

## General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of kiwifruit grown in California in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order;

3. The marketing order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of kiwifruit produced or packed in the production area; and

5. All handling of kiwifruit produced or packed in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 60-day comment period is provided to allow interested persons to respond to these proposals. Any comments received on the amendments proposed in this rule will be analyzed, and if AMS determines to proceed based on all the information presented, a producer referendum would be conducted to determine grower support for the proposed amendments. If appropriate, a final rule would then be issued to effectuate the amendments favored by producers participating in the referendum.

## List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is proposed to be amended as follows:

### PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 920 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Revise § 920.27 to read as follows:

#### § 920.27 Alternate members.

An alternate member of the committee, during the absence of the member for whom that individual is an alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event both a member and his or her alternate are unable to attend a committee meeting, the committee may designate any other alternate member from the same district to serve in such member's place and stead. In the event of the death, removal, resignation, or disqualification of a member, the alternate of such member shall act for him or her until a successor for such member is selected and has qualified.

■ 3. In § 920.32, revise paragraph (a) to read as follows:

#### § 920.32 Procedure.

(a) Eight members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: *Provided*, That actions of the committee with respect to expenses and assessments, production and postharvest research, market research and development, or recommendations for regulations pursuant to §§ 920.50 through 920.55, of this part shall require at least eight concurring votes.

\* \* \* \* \*

■ 4. Add § 920.45 to read as follows:

#### § 920.45 Contributions.

The committee may accept voluntary contributions, but these shall only be used to pay expenses incurred pursuant to §§ 920.47 and 920.48. Furthermore, such contributions shall be free from any encumbrances by the donor, and the committee shall retain complete control of their use.

■ 5. Add § 920.47 to read as follows:

#### § 920.47 Production and postharvest research.

The committee, with the approval of the Secretary, may establish or provide

for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of kiwifruit.

■ 6. Add § 920.48 to read as follows:

#### § 920.48 Market research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of kiwifruit.

Dated: February 4, 2013.

**David R. Shipman,**

*Administrator, Agricultural Marketing Service.*

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## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1215

**RIN 2590–AA51**

### Production of FHFA Records, Information, and Employee Testimony in Legal Proceedings

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking; with request for comments.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) proposes a regulation governing the production of FHFA records, information or employee testimony in connection with legal proceedings in which neither the United States, nor FHFA is a party. This proposed rule would establish requirements and procedures for demanding or requesting parties to submit demands or requests, and factors for FHFA to consider in determining whether FHFA employees will provide records, information or testimony relating to their official duties. FHFA's desirable intent is to standardize practices, promote uniformity in decisions, preserve the ability of FHFA to conduct agency business, protect confidential information, provide guidance to demanding or requesting parties, minimize involvement in matters unrelated to the agency missions and programs of FHFA, avoid wasteful allocation of agency resources, and preclude spending public time and money for private purposes.

**DATES:** Comments on this proposed rule are due 60 days after publication. For additional information, see **SUPPLEMENTARY INFORMATION.**

**ADDRESSES:** You may submit your comments, identified by Regulatory Information Number (RIN) 2590-AA51, by any of the following methods:

- **Email:** Comments to Alfred M. Pollard, General Counsel, may be sent by email to [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov). Please include Comments/RIN 2590-AA51 in the message's subject line.
- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal*, please also send it by email to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure timely receipt by the Agency. Please include Comments/RIN 2590-AA51 in the subject line of the message.
- **Courier/Hand Delivery:** The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA51, Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged in at the Guard's Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- **U.S. Mail, United Parcel Service, Federal Express or Other Mail Service:** The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA51, Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** James P. Jordan, Senior Counsel, 202-649-3075 (not a toll-free number), Federal Housing Finance Center, Constitution Center, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Comments**

FHFA invites comments on all aspects of the proposed rule, and may revise the language of the proposed rule as appropriate after taking all comments into consideration. Copies of all comments received will be posted without change on the FHFA web site at <http://www.fhfa.gov>, and will include any personal information you provide, such as your name, address, email address, and telephone number. Copies of all comments received will be made available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh St. SW., Washington, DC 20024. To make

an appointment to inspect comments, please call the Office of General Counsel at 202-649-3804

