

Proposed Rules

Federal Register

Vol. 75, No. 66

Wednesday, April 7, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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, HUD, Office of Federal Housing Enterprise Oversight.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Housing Finance Agency (FHFA) proposes to issue a regulation that would codify the authority and responsibility of FHFA to establish procedures for the submission and consideration of applications for awards of fees and other expenses by prevailing parties in adjudications against FHFA.

DATES: Comments regarding this Notice of Proposed Rulemaking must be received on or before May 24, 2010. For additional information, see

SUPPLEMENTARY INFORMATION.

ADDRESSES: You may submit your comments on the proposed regulation, identified as RIN "2590-AA29" by any of the following methods:

- *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-AA29, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.

- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA29, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The

package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- *E-mail:* Comments to Alfred M. Pollard, General Counsel may be sent by e-mail to RegComments@fhfa.gov. Please include "RIN 2590-AA29" in the subject line of the message.

- *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 e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by the agency. Include the following information in the subject line of your submission: "RIN 2590-AA29."

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. Comments

The Federal Housing Finance Agency (FHFA) invites comments on all aspects of the proposed regulation, and will consider all relevant comments before issuing the final regulation. Copies of all comments will be posted without change, including any personal information you provide, such as your name and address, on the FHFA Web site at: <http://www.fhfa.gov>. In addition, copies of all comments received will be 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, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel (FHFA) at (202) 414-6924.

II. 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.¹ FHFA was established to oversee the prudential operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Federal Home Loan Banks (collectively with Enterprises, regulated entities) and to ensure that they operate in a safe and sound manner including being capitalized adequately; foster liquid, efficient, competitive and resilient national housing finance markets; comply with the Safety and Soundness Act and rules, regulations, guidelines and orders issued under the Safety and Soundness Act, and the respective authorizing statutes of the regulated entities; and 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 regulated entities are consistent with the public interest.

The Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFBB) were abolished on July 30, 2009, one year after the enactment of HERA. However, the regulated entities continue to operate under regulations promulgated by OFHEO and FHFBB and such regulations are enforceable by the Director of FHFA until such regulations are modified, terminated, set aside, or superseded by the Director of FHFA.²

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. Because FHFA conducts adversarial adjudications, FHFA proposes to issue a regulation to codify the responsibility of FHFA to establish procedures for the submission and consideration of applications for awards of fees and other expenses by prevailing parties. After the proposed regulation is published in its final form, the OFHEO "Implementation of the Equal Access to

¹ See Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, Section 1101 of HERA.

² See section 1302 and section 1312 of HERA.

Justice Act" regulation at 12 CFR part 1705 will be removed. This proposed regulation is substantially the same as that OFHEO regulation.

III. Section-by-Section Analysis

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

Subpart A—General Provisions

Section 1203.1 Purpose and Scope

Proposed § 1203.1 would provide 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 would also provide 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 proposed section would set forth definitions for the regulation.

Adjudicative officer would be defined as 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 would be defined as 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 would be defined as 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 would be defined as 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 would be defined as 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 would be defined as the Director of the Federal Housing Finance Agency.

Fees and other expenses would be defined as including 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 would be defined as the Federal Housing Finance Agency.

Final disposition date would be defined as 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 would be defined as 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 would be defined as 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

Proposed § 1203.3 would set out the eligibility requirements for parties seeking fees and expenses.

Proposed paragraph (a) of this section would require 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 would also require 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.

Proposed paragraph (b) of this section would require 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 organization that has a net worth of not more than \$7 million and not more than 500 employees.

Proposed paragraph (c) of this section would clarify 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 adversary 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

Proposed § 1203.4 would set out the standards for the award of fees and expenses.

Proposed paragraph (a) of this section would provide that an eligible party that files an application for award of fees and other expenses in accordance with this part would 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 would also explain 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 would be on the eligible party.

Proposed paragraph (b) of this section would provide that an eligible party that submits an application for award in accordance with this part would 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 would further explain that FHFA would have 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

Proposed § 1203.5 would set forth what fees and expenses a party may collect under this part.

Proposed paragraph (a) of this section would provide that awards of fees and other expenses would 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. This paragraph would also explain that, except as provided in proposed § 1203.6, an award for the fee of an attorney or agent could not exceed \$125 per hour and an award to compensate an expert witness could not exceed the highest rate at which FHFA pays expert witnesses. However, under this paragraph, an award could 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.

Proposed paragraph (b) of this section would set 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.

Proposed paragraph (c) of this section would provide 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 would consider the prevailing rate for similar services in the community in which the services were performed.

Proposed paragraph (d) of this section would provide that fees and other expenses incurred before the date on which an adversary adjudication was initiated would 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

Proposed § 1203.6 would provide that FHFA could 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 would include the limited availability of attorneys or agents who are qualified to handle certain types of adversary adjudications. This section would provide that FHFA could 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

Proposed § 1203.7 would provide that 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.

