home Loan Bank Act (12 U.S.C. 1421 *et seq.*) to establish FHFA as an independent agency of the Federal Government.<sup>1</sup> HERA transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), and the Federal Home Loan Banks (collectively, regulated entities), from the Office of Federal Housing Enterprise Oversight

<sup>1</sup> See Division A, titled the “Federal Housing Finance Regulatory Reform Act of 2008,” Title I, Section 1101 of HERA.

(OFHEO) and the Federal Housing Finance Board (FHFB), respectively, to FHFA. FHFA was established to oversee the prudential operations of the regulated entities to ensure that they operate in a safe and sound manner, including being adequately capitalized; and carry out their public policy missions, including fostering liquid, efficient, competitive and resilient national housing finance markets. The regulated entities continue to operate under regulations promulgated by OFHEO and FHFB and such regulations are enforceable by the Director of FHFA until such regulations are modified, terminated, set aside, or superseded by regulations issued by FHFA.<sup>2</sup>

#### *B. Equal Access to Justice Act*

The Equal Access to Justice Act, 5 U.S.C. 504, requires that an agency that conducts adversarial adjudications award costs and fees in connection with that adjudication to the prevailing party unless the adjudicative officer of the agency finds that the agency's position was substantially justified or other circumstances make such an award unjust.

### **II. Proposed Rulemaking and Request for Comments**

Because FHFA conducts adversarial adjudications, FHFA proposed and requested comments on a regulation to establish procedures for the submission and consideration of applications for awards of fees and other expenses by prevailing parties as required by the Equal Access to Justice Act. The proposed regulation was published in the **Federal Register** at 75 FR 17622 (April 7, 2010). FHFA received no comments on the proposed regulation.

### **III. Final Rulemaking**

FHFA is publishing as final the proposed Equal Access to Justice Act Implementation regulation. In addition, FHFA is removing the OFHEO Implementation of the Equal Access to Justice Act regulation at 12 CFR part 1705.

### **IV. Section by Section Analysis**

The following is a section-by-section analysis of the regulation.

#### **Subpart A—General Provisions**

##### *Section 1203.1 Purpose and Scope*

Section 1203.1 provides that the purpose of this regulation is to implement the Equal Access to Justice Act, 5 U.S.C. 504, by establishing procedures for the filing and consideration of applications for awards

of fees and other expenses to eligible individuals and entities who are parties to adversary adjudications before FHFA. This section also provides that the purpose of this part is to award fees and other expenses in connection with adversary adjudications before FHFA.

##### *Section 1203.2 Definitions*

This section sets forth definitions for the regulation.

*Adjudicative officer* means the official who presided at the underlying adversary adjudication, without regard to whether the official is designated as a hearing examiner, administrative law judge, administrative judge, or otherwise.

*Adversary adjudication* means an administrative proceeding conducted by FHFA under 5 U.S.C. 554 in which the position of FHFA or any other agency of the United States is represented by counsel or otherwise, including but not limited to an adjudication conducted under the Safety and Soundness Act, as amended, and any implementing regulations. Any issue as to whether an administrative proceeding is an adversary adjudication for purposes of this part will be an issue for resolution in the proceeding on the application for award.

*Affiliate* means an individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the party, or any corporation or other entity of which the party directly or indirectly owns or controls a majority of the voting shares or other interest, unless the adjudicative officer determines that it would be unjust and contrary to the purpose of the Equal Access to Justice Act in light of the actual relationship between the affiliated entities to consider them to be affiliates for purposes of this part.

*Agency counsel* means the attorney or attorneys designated by the General Counsel of FHFA to represent FHFA in an adversary adjudication covered by this part.

*Demand of FHFA* means the express demand of FHFA that led to the adversary adjudication, but does not include a recitation by FHFA of the maximum statutory penalty when accompanied by an express demand for a lesser amount.

*Director* means the Director of the Federal Housing Finance Agency.

*Fees and other expenses* includes reasonable attorney or agent fees, the reasonable expenses of expert witnesses, and the reasonable cost of any study, analysis, engineering report, test, or expense which the agency finds

necessary for the preparation of the eligible party's case.

*FHFA* means the Federal Housing Finance Agency.

*Final disposition date* means the date on which a decision or order disposing of the merits of the adversary adjudication or any other complete resolution of the adversary adjudication, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

*Party* means an individual, partnership, corporation, association, or public or private organization that is named or admitted as a party, that is admitted as a party for limited purposes, or that is properly seeking and entitled as of right to be admitted as a party in an adversarial adjudication.

*Position of FHFA* means the position taken by FHFA in the adversary adjudication, including the action or failure to act by FHFA upon which the adversary adjudication was based.

