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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

RIN 0503-AA42

Procedures Relating to Awards Under the Equal Access to Justice Act

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from \$125.00 to \$150.00 for covered proceedings initiated on and after the effective date of this final rule.

DATES: This final rule is effective March 3, 2011.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from \$125.00 to \$150.00 for proceedings initiated on and after the effective date of the publication of this final rule. EAJA, 5 U.S.C. 504, provides to certain parties in adversary agency adjudications reimbursement for attorney fees and other expenses under limited circumstances. The proposed rule was issued in response to a Petition for Rulemaking (PFR) received by USDA on September 29, 2008, filed by Public Citizen Litigation Group, Five Points

Road Joint Venture, and Charles Brown, Esq., under the provisions of 7 CFR 1.187 and 1.28. The PFR sought an increase in the maximum attorney fees payable based on the U.S. Department of Labor Consumer Price All-Items Index for All Urban Consumers. In brief, the petitioners sought an automatic escalator clause using 1996 as the base year and \$125.00 per hour as the base year maximum fee, with the new amount applying to all pending and future covered proceedings before USDA.

In the proposed rule, USDA invited comments, which were due by September 28, 2010. USDA received two comments.

Comment: One commenter, citing the economy, objected to the increase in the maximum hourly rate from \$125.00 to \$150.00 and suggested that the maximum hourly rate should be decreased. This commenter also advocated for the enactment of a law requiring attorneys to provide twenty hours per week of “public service.”

Response: USDA considered this comment but is not making any changes to the proposed rule. In the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, Title II, section 231 (1996), Congress amended EAJA at 5 U.S.C. 504(b)(1)(A) by raising the hourly maximum attorney fees rate from \$75.00 to \$125.00. Because inflation has eroded the value of the \$125 per hour fee set by Congress in 1996, USDA does not believe it would be appropriate to decrease the \$125 per hour rate. Rather, USDA has determined that an increase of \$25.00—from \$125.00 to \$150.00—is appropriate. Finally, the enactment of laws is a function of the Congress and is, therefore, outside the purview of this regulation.

Comment: One commenter objected to any increase in the maximum hourly rate until “a more detailed process of documentation, as well as a comprehensive review of past usage of the EAJA” is undertaken. The commenter argued that attorney fee reimbursements under EAJA “have been recovered and utilized primarily by environmental groups,” and that such groups are “clearly receiving a disproportionate amount of funding from EAJA.” The commenter suggested that attorneys representing industry groups are disadvantaged because of

such disproportionate amount of EAJA attorney fees reimbursements that are recovered by environmental groups. In support of its assertions, the commenter referred generally to research conducted by the Budd-Falen Law Offices, L.L.C., but does not state whether such research analyzed the EAJA statute for agency adjudications (5 U.S.C. 504) or the EAJA statute applicable in Federal judiciary proceedings (28 U.S.C. 2412), or both.

Response: USDA considered this comment but is not making any changes to the proposed rule. Eligibility for reimbursement of attorney fees to prevailing parties in agency adversary adjudications is determined by statute (5 U.S.C. 504). If an entity meets the statutory eligibility requirements and otherwise complies with the EAJA procedures as implemented by USDA in 7 CFR part 1, subpart J, an EAJA award will be made. The mere status of the entity as an environmental group or an industry group has no bearing on agency EAJA determinations. EAJA determinations in judicial proceedings are governed by 28 U.S.C. 2412 and are made by the courts, not the agency. Any perceived inequities in EAJA reimbursements across particular interest groups may be addressed to Congress as part of the legislative process. USDA believes that an increase in the current maximum hourly rate is appropriate for the reasons stated previously.

For the reasons stated in the proposed rule, USDA is raising the hourly fee set forth in 7 CFR 1.186 from \$125.00 to \$150.00, to be applicable to covered proceedings initiated on and after the effective date of this final rule.

This action has been reviewed under Executive Order No. 12866 and has been determined not to be a “significant regulatory action.” This final rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal

mandates, the President's priorities or principles set forth in the Executive Order.

USDA certifies that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Public Law 96-534, as amended (5 U.S.C. 601 *et seq.*).

USDA has determined that the provisions of the Paperwork Reduction Act, as amended, (44 U.S.C. 3501 *et seq.*), do not apply to any collections of information contained in this final rule because any such collections of information are made during the conduct of administrative action involving an agency against specific individuals or entities. 5 CFR 1320.4(a)(2).

List of Subjects in 7 CFR Part 1

Administrative practice and procedure.

Accordingly, Title 7 of the Code of Federal Regulations is amended as follows:

PART 1—ADMINISTRATIVE REGULATIONS

- 1. The authority for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

Subpart J—Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department

- 2. Amend § 1.186 by revising paragraph (b) to read as follows:

§ 1.186 Allowable fees and expenses.

* * * * *

(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

* * * * *

- 3. Amend § 1.187 by revising paragraph (a) to read as follows:

§ 1.187 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special

circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than \$150 per hour in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

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Thomas J. Vilsack,
Secretary of Agriculture.

[FR Doc. 2011-4423 Filed 3-2-11; 8:45 am]

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FEDERAL HOUSING FINANCE BOARD

12 CFR Part 932

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1225

RIN 2590-AA01

Minimum Capital

AGENCY: Federal Housing Finance Board and Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final rule to implement a provision of the Federal Housing Enterprises Financial Safety and Soundness Act, as amended, that provides for a temporary increase in the minimum capital level for the entities regulated by FHFA—the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Home Loan Banks. The final rule establishes standards for imposing a temporary increase and for rescinding such an increase, and a time frame for review of such an increase.

DATES: This rule is effective April 4, 2011.

FOR FURTHER INFORMATION CONTACT:

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Christopher.Curtis@fhfa.gov, (202) 414-8947, or Jamie Schwing, Associate General Counsel,
Jamie.Schwing@fhfa.gov, (202) 414-3787, (not toll-free numbers), 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) to establish FHFA as an independent agency of the Federal Government. FHFA was established to oversee the operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Federal Home Loan Banks (Banks) (collectively, regulated entities). FHFA is to ensure that the regulated entities operate in a safe and sound manner including being capitalized adequately; that their operations foster liquid, efficient, competitive and resilient national housing finance markets; that they comply with the Safety and Soundness Act and their authorizing statutes, and with rules, regulations, guidelines and orders issued under those statutes; that they carry out their missions through activities authorized and consistent with the Safety and Soundness Act and their authorizing statutes; and that the activities and operations of the entities are consistent with the public interest.¹ The regulated entities continue to operate under regulations promulgated by the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board, and the relevant regulations of the Department of Housing and Urban Development, until such time as the existing regulations are supplanted by regulations promulgated by FHFA.²

B. The Bank System Generally

The twelve Banks are instrumentalities of the United States organized under the Federal Home Loan Bank Act (Bank Act).³ See 12 U.S.C. 1423, 1432(a). The Banks are cooperatives: Only members of a Bank may purchase the capital stock of a Bank, and only members or certain eligible housing associates (such as state housing finance agencies) may obtain access to secured loans, known as advances, or other products provided by

¹ 12 U.S.C. 4513.

² Sections 1302 and 1312 of HERA.

³ Each Bank is generally referred to by the name of the city in which it is located. The twelve Banks are located in: Boston, New York, Pittsburgh, Atlanta, Cincinnati, Indianapolis, Chicago, Des Moines, Dallas, Topeka, San Francisco, and Seattle.