**II. Background**

**A. Establishment of FHFA**

The Housing and Economic Recovery Act of 2008 ("HERA"), Public Law No. 110-289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) (12 U.S.C. 4501 *et seq.*) and the Federal Home Loan Bank Act (12 U.S.C. 1421-1449) to establish FHFA as an independent agency of the Federal Government. HERA transferred the supervisory and oversight responsibilities of the Office of Federal Housing Enterprise Oversight over Fannie Mae and Freddie Mac, and of the Federal Housing Finance Board over the Federal Home Loan Banks and the Bank System's Office of Finance, to FHFA. FHFA is tasked with ensuring that the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks (collectively, the regulated entities) operate in a safe and sound manner; foster liquid, efficient, competitive and resilient national housing finance markets; comply with their respective authorizing statutes, and all rules, regulations, guidelines, and orders issued pursuant to those authorities; carry out their missions through duly authorized activities; and that their activities and operations are consistent with the public interest. Section 1105 of HERA amended the Safety and Soundness Act and the Inspector General Act of 1978 to establish an Inspector General within FHFA. See 12 U.S.C. 4517(d). Among other duties, FHFA Office of Inspector General ("FHFA-OIG") is responsible for conducting audits, evaluations, and investigations of FHFA's programs and operations; recommending policies that promote economy and efficiency in the administration of FHFA's programs and operations; and preventing and detecting fraud, waste and abuse in FHFA's programs and operations.

**B. Need for Proposed Rule**

Federal agencies often receive formal demands (including subpoenas) or informal requests to produce records, information, or testimony in judicial, legislative or administrative proceedings in which those agencies or the United States is not a named party. Many federal agencies have issued regulations to address the submission, evaluation, and processing of these demands or requests. They have done so because responding to these demands or

requests is burdensome, may disrupt an agency employee's work schedule significantly, may involve the agency in issues unrelated to its responsibilities, may divert agency resources from accomplishing mission critical functions, and may impede the agency's accomplishment of its mission and goals. Standard rules alleviate these difficulties by ensuring timely notice and centralized, objective decision making. The United States Supreme Court upheld this type of regulation in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), holding that provisions in the federal "housekeeping" statute, 5 U.S.C. 22, 5 U.S.C.A. 22 (now 5 U.S.C. 301), authorize agencies to promulgate rules governing record production and employee testimony.

Since the establishment of FHFA and the establishment of the FHFA-OIG within FHFA, FHFA has not issued a regulation governing the submission, evaluation, and processing of demands or requests in connection with a legal proceeding. This proposed rule fills that gap and replaces applicable legacy regulations issued by FHFA's predecessor agencies, the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board. The proposed rule would prohibit FHFA employees from producing records, information, or testimony in response to demands or requests, unless the demands or requests comply with the rule, *and* FHFA then grants permission for the production. Compliance with the rule is necessary, but not sufficient, for production to occur. The proposed rule identifies the information that demanding or requesting parties must provide and the factors that FHFA may consider when evaluating demands or requests.

The proposed rule would ensure a more efficient use of agency resources, minimize the possibility of involving FHFA in issues unrelated to its mission, promote uniformity in responding to demands or requests, and maintain the impartiality of FHFA in matters that are in dispute between other parties. It will also serve the interests of FHFA in protecting sensitive, confidential and privileged information and records that are generated and compiled in the performance of official duties.

For these reasons, public notice and opportunity to comment are not required under the Administrative Procedure Act, but FHFA is providing such notice and opportunity to comment as a matter of discretion.

### III. Section-by-Section Analysis

#### Section 1215.1 Scope and Purpose

This section describes the rule's scope, which includes internal agency operations. This section also sets forth the rule's purpose, which is to specify the manner in which, and standards by which, demands or requests for records, information, or testimony must be submitted, evaluated, and processed.

#### Section 1215.2 Applicability

This section identifies those demands or requests for FHFA records, information, or testimony that are subject to the rule. This section also states the types of demands or requests excepted from the rule.

#### Section 1215.3 Definitions

This section defines terms relevant to the regulation.

#### Section 1215.4 General Prohibition

This section bars producing FHFA records, information, or testimony in response to a demand or request without proper written authorization.

#### Section 1215.5 Delegation

This section authorizes FHFA's Director to delegate his authority under this part.

#### Section 1215.6 Factors FHFA May Consider

This section sets forth factors that FHFA may consider when evaluating demands or requests.

#### Section 1215.7 Serving Demands and Submitting Requests

This section describes the manner in which demands or requests for FHFA records, information, or testimony must be served and submitted.