##### *Section 1203.3 Eligible Parties*

Section 1203.3 sets out the eligibility requirements for parties seeking fees and expenses.

Paragraph (a) of this section requires the applicant to be a party to the adversary adjudication for which it seeks an award and be a small entity as defined in 5 U.S.C. 601. It also requires an applicant to meet all conditions of eligibility set out in this paragraph and comply with all the requirements in subpart B of this part.

Paragraph (b) of this section requires that a party be one of the following:

- An individual who has a net worth of not more than \$2 million;
- The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interest, and not more than 500 employees; however, a party who owns an unincorporated business will be considered to be an "individual" rather than the "sole owner of an unincorporated business" if the issues on which the party prevails are related primarily to personal interests rather than to business interests;
- A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;
- A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees; or
- Any other partnership, corporation, association, unit of local government, or

<sup>2</sup> See sections 1302 and 1312 of HERA.

organization that has a net worth of not more than \$7 million and not more than 500 employees.

Paragraph (c) of this section clarifies the requirements for eligibility by requiring that:

- The employees of a party must include all persons who regularly perform services for remuneration for the party, under the party's direction and control. Part-time employees must be included on a proportional basis.
- The net worth and number of employees of the party and its affiliates must be aggregated to determine eligibility.
- The net worth and number of employees of a party will be determined as of the date the underlying adversary adjudication was initiated.
- A party that participates in an adversarial adjudication primarily on behalf of one or more entities that would be ineligible for an award is not itself eligible for an award.

#### *Section 1203.4 Standards for Awards*

Section 1203.4 sets out the standards for the award of fees and expenses.

Paragraph (a) of this section provides that an eligible party that files an application for award of fees and other expenses in accordance with this part will receive an award of fees and other expenses related to defending against a demand of FHFA if the demand was in excess of the decision in the underlying adversary adjudication and was unreasonable when compared with the decision under the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or unless special circumstances make an award unjust. This paragraph also explains that the burden of proof that the demand of FHFA was substantially in excess of the decision and is unreasonable when compared with the decision is on the eligible party.

Paragraph (b) of this section provides that an eligible party that submits an application for award in accordance with this part will receive an award of fees and other expenses incurred in connection with an adversary adjudication in which it prevailed or in a significant and discrete substantive portion of the adversary adjudication in which it prevailed, unless the position of FHFA in the adversary adjudication was substantially justified or special circumstances make an award unjust. This paragraph further explains that FHFA has the burden of proof to show that its position was substantially justified and could do so by showing that its position was reasonable in law and in fact.

#### *Section 1203.5 Allowable Fees and Expenses*

Section 1203.5 sets forth what fees and expenses a party may collect under this part.

Paragraph (a) of this section provides that awards of fees and other expenses are based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the party. This paragraph also explains that, except as provided in § 1203.6, an award for the fee of an attorney or agent can not exceed \$125 per hour and an award to compensate an expert witness can not exceed the highest rate at which FHFA pays expert witnesses. However, under this paragraph, an award can also include the reasonable expenses of the attorney, agent, or expert witness as a separate item if he or she ordinarily charges clients separately for such expenses.

Paragraph (b) of this section sets out the factors the adjudicative officer must consider for determining the reasonableness of the fee, including the following:

- If the attorney, agent, or expert witness is in private practice, his or her customary fees for similar services; or, if the attorney, agent, or expert witness is an employee of the eligible party, the fully allocated costs of the services;
- The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;
- The time actually spent in the representation of the eligible party;
- The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication; and
- Such other factors as may bear on the value of the services provided.

Paragraph (c) of this section provides that in determining the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party, the adjudicative officer will consider the prevailing rate for similar services in the community in which the services were performed.

Paragraph (d) of this section provides that fees and other expenses incurred before the date on which an adversarial adjudication was initiated will be awarded only if the eligible party can demonstrate that they were reasonably incurred in preparation for the adversary adjudication.

#### *Section 1203.6 Rulemaking on Maximum Rate for Fees*

Section 1203.6 provides that FHFA can adopt regulations providing for an award of attorney or agent fees at a rate higher than \$125 per hour in adversary adjudications covered by this part if warranted by an increase in the cost of living or by special circumstances. Special circumstances include the limited availability of attorneys or agents who are qualified to handle certain types of adversary adjudications. This section provides that FHFA can conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

#### *Section 1203.7 Awards Against Other Agencies*

Section 1203.7 provides that if another agency of the United States participates in an adversarial adjudication before FHFA and takes a position that was not substantially justified, the award or appropriate portion of the award to an eligible party that prevailed over that agency will be made against that agency.