Subpart B—Information Required From Applicants

Section 1203.10 Contents of the Application for Award

Proposed § 1203.10 would provide, under proposed paragraph (a) of this section, that an application for award of fees and other expenses under either proposed § 1203.4(a) or § 1203.4(b) would 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 proposed § 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.

Proposed paragraph (b) of this section would require that an application for award under proposed § 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 would also require the application to show that the applicant is a small entity as defined in 5 U.S.C. 601.

Proposed paragraph (c) of this section would set out the requirements for an application for award under proposed § 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

Proposed § 1203.11 would state 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

Proposed § 1203.12 would provide the requirements for documenting fees and expenses.

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

Proposed paragraph (b) of this section would require 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

Proposed § 1203.20 would set out the procedures for filing and service of an application for award.

Proposed paragraph (a) of this section would require 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.

Proposed paragraph (b) of this section would require 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.

Proposed paragraph (c) of this section would require 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

Proposed § 1203.21 would set out the procedure for responding to the application for an award.

Proposed paragraph (a) of this section would require 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 proposed paragraphs (b) and (c) of this section. This paragraph would also require 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 would include with the response either supporting affidavits or a request for further proceedings under proposed § 1203.25.

Proposed paragraph (b) of this section would provide 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 would extend 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.

Proposed paragraph (c) of this section would provide that agency counsel could request that the adjudicative officer extend the time period for filing a response. This paragraph would further provide that if agency counsel does not answer 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

Proposed § 1203.22 would provide that within 15 days after service of a response, the applicant could file a reply. This section would further provide 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 proposed § 1203.25.

Section 1203.23 Comments by Other Parties

Proposed § 1203.23 would provide that any party to the underlying adversary adjudication other than the applicant and agency counsel could 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 would also provide 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

Proposed § 1203.24 would provide that the applicant and agency counsel could 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. This section would further require 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

Proposed § 1203.25 would set forth procedures for further proceedings on an application for award.

Proposed paragraph (a) of this section would provide 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 proposed § 1203.27, the adjudicative officer could 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 would further

provide that 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. Last, this paragraph would require that the issue as to whether the position of FHFA in the underlying adversary adjudication was substantially justified must be determined on the basis of the whole administrative record that was made in the underlying adversary adjudication.

Proposed paragraph (b) of this section would require that a request that the adjudicative officer order further proceedings under this section would 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

Proposed § 1203.26 would set forth the requirements for the decision of the adjudicative officer.

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

Proposed paragraph (b) of this section would provide 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 would provide that the initial decision would become the final decision of FHFA after 30 days from the day it was issued, unless review is ordered under proposed § 1203.27.

Proposed paragraph (c) of this section would provide that in all initial decisions, the adjudicative officer would 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 would also provide 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.

Proposed paragraph (d) of this section would provide that in initial decisions on applications filed pursuant to proposed § 1203.4(a), the adjudicative officer would 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.

Proposed paragraph (e) of this section would provide that in decisions on applications filed pursuant to proposed § 1203.4(b), the adjudicative officer would 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

Proposed § 1203.27 would provide that within 30 days after the adjudicative officer issues an initial decision under proposed § 1203.26, either the applicant or agency counsel could request the Director to review the initial decision of the adjudicative officer. This section would also provide that the Director or his or her designee could also decide, on his or her own initiative, to review the initial decision. Under this section, whether to review a decision would be 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 proposed § 1203.25.

Section 1203.28 Judicial Review

Proposed § 1203.28 would provide 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

Proposed § 1203.29 would provide that to receive payment of an award of fees and other expenses granted under this part, the applicant would 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 would 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.

Regulatory Impacts

Paperwork Reduction Act

The proposed 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 proposed regulation under the Regulatory Flexibility Act and certifies that the proposed 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 an 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 proposes to amend 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 Answer to the application for award.
 1203.22 Reply to the answer.
 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.

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, test, or 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. 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.

(b) 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 Answer 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 answer, 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 answer 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 answer 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 answer.

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: April 1, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2010-7889 Filed 4-6-10; 8:45 am]

BILLING CODE 8070-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2010-0364; Directorate Identifier 2009-NE-27-AD]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce plc RB211 Trent 700 and Trent 800 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: In completing a review of Engine Manual repair/acceptance limits for titanium compressor shafts, Rolls-Royce has found the specified limits to be incorrect such that the shot peened surface layer at life critical features (the axial dovetail slots) may have been inadvertently removed in-service. Removal of the shot peened layer results in increased vulnerability of the part to tensile stresses, which could reduce the life of the shaft to below the published life limits.

We are proposing this AD to prevent failure of the intermediate-pressure (IP) and high-pressure (HP) shaft, which could result in an overspeed condition, possible uncontained disc failure and damage to the airplane.

DATES: We must receive comments on this proposed AD by May 24, 2010.

ADDRESSES: You may send comments by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow

the instructions for sending your comments electronically.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- **Fax:** (202) 493-2251.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647-5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: james.lawrence@faa.gov; telephone (781) 238-7176; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2010-0364; Directorate Identifier 2009-NE-27-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.).