#### Section 1215.8 Timing and Form of Demands and Requests

This section describes the timing by which and the form in which a demanding or requesting party must serve its demand or submit its request.

#### Section 1215.9 Failure To Meet This Part's Requirements

This section describes the consequences of failing to meet requirements set forth in this part.

#### Section 1215.10 Processing Demands and Requests

This section describes how demands or requests must be processed and establishes deadlines. This section also provides the limited instances in which these processes or deadlines may be waived.

#### Section 1215.11 FHFA Determination

This section authorizes FHFA's Director to make FHFA's determination on demands or requests for information to be provided by FHFA. This section also describes the notice to be provided to the demanding or requesting parties when an FHFA determination is made.

#### Section 1215.12 Restrictions That Apply to Testimony

This section authorizes the imposition of conditions on FHFA employee testimony.

#### Section 1215.13 Restrictions That Apply to Records and Information

This section authorizes the imposition of conditions on production of FHFA records or information.

#### Section 1215.14 Procedure in the Event of an Adverse FHFA Determination

This section establishes an administrative mechanism by which parties aggrieved by an FHFA determination about a demand or request may seek reconsideration of that determination. This section also establishes a petition for FHFA reconsideration as a prerequisite to judicial review.

#### Section 1215.15 Conflicting Court Order

This section directs persons in possession of FHFA information to decline to comply with a court order that conflicts with an FHFA determination.

#### Section 1215.16 Fees

This section describes FHFA's entitlement to fees arising from the production of requested records, information, or testimony.

### IV. Paperwork Reduction Act

The proposed rule 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.*).

### V. 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 will 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. FHFA certifies that the proposed regulation, if adopted, is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the internal operations and legal obligations of FHFA and FHFA-OIG.

#### List of Subjects in 12 CFR Part 1215

Administrative practice and procedure, Courts, Government employees, Records, Subpoenas, Testimony.

For the reasons set forth in the **SUPPLEMENTARY INFORMATION**, and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency proposes to amend Chapter XII of Title 12 of the Code of Federal Regulations by adding a new part 1215.

■ 1. Add Part 1215 to read as follows:

#### **PART 1215—PRODUCTION OF FHFA RECORDS, INFORMATION, AND EMPLOYEE TESTIMONY IN LEGAL PROCEEDINGS**

Sec.

- 1215.1 Scope and Purpose.
- 1215.2 Applicability.
- 1215.3 Definitions.
- 1215.4 General Prohibition.
- 1215.5 Delegation.
- 1215.6 Factors FHFA May Consider.
- 1215.7 Serving Demands and Submitting Requests.
- 1215.8 Timing and Form of Demands and Requests.
- 1215.9 Failure to Meet this Part's Requirements
- 1215.10 Processing Demands and Requests.
- 1215.11 FHFA Determination.
- 1215.12 Restrictions That Apply to Testimony.
- 1215.13 Restrictions That Apply to Records and Information.
- 1215.14 Procedure in the Event of an Adverse FHFA Determination.
- 1215.15 Conflicting Court Order.
- 1215.16 Fees.

**Authority:** 5 U.S.C. 301; 12 U.S.C. 4526.

#### **§ 1215.1 Scope and Purpose.**

(a) This regulation sets forth the policies and procedures that must be followed in order to compel an employee of the Federal Housing Finance Agency (FHFA) to produce records or information, or to provide testimony relating to the employee's official duties, in the context of a legal proceeding. Parties seeking records, information, or testimony must comply with these requirements when submitting demands or requests:

(b) FHFA intends these provisions to:

- (1) Promote economy and efficiency in its programs and operations;

- (2) Minimize the possibility of involving FHFA in controversial issues not related to its mission and functions;

- (3) Maintain FHFA's impartiality;

- (4) Protect employees from being compelled to serve as involuntary witnesses for wholly private interests, or as inappropriate expert witnesses regarding current law or the activities of FHFA; and

- (5) Protect sensitive, confidential information and FHFA's deliberative processes.

(c) By providing these policies and procedures, FHFA does not waive the sovereign immunity of the United States.

(d) This part provides guidance for FHFA's internal operations. This part does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

(e) The production of records, information, or testimony pursuant to this part, does not constitute a waiver by FHFA of any privilege.

#### **§ 1215.2 Applicability.**

(a) This regulation applies to demands or requests for records, information, or testimony, in legal proceedings in which FHFA is not a named party.