### **Subpart B—Information Required From Applicants**

#### *Section 1203.10 Contents of the Application for Award*

Section 1203.10 provides, under paragraph (a) of this section, that an application for award of fees and other expenses under either § 1203.4(a) or § 1203.4(b) will have to:

- Identify the applicant and the adversary adjudication for which an award is sought;
- State the amount of fees and other expenses for which an award is sought;
- Provide the statements and documentation required by paragraph (b) or (c) of this section and § 1203.12 and any additional information required by the adjudicative officer; and
- Be signed by the applicant or an authorized officer or attorney of the applicant and contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

Paragraph (b) of this section requires that an application for award under § 1203.4(a), must show that the demand of FHFA was substantially in excess of, and was unreasonable when compared to, the decision in the underlying adversary adjudication under the facts and circumstances of the case. This paragraph also requires the application

to show that the applicant is a small entity as defined in 5 U.S.C. 601.

Paragraph (c) of this section sets out the requirements for an application for award under § 1203.4(b) including that the application must:

- Show that the applicant has prevailed in a significant and discrete substantive portion of the underlying adversary adjudication and identify the position of FHFA in the adversary adjudication that the applicant alleges was not substantially justified;
- State the number of employees of the applicant and describe briefly the type and purposes of its organization or business (if the applicant is not an individual);
- State that the net worth of the applicant does not exceed \$2 million, if the applicant is an individual; or for all other applicants, state that the net worth of the applicant and its affiliates, if any, does not exceed \$7 million; and
- Include one of the following:
  - A detailed exhibit showing the net worth (net worth exhibit) of the applicant and its affiliates, if any, when the underlying adversary adjudication was initiated. The net worth exhibit may be in any form convenient to the applicant as long as the net worth exhibit provides full disclosure of the assets and liabilities of the applicant and its affiliates, if any, and is sufficient to determine whether the applicant qualifies as an eligible party;
  - A copy of a ruling by the Internal Revenue Service that shows that the applicant qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3); or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the belief that the applicant qualifies under such section; or
  - A statement that the applicant is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a).

#### **Section 1203.11 Confidentiality of Net Worth Exhibit**

Section 1203.11 states that unless otherwise ordered by the Director, or required by law, the statement of net worth will be for the confidential use of the adjudicative officer, the Director and agency counsel.

#### **Section 1203.12 Documentation for Fees and Expenses**

Section 1203.12 provides the requirements for documenting fees and expenses.

Paragraph (a) of this section requires that the application for award must be accompanied by full and itemized documentation of the fees and other expenses for which an award is sought. This paragraph further provides that the adjudicative officer could require the applicant to provide vouchers, receipts, logs, or other documentation for any fees or expenses claimed.

Paragraph (b) of this section requires that a separate itemized statement be submitted for each entity or individual whose services are covered by the application and that each itemized statement must include:

- The hours spent by each entity or individual;
- A description of the specific services performed and the rates at which each fee has been computed; and
- Any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity.

#### **Subpart C—Procedures for Filing and Consideration of the Application for Award**

##### **Section 1203.20 Filing and Service of the Application for Award and Related Papers**

Section 1203.20 sets out the procedures for filing and service of an application for award.

Paragraph (a) of this section requires that an application for an award of fees and other expenses must be filed no later than 30 days after the final disposition of the underlying adversary adjudication.

Paragraph (b) of this section requires that an application for award and other papers related to the proceedings on the application for award must be filed and served on all parties in the same manner as papers are filed and served in the underlying adversary adjudication, except as otherwise provided in this part.

Paragraph (c) of this section requires that the computation of time for filing and service of the application of award and other papers must be computed in the same manner as in the underlying adversary adjudication.

##### **Section 1203.21 Response to the Application for Award**

Section 1203.21 sets out the procedure for responding to the application for an award.

Paragraph (a) of this section requires that agency counsel file a response within 30 days after service of an application for award of fees and other expenses except as provided in

paragraphs (b) and (c) of this section. This paragraph also requires that agency counsel explain any objections to the award requested and identify the facts relied upon to support the objections. If any of the alleged facts are not already in the record of the underlying adversary adjudication, agency counsel must include with the response either supporting affidavits or a request for further proceedings under § 1203.25.

Paragraph (b) of this section provides that if agency counsel and the applicant believe that the issues in the application for award can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement extends the time for filing a response for an additional 30 days. Upon request by agency counsel and the applicant, the adjudicative officer could grant for good cause further time extensions.

Paragraph (c) of this section provides that agency counsel may request that the adjudicative officer extend the time period for filing a response. This paragraph further provides that if agency counsel does not respond or otherwise does not contest or settle the application for award within the 30-day period or the extended time period, the adjudicative officer may make an award of fees and other expenses upon a satisfactory showing of entitlement by the applicant.

##### **Section 1203.22 Reply to the Response**

Section 1203.22 provides that within 15 days after service of a response, the applicant may file a reply. This section further provides that if the reply is based on any alleged facts not already in the record of the underlying adversary adjudication, the applicant must include with the reply either supporting affidavits or a request for further proceedings under § 1203.25.

##### **Section 1203.23 Comments by Other Parties**

Section 1203.23 provides that any party to the underlying adversary adjudication other than the applicant and agency counsel may file comments on an application for award within 30 calendar days after it is served, or on a response within 15 calendar days after it is served. This section also provides that a commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

#### *Section 1203.24 Settlement*

Section 1203.24 provides that the applicant and agency counsel may agree on a proposed settlement of an award before the final decision on the application for award is made, either in connection with a settlement of the underlying adversary adjudication or after the underlying adversarial adjudication has been concluded. This section further requires that if the eligible party and agency counsel agree on a proposed settlement of an award before an application for award has been filed, the application must be filed with the proposed settlement.

#### *Section 1203.25 Further Proceedings on the Application for Award*

Section 1203.25 sets forth procedures for further proceedings of an application for award.

Paragraph (a) of this section provides that on request of either the applicant or agency counsel, on the adjudicative officer's own initiative, or as requested by the Director of FHFA under § 1203.27, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidential hearing. This paragraph further provides that such additional proceedings will be held only when necessary for full and fair resolution of the issues arising from the application for award and will be conducted as promptly as possible. Last, this paragraph requires that the issue as to whether the position of FHFA in the underlying adversary adjudication was substantially justified must be determined based on the whole administrative record that was made in the underlying adversary adjudication.

Paragraph (b) of this section requires that a request that the adjudicative officer order further proceedings under this section must specifically identify the information sought on the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

#### *Section 1203.26 Decision of the Adjudicative Officer*

Section 1203.26 sets forth the requirements for the decision of the adjudicative officer.

Paragraph (a) of this section provides that the adjudicative officer must make the initial decision on the basis of the written record, except if further proceedings are ordered under § 1203.25.

Paragraph (b) of this section provides that the adjudicative officer must issue a written initial decision on the application for award within 30 days after completion of proceedings on the application. This paragraph provides that the initial decision becomes the final decision of FHFA after 30 days from the day it was issued, unless review is ordered under § 1203.27.

Paragraph (c) of this section provides that in all initial decisions, the adjudicative officer must include findings and conclusions with respect to the applicant's eligibility and an explanation of the reasons for any difference between the amount requested by the applicant and the amount awarded. This paragraph also provides that if the applicant has sought an award against more than one agency, the adjudicative officer must also include findings and conclusions with respect to the allocation of payment of any award made.

Paragraph (d) of this section provides that in initial decisions on applications filed pursuant to § 1203.4(a), the adjudicative officer must include findings and conclusions as to whether FHFA made a demand that was substantially in excess of the decision in the underlying adversary adjudication and that was unreasonable when compared with that decision; and, if at issue, whether the applicant has committed a willful violation of the law or otherwise acted in bad faith, or whether special circumstances would make the award unjust.

Paragraph (e) of this section provides that in decisions on applications filed pursuant to § 1203.4(b), the adjudicative officer must include written findings and conclusions as to whether the applicant is a prevailing party and whether the position of FHFA was substantially justified; and, if at issue, whether the applicant unduly protracted or delayed the underlying adversary adjudication or whether special circumstance make the award unjust.

#### *Section 1203.27 Review by FHFA*

Section 1203.27 provides that within 30 days after the adjudicative officer issues an initial decision under § 1203.26, either the applicant or agency counsel may request the Director to review the initial decision of the adjudicative officer. This section also provides that the Director or his or her designee may also decide, on his or her own initiative, to review the initial decision. Under this section, whether to review a decision is at the discretion of the Director or his or her designee. If review is ordered, the Director or his or

her designee would issue a final decision on the application for award or remand the application for award to the adjudicative officer for further proceedings under § 1203.25.

#### *Section 1203.28 Judicial Review*

Section 1203.28 provides that any party, other than the United States, that is dissatisfied with the final decision on an application for award of fees and expenses under this part could seek judicial review as provided in 5 U.S.C. 504(c)(2).

#### *Section 1203.29 Payment of Award*

Section 1203.29 provides that to receive payment of an award of fees and other expenses granted under this part, the applicant must submit a copy of the final decision that grants the award and a certification that the applicant will not seek review of the decision in the United States courts to the Director, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. Under this section, FHFA must pay the amount awarded to the applicant within 60 days of receipt of the submission of the copy of the final decision and the certification, unless judicial review of the award has already been sought by any party to the proceedings.