(b) This regulation does not apply to:

- (1) Demands or requests for an FHFA employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of FHFA;

- (2) Requests for the release of non-exempt records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

- (3) Congressional demands or requests for records or testimony.

#### **§ 1215.3 Definitions.**

As used in this part—

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production of records, information, or testimony that is issued in a legal proceeding.

*Employee* means:

- (1) Any current or former officer or employee of FHFA or of FHFA-OIG;

- (2) Any other individual hired through contractual agreement by or on behalf of FHFA who has performed or is performing services under such an agreement for FHFA; and

- (3) Any individual who has served or is serving in any consulting or advisory capacity to FHFA, whether formal or informal.

*Federal Home Loan Bank* means a bank established under the authority of 12 U.S.C. 1423(a).

*FHFA* means the Federal Housing Finance Agency including the FHFA-OIG.

*FHFA Counsel* means an attorney in FHFA's Office of the General Counsel.

*General Counsel* means FHFA's General Counsel or a person within FHFA's Office of General Counsel to whom the General Counsel has delegated responsibilities under this part.

*Legal Proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*Produce* means provide, disclose, expose, or grant access to.

*Records or Information* means, regardless of the person or entity in possession:

- (1) All documents and materials that are FHFA agency records under the Freedom of Information Act, 5 U.S.C. 552;

- (2) All other documents and materials contained in FHFA files; and

- (3) All other information or materials acquired by an FHFA employee in the performance of his or her official duties or because of his or her official status.

*Regulated entity* has the same meaning as set forth in 12 U.S.C. 4502(20). For this regulation's purposes, "regulated entity" also includes—

- (1) The Office of Finance; and

- (2) Any current or former director, officer, employee, contractor or agent of a regulated entity.

*Request* means any informal request, by whatever method, in connection with a legal proceeding, seeking production of records, information, or testimony that has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, and recorded interviews made by an individual about FHFA information in connection with a legal proceeding.

#### **§ 1215.4 General Prohibition.**

(a) No employee, agent, regulated entity, the Office of Finance, or any other person or entity in possession of records or information may produce those records or information, or provide any testimony related to the records or information, in response to any demand or request without prior written approval to do so from the Director.

(b) Any person or entity that fails to comply with this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current employee also may be subject to administrative or disciplinary proceedings.

#### **§ 1215.5 Delegation.**

To the extent permissible by statute, the Director may delegate his authority under this part to any FHFA employee and the General Counsel may delegate his authority under this part to any FHFA Counsel.

#### **§ 1215.6 Factors FHFA May Consider.**

The Director may grant an employee permission to testify regarding agency matters, and to produce records and information, in response to a demand or request. Among the relevant factors that the Director may consider in making this determination are whether:

- (a) This part's purposes are met;

- (b) FHFA has an interest in the decision that may be rendered in the legal proceeding;

- (c) Approving the demand or request would assist or hinder FHFA in performing statutory duties or use FHFA resources;

- (d) Production might assist or hinder employees in doing their work;

- (e) The records, information, or testimony can be obtained from other sources. (Concerning testimony, "other sources" means a non-agency employee, or an agency employee other than the employee named).

- (f) The demand or request is unduly burdensome or otherwise inappropriate under the rules of discovery or procedure governing the case or matter in which the demand or request arose;

- (g) Production of the records, information, or testimony might violate or be inconsistent with a statute, Executive Order, regulation, or other legal authority;

- (h) Production of the records, information, or testimony might reveal confidential or privileged information, trade secrets, or confidential commercial or financial information;

- (i) Production of the records, information, or testimony might impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

- (j) Production of the records, information, or testimony might result in FHFA appearing to favor one litigant over another;

- (k) The demand or request pertains to documents that were produced by another agency;

- (l) The demand or request complies with all other applicable rules;

(m) The demand or request is sufficiently specific to be answered;

(n) The relevance of the records, information, or testimony to the purposes for which they are sought, and for which they may be used for substantive evidence;

(o) Production of the records, information, or employee testimony may implicate a substantial government interest; and

(p) Any other good cause.

#### **§ 1215.7 Serving Demands and Submitting Requests.**

(a) All demands and requests must be in writing.

(b) Demands must be served and requests must be submitted to the FHFA General Counsel at the following address: General Counsel, Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street, SW., Washington, DC 20024.