### **Regulatory Impacts**

#### *Paperwork Reduction Act*

The regulation does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation does not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the regulation under the Regulatory Flexibility Act and certifies that the regulation is not likely to have a significant economic impact on a substantial number of small business entities. The regulation is applicable only to parties who have prevailed in adjudication against FHFA. These parties will not represent a substantial number of small business entities.

**List of Subjects in 12 CFR Parts 1203 and 1705**

Administrative practice and procedure, Equal access to justice.

**Authority and Issuance**

■ Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4526 and 5 U.S.C. 504, FHFA amends Chapters XII and XVII of Title 12 of the Code of Federal Regulations, as follows:

**CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY****SUBCHAPTER A—ORGANIZATION AND OPERATIONS**

■ 1. Add part 1203 to Subchapter A to read as follows:

**PART 1203—EQUAL ACCESS TO JUSTICE ACT****Subpart A—General Provisions**

Sec.

- 1203.1 Purpose and scope.
- 1203.2 Definitions.
- 1203.3 Eligible parties.
- 1203.4 Standards for awards.
- 1203.5 Allowable fees and expenses.
- 1203.6 Rulemaking on maximum rate for fees.
- 1203.7 Awards against other agencies.
- 1203.8–1203.9 [Reserved]

**Subpart B—Information Required From Applicants**

- 1203.10 Contents of the application for award.
- 1203.11 Confidentiality of net worth exhibit.
- 1203.12 Documentation for fees and expenses.
- 1203.13–1203.19 [Reserved]

**Subpart C—Procedures for Filing and Consideration of the Application for Award**

- 1203.20 Filing and service of the application for award and related papers.
- 1203.21 Response to the application for award.
- 1203.22 Reply to the response.
- 1203.23 Comments by other parties.
- 1203.24 Settlement.
- 1203.25 Further proceedings on the application for award.
- 1203.26 Decision of the adjudicative officer.
- 1203.27 Review by FHFA.
- 1203.28 Judicial review.
- 1203.29 Payment of award.

**Authority:** 12 U.S.C. 4526, 5 U.S.C. 504.

**Subpart A—General Provisions****§ 1203.1 Purpose and scope.**

(a) This part implements the Equal Access to Justice Act, 5 U.S.C. 504, by establishing procedures for the filing and consideration of applications for awards of fees and other expenses to eligible individuals and entities who are parties to adversary adjudications before FHFA.

(b) This part applies to the award of fees and other expenses in connection with adversary adjudications before FHFA. However, if a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to 28 U.S.C. 2412(d)(3).

**§ 1203.2 Definitions.**

As used in this part:

*Adjudicative officer* means the official who presided at the underlying adversary adjudication, without regard to whether the official is designated as a hearing examiner, administrative law judge, administrative judge, or otherwise.

*Adversary adjudication* means an administrative proceeding conducted by FHFA under 5 U.S.C. 554 in which the position of FHFA or any other agency of the United States is represented by counsel or otherwise, including but not limited to an adjudication conducted under the Safety and Soundness Act, as amended, and any implementing regulations. Any issue as to whether an administrative proceeding is an adversary adjudication for purposes of this part will be an issue for resolution in the proceeding on the application for award.

*Affiliate* means an individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the party, or any corporation or other entity of which the party directly or indirectly owns or controls a majority of the voting shares or other interest, unless the adjudicative officer determines that it would be unjust and contrary to the purpose of the Equal Access to Justice Act in light of the actual relationship between the affiliated entities to consider them to be affiliates for purposes of this part.

*Agency counsel* means the attorney or attorneys designated by the General Counsel of FHFA to represent FHFA in an adversary adjudication covered by this part.

*Demand of FHFA* means the express demand of FHFA that led to the adversary adjudication, but does not include a recitation by FHFA of the maximum statutory penalty when accompanied by an express demand for a lesser amount.

*Director* means the Director of the Federal Housing Finance Agency.

*Fees and other expenses* means reasonable attorney or agent fees, the reasonable expenses of expert witnesses, and the reasonable cost of any study, analysis, engineering report, or test, which the agency finds necessary for the preparation of the eligible party's case.

*FHFA* means the Federal Housing Finance Agency.

*Final disposition date* means the date on which a decision or order disposing of the merits of the adversary adjudication or any other complete resolution of the adversary adjudication, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

*Party* means an individual, partnership, corporation, association, or public or private organization that is named or admitted as a party, that is admitted as a party for limited purposes, or that is properly seeking and entitled as of right to be admitted as a party in an adversary adjudication.

*Position of FHFA* means the position taken by FHFA in the adversary adjudication, including the action or failure to act by FHFA upon which the adversary adjudication was based.

**§ 1203.3 Eligible parties.**

(a) To be eligible for an award of fees and other expenses under the Equal Access to Justice Act, the applicant must show that it meets all conditions of eligibility set out in this paragraph and has complied with all the requirements in Subpart B of this part. The applicant must also be a party to the adversary adjudication for which it seeks an award.

(b) To be eligible for an award of fees and other expenses for prevailing parties, a party must be one of the following:

(1) An individual who has a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interest, and not more than 500 employees; however, a party who owns an unincorporated business will be considered to be an "individual" rather than the "sole owner of an unincorporated business" if the issues on which the party prevails are related primarily to personal interests rather than to business interests;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization that has a

net worth of not more than \$7 million and not more than 500 employees; or

(6) For the purposes of an application filed pursuant to 5 U.S.C. 504(a)(4), a small entity as defined in 5 U.S.C. 601.

(c) For purposes of eligibility under this section:

(1) The employees of a party must include all persons who regularly perform services for remuneration for the party, under the party's direction and control. Part-time employees must be included on a proportional basis.

(2) The net worth and number of employees of the party and its affiliates must be aggregated to determine eligibility.

(3) The net worth and number of employees of a party will be determined as of the date the underlying adversary adjudication was initiated.

(4) A party that participates in an adversary adjudication primarily on behalf of one or more entities that would be ineligible for an award is not itself eligible for an award.

#### **§ 1203.4 Standards for awards.**

(a) An eligible party that files an application for award of fees and other expenses in accordance with this part will receive an award of fees and other expenses related to defending against a demand of FHFA if the demand was in excess of the decision in the underlying adversary adjudication and was unreasonable when compared with the decision under the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or unless special circumstances make an award unjust. The burden of proof that the demand of FHFA was substantially in excess of the decision and is unreasonable when compared with the decision is on the eligible party.

(b) An eligible party that submits an application for award in accordance with this part will receive an award of fees and other expenses incurred in connection with an adversary adjudication in which it prevailed or in a significant and discrete substantive portion of the adversary adjudication in which it prevailed, unless the position of FHFA in the adversary adjudication was substantially justified or special circumstances make an award unjust. FHFA has the burden of proof to show that its position was substantially justified and may do so by showing that its position was reasonable in law and in fact.

#### **§ 1203.5 Allowable fees and expenses.**

(a) Awards of fees and other expenses will be based on rates customarily charged by persons engaged in the

business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the party. However, except as provided in § 1203.6, an award for the fee of an attorney or agent may not exceed \$125 per hour and an award to compensate an expert witness may not exceed the highest rate at which FHFA pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or expert witness as a separate item if he or she ordinarily charges clients separately for such expenses.

(b) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer will consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fees for similar services; or, if the attorney, agent, or expert witness is an employee of the eligible party, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the eligible party;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudication; and

(5) Such other factors as may bear on the value of the services provided.

(c) In determining the reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party, the adjudicative officer will consider the prevailing rate for similar services in the community in which the services were performed.

(d) Fees and other expenses incurred before the date on which an adversary adjudication was initiated will be awarded only if the eligible party can demonstrate that they were reasonably incurred in preparation for the adversary adjudication.

#### **§ 1203.6 Rulemaking on maximum rate for fees.**

If warranted by an increase in the cost of living or by special circumstances, FHFA may adopt regulations providing for an award of attorney or agent fees at a rate higher than \$125 per hour in adversary adjudications covered by this part. Special circumstances include the limited availability of attorneys or agents who are qualified to handle certain types of adversary adjudications. FHFA will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the

Administrative Procedure Act, 5 U.S.C. 553.

#### **§ 1203.7 Awards against other agencies.**

If another agency of the United States participates in an adversary adjudication before FHFA and takes a position that was not substantially justified, the award or appropriate portion of the award to an eligible party that prevailed over that agency will be made against that agency.

#### **§§ 1203.8–1203.9 [Reserved]**

### **Subpart B—Information Required From Applicants**

#### **§ 1203.10 Contents of the application for award.**

(a) An application for award of fees and other expenses under either § 1203.4(a) and § 1203.4(b) must:

(1) Identify the applicant and the adversary adjudication for which an award is sought;

(2) State the amount of fees and other expenses for which an award is sought;

(3) Provide the statements and documentation required by paragraph (b) or (c) of this section and § 1203.12 and any additional information required by the adjudicative officer; and

(4) Be signed by the applicant or an authorized officer or attorney of the applicant and contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) An application for award under § 1203.4(a) must show that the demand of FHFA was substantially in excess of, and was unreasonable when compared to, the decision in the underlying adversary adjudication under the facts and circumstances of the case. It must also show that the applicant is a small entity as defined in 5 U.S.C. 601.