(c) Demands must not be served upon, nor requests submitted to any regulated entity for records, information, or testimony regardless of whether the records, information, or testimony sought are in the possession of, or known by, the regulated entity. If a regulated entity receives a request or demand for records, information, or testimony, the regulated entity must immediately notify the General Counsel and provide FHFA an opportunity to object to the demand or request before responding to the demand or request. Submitting a demand or request to a regulated entity may result in rejection of the demand or request under § 1215.9.

(d) If an employee receives a request or demand that is not properly routed through FHFA's General Counsel, as required under this section, the employee must promptly notify the General Counsel. An employee's failure to notify the General Counsel is grounds for discipline or other adverse action.

#### **§ 1215.8 Timing and Form of Demands and Requests.**

(a) A party seeking records, information, or testimony must submit a request and receive a rejection before making a demand for records, information, or testimony.

(b) A demand or request to FHFA must include a detailed description of the basis for the demand or request and comply with the requirements in § 1215.7.

(c) Demands and requests must be submitted at least 60 days in advance of the date on which the records, information, or testimony is needed. Exceptions to this requirement may be granted upon a showing of compelling need.

(d) A demand or request for testimony also must include an estimate of the amount of time that the employee will need to devote to the process of testifying (including anticipated travel time and anticipated duration of round trip travel), plus a showing that no document or the testimony of non-agency persons, including retained experts, could suffice in lieu of the employee's testimony.

(e) Upon submitting a demand or request seeking employee testimony, the requesting party must notify all other parties to the legal proceeding.

(f) After receiving notice of a demand or request for testimony, but before the testimony occurs, a party to the legal proceeding who did not join in the demand or request and who wishes to question the witness beyond the scope of the testimony sought must submit a separate demand or request within 60 days of receiving the notice required under paragraph (e) of this section and must then comply with paragraph (c) of this section.

(g) Every demand or request must include the legal proceeding's caption and docket number, the forum; the name, address, phone number, State Bar number, and, if available, electronic mail address of counsel to all parties to the legal proceeding (in the case of *pro-se* parties, substitute the name, address, phone number, and electronic mail address of the *pro-se* party); and a statement of the demanding or requesting party's interest in the case. In addition, the demanding or requesting party must submit a clear and concise written statement that includes: a summary of the legal and factual issues in the proceeding and a detailed explanation as to how the records, information or testimony will contribute substantially to the resolution of one or more specially identified issues in the legal proceeding. A copy of the complaint or charging document may accompany—but must not be substituted for—the required statement.

#### **§ 1215.9 Failure to Meet this Part's Requirements.**

FHFA may oppose any demand or request that does not meet the requirements set forth in this part.

#### **§ 1215.10 Processing Demands and Requests.**

(a) The Director will review every demand or request received and, in accordance with this regulation, determine whether, and under what conditions, to authorize an employee to produce records, information, or testimony.

(b) The Director will process demands and requests in the order in which they are received. The Director will ordinarily respond within 60 days from the date that the agency receives all information necessary to evaluate the demand or request. However, the time for response will depend upon the scope of the demand or request. The Director may respond outside of the 60-day period:

(1) Under exigent or unusual circumstances; or

(2) When FHFA must receive and process records or information in the possession, custody, or control of a third party.

(c) The Director may confer with counsel to parties to a legal proceeding about demands or requests made pursuant to this part. The conference may be *ex-parte*. Failure to confer in good faith, in order to enable the Director to make an informed determination, may justify rejection of the demand or request.

(d) The Director may rely on sources of information other than those provided by the demanding or requesting parties as bases for making a determination.

(e) The Director may grant a waiver of any requirement in this section to promote a significant interest of FHFA or the United States, or for other good cause.

#### **§ 1215.11 FHFA Determination.**

(a) The Director makes FHFA's determinations regarding demands and requests.

(b) The Director will notify the demanding or requesting party of FHFA's determination, the reasons for the approval or rejection of the demand or request, and any conditions that the Director may impose on the release of records, information, or testimony.

#### **§ 1215.12 Restrictions That Apply to Testimony.**

(a) The Director may impose conditions or restrictions on testimony, including but not limited to limiting the scope of testimony or requiring the demanding or requesting party and other parties to the legal proceeding to agree that the testimony transcript will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The Director may also require a copy of the transcript of testimony to be provided to FHFA at the demanding or requesting party's expense.