(c) An application for award under § 1203.4(b) must:

(1) Show that the applicant has prevailed in a significant and discrete substantive portion of the underlying adversary adjudication and identify the position of FHFA in the adversary adjudication that the applicant alleges was not substantially justified;

(2) State the number of employees of the applicant and describe briefly the type and purposes of its organization or business (if the applicant is not an individual);

(3) State that the net worth of the applicant does not exceed \$2 million, if the applicant is an individual; or for all other applicants, state that the net worth of the applicant and its affiliates, if any, does not exceed \$7 million; and

(4) Include one of the following:



(i) A detailed exhibit showing the net worth (net worth exhibit) of the applicant and its affiliates, if any, when the underlying adversary adjudication was initiated. The net worth exhibit may be in any form convenient to the applicant as long as the net worth exhibit provides full disclosure of the assets and liabilities of the applicant and its affiliates, if any, and is sufficient to determine whether the applicant qualifies as an eligible party;

(ii) A copy of a ruling by the Internal Revenue Service that shows that the applicant qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3); or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the belief that the applicant qualifies under such section; or

(iii) A statement that the applicant is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a).

#### **§ 1203.11 Confidentiality of net worth exhibit.**

Unless otherwise ordered by the Director, or required by law, the statement of net worth will be for the confidential use of the adjudicative officer, the Director, and agency counsel.

#### **§ 1203.12 Documentation for fees and expenses.**

(a) The application for award must be accompanied by full and itemized documentation of the fees and other expenses for which an award is sought. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other documentation for any fees or expenses claimed.

(b) A separate itemized statement must be submitted for each entity or individual whose services are covered by the application. Each itemized statement must include:

(1) The hours spent by each entity or individual;

(2) A description of the specific services performed and the rates at which each fee has been computed; and

(3) Any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity.

#### **§§ 1203.13–1203.19 [Reserved]**

### **Subpart C—Procedures for Filing and Consideration of the Application for Award**

#### **§ 1203.20 Filing and service of the application for award and related papers.**

(a) An application for an award of fees and other expenses must be filed no later than 30 days after the final disposition of the underlying adversary adjudication.

(b) An application for award and other papers related to the proceedings on the application for award must be filed and served on all parties in the same manner as papers are filed and served in the underlying adversary adjudication, except as otherwise provided in this part.

(c) The computation of time for filing and service of the application of award and other papers must be computed in the same manner as in the underlying adversary adjudication.

#### **§ 1203.21 Response to the application for award.**

(a) Agency counsel must file a response within 30 days after service of an application for award of fees and other expenses except as provided in paragraphs (b) and (c) of this section. In the response, agency counsel must explain any objections to the award requested and identify the facts relied upon to support the objections. If any of the alleged facts are not already in the record of the underlying adversary adjudication, agency counsel must include with the response either supporting affidavits or a request for further proceedings under § 1203.25.

(b) If agency counsel and the applicant believe that the issues in the application for award can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement will extend the time for filing a response for an additional 30 days. Upon request by agency counsel and the applicant, the adjudicative officer may grant for good cause further time extensions.

(c) Agency counsel may request that the adjudicative officer extend the time period for filing a response. If agency counsel does not respond or otherwise does not contest or settle the application for award within the 30-day period or the extended time period, the adjudicative officer may make an award of fees and other expenses upon a satisfactory showing of entitlement by the applicant.

#### **§ 1203.22 Reply to the response.**

Within 15 days after service of a response, the applicant may file a reply.

If the reply is based on any alleged facts not already in the record of the underlying adversary adjudication, the applicant must include with the reply either supporting affidavits or a request for further proceedings under § 1203.25.

#### **§ 1203.23 Comments by other parties.**

Any party to the underlying adversary adjudication other than the applicant and agency counsel may file comments on an application for award within 30 calendar days after it is served, or on a response within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

#### **§ 1203.24 Settlement.**

The applicant and agency counsel may agree on a proposed settlement of an award before the final decision on the application for award is made, either in connection with a settlement of the underlying adversary adjudication or after the underlying adversary adjudication has been concluded. If the eligible party and agency counsel agree on a proposed settlement of an award before an application for award has been filed, the application must be filed with the proposed settlement.

#### **§ 1203.25 Further proceedings on the application for award.**

(a) On request of either the applicant or agency counsel, on the adjudicative officer's own initiative, or as requested by the Director under § 1203.27, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions, or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidential hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application for award and will be conducted as promptly as possible. The issue as to whether the position of FHFA in the underlying adversary adjudication was substantially justified will be determined on the basis of the whole administrative record that was made in the underlying adversary adjudication.

(b) A request that the adjudicative officer order further proceedings under this section must specifically identify the information sought on the disputed issues and must explain why the



additional proceedings are necessary to resolve the issues.

**§ 1203.26 Decision of the adjudicative officer.**

(a) The adjudicative officer must make the initial decision on the basis of the written record, except if further proceedings are ordered under § 1203.25.

(b) The adjudicative officer must issue a written initial decision on the application for award within 30 days after completion of proceedings on the application. The initial decision will become the final decision of FHFA after 30 days from the day it was issued, unless review is ordered under § 1203.27.

(c) In all initial decisions, the adjudicative officer must include findings and conclusions with respect to the applicant's eligibility and an explanation of the reasons for any difference between the amount requested by the applicant and the amount awarded. If the applicant has sought an award against more than one agency, the adjudicative officer must also include findings and conclusions with respect to the allocation of payment of any award made.

(d) In initial decisions on applications filed pursuant to § 1203.4(a), the adjudicative officer must include findings and conclusions as to whether FHFA made a demand that was substantially in excess of the decision in the underlying adversary adjudication and that was unreasonable when compared with that decision; and, if at issue, whether the applicant has committed a willful violation of the law or otherwise acted in bad faith, or whether special circumstances would make the award unjust.

(e) In decisions on applications filed pursuant to § 1203.4(b), the adjudicative officer must include written findings and conclusions as to whether the applicant is a prevailing party and whether the position of FHFA was substantially justified; and, if at issue, whether the applicant unduly protracted or delayed the underlying adversary adjudication or whether special circumstance make the award unjust.

**§ 1203.27 Review by FHFA.**

Within 30 days after the adjudicative officer issues an initial decision under § 1203.26, either the applicant or agency counsel may request the Director to review the initial decision of the adjudicative officer. The Director may also decide, at his or her discretion, to review the initial decision. If review is ordered, the Director must issue a final

decision on the application for award or remand the application for award to the adjudicative officer for further proceedings under § 1203.25.

**§ 1203.28 Judicial review.**

Any party, other than the United States, that is dissatisfied with the final decision on an application for award of fees and expenses under this part may seek judicial review as provided in 5 U.S.C. 504(c)(2).

**§ 1203.29 Payment of award.**

To receive payment of an award of fees and other expenses granted under this part, the applicant must submit a copy of the final decision that grants the award and a certification that the applicant will not seek review of the decision in the United States courts to the Director, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. FHFA must pay the amount awarded to the applicant within 60 days of receipt of the submission of the copy of the final decision and the certification, unless judicial review of the award has been sought by any party to the proceedings.

**CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**PART 1705—[REMOVED]**

**■ 2. Remove part 1705.**

Dated: October 14, 2010.

**Edward J. DeMarco,**  
*Acting Director, Federal Housing Finance Agency.*

[FR Doc. 2010-26650 Filed 10-21-10; 8:45 am]

**BILLING CODE 8070-01-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA-2010-0611; Directorate Identifier 2009-SW-18-AD; Amendment 39-16487; AD 2010-22-08]**

**RIN 2120-AA64**

**Airworthiness Directives; Eurocopter France Model AS 350 B, BA, B1, B2, B3, and D, and Model AS355 E, F, F1, F2, and N Helicopters**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the Eurocopter France Model AS 350 B, BA,

B1, B2, B3, and D, and Model AS355 E, F, F1, F2, and N helicopters, with certain main rotor servo-controls and tail rotor servo-controls. This AD requires replacing all servo-controls that are identified in the Applicability section of this AD. This AD is prompted by an internal review conducted by the manufacturer which revealed that some main and tail rotor servo-controls do not conform to the approved design. The actions specified by this AD are intended to prevent the distributor slide valve jamming in its sleeve, leading to reduced controllability of the rotors and subsequent loss of control of the helicopter.

**DATES:** Effective November 26, 2010.

**ADDRESSES:** You may get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053-4005, telephone (972) 641-3460, fax (972) 641-3527.

**Examining the Docket:** You may examine the docket that contains this AD, any comments, and other information on the Internet at <http://www.regulations.gov> or at the Docket Operations office, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** J. R. Holton, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, ASW-111, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222-4964, fax (817) 222-5961.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a Notice of Proposed Rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the Eurocopter France Model AS 350 B, BA, B1, B2, B3, and D, and Model AS355 E, F, F1, F2, and N helicopters on June 9, 2010. That NPRM was published in the **Federal Register** on June 16, 2010 (75 FR 34062). That NPRM proposed to require replacing all servo-controls that are identified in the Applicability section of the proposed AD. The NPRM was prompted by an internal review conducted by the manufacturer which revealed that some main and tail rotor servo-controls do not conform to the approved design. The actions specified by the NPRM are intended to prevent the distributor slide valve jamming in its sleeve, leading to reduced controllability of the rotors and subsequent loss of control of the helicopter.

The European Aviation Safety Agency (EASA), which is the Technical Agent