(b) The Director may offer an employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to

facts within his or her personal knowledge, but, unless specifically authorized to do so by the Director, the employee must not:

(1) Disclose confidential or privileged information; or

(2) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or FHFA's mission or functions. This provision does not apply to requests from the United States for expert or opinion testimony.

(d) The Director may assign FHFA Counsel to be present for an employee's testimony.

#### **§ 1215.13 Restrictions That Apply to Records and Information.**

(a) The Director may impose conditions or restrictions on the release of records and information, including but not limited to requiring that parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access and further disclosure, or that parties take other appropriate steps to comply with applicable privacy requirements. The terms of a protective order or confidentiality agreement must be acceptable to the Director. In cases where protective orders or confidentiality agreements have already been executed, the Director may condition the release of records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the Director so determines, original agency records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their status as original records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

(c) The scope of permissible production is limited to that set forth in the prior, written authorization granted by the Director.

(d) If records or information are produced in connection with a legal proceeding, the demanding or requesting party must:

(1) Promptly notify all other parties to the legal proceeding that the records or information are FHFA records or information and are subject to this part and any applicable confidentiality agreement or protective order;

(2) Provide copies of any confidentiality agreement or protective order to all other parties; and

(3) Retrieve the records or information from the court or other competent

authority's file when the court or other competent authority no longer requires the records or information and certify that every party covered by a confidentiality agreement, protective order, or other privacy protection has destroyed all copies of the records or information.

#### **§ 1215.14 Procedure in the Event of an Adverse FHFA Determination.**

(a) *Procedure for seeking reconsideration of FHFA's determination.* A demanding or requesting party seeking reconsideration of FHFA's rejection of a demand or request, or of any restrictions on receiving records, information, or testimony, may seek reconsideration of the rejection or restrictions as follows—

(1) *Notice of Intention to Petition for Reconsideration.* The aggrieved demanding or requesting party may seek reconsideration by filing a written Notice of Intention to Petition for Reconsideration (Notice) within 10 business days of the date of FHFA's determination. The Notice must identify the petitioner, the determination for which reconsideration is being petitioned, and any dates (such as deposition, hearing, or court dates) that are significant to petitioner. The Notice must be served in accordance with § 1215.7.

(2) *Petition for Reconsideration.* Within five business days of filing Notice, the petitioner must file a Petition for Reconsideration (Petition) in accordance with § 1215.7. The Petition must contain a clear and concise statement of the basis for the reconsideration with supporting authorities. Determinations about petitions for reconsideration are within the discretion of the FHFA Director, and are final.

(b) *Prerequisite to judicial review.* Pursuant to section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition to FHFA for reconsideration of a final determination made under the authority of this part is a prerequisite to judicial review.

#### **§ 1215.15 Conflicting Court Order.**

Notwithstanding FHFA's rejection of a demand for records, information, or testimony, if a court or other competent authority orders an FHFA employee to comply with the demand, the employee must promptly notify FHFA's General Counsel of the order, and the employee must respectfully decline to comply, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). An employee's failure to notify the General Counsel of a court or other authority's

order is grounds for discipline or other adverse action.

#### **§ 1215.16 Fees.**

(a) The Director may condition the production of records, information, or an employee's appearance on advance payment of reasonable costs to FHFA, which may include but are not limited to those associated with employee search time, copying, computer usage, and certifications.

(b) Witness fees will include fees, expenses, and allowances prescribed by the rules applicable to the particular legal proceeding. If no fees are prescribed, FHFA will base fees on the rule of the federal district court closest to the location where the witness will appear. Such fees may include but are not limited to time for preparation, travel, and attendance at the legal proceeding.

Dated: February 2, 2013.

**Edward J. DeMarco,**

*Acting Director, Federal Housing Finance Agency.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

[Docket No. FAA-2013-0088; Directorate Identifier 2011-NM-233-AD]

RIN 2120-AA64

#### **Airworthiness Directives; Airbus Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede an existing airworthiness directive (AD) that applies to all Airbus Model A318, A319, A320, and A321 series airplanes. The existing AD currently requires repetitive inspections of the upper support of the nose landing gear (NLG), and related investigative and corrective actions if necessary; and also provides an optional terminating action for the repetitive inspections. Since we issued that AD, we have determined that previously allowed terminating actions no longer address the unsafe condition and that a new terminating action is necessary. This proposed AD would require installing a new enhanced manufacturing and maintainability (EMM) braking and steering control unit (BSCU) standard and adds airplanes to