

## Notices

Federal Register

Vol. 46, No. 46

Tuesday, March 10, 1981

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

#### Implementation of the Equal Access to Justice Act

**AGENCY:** Office of the Chairman, Administrative Conference of the United States.

**ACTION:** Requests for comments on draft model rules.

**SUMMARY:** The Chairman, Administrative Conference of the United States, requests comment on draft model regulations for the implementation of the Equal Access to Justice Act. [Pub. L. 96-481, 94 Stat. 2325.] The act provides for the award of attorneys fees and other expenses to parties who prevail over the Federal government in certain administrative proceedings. It requires the agencies conducting these proceedings to adopt regulations establishing procedures for making awards, after consultation with the Chairman of the Administrative Conference of the United States. The model regulations are intended to serve as a guideline for agencies in developing their own regulations. These draft model regulations have been developed with the assistance of an interagency task force composed of volunteers from numerous Federal departments and agencies.

**DATES:** Comments must be received on or before April 24, 1981.

**ADDRESSES:** Interested persons are invited to submit written comments to the Office of the Chairman, Administrative Conference of the United States, 2120 L Street, N.W., Suite 500, Washington, D.C. 20037. The comments received will be available for public inspection at the same address from 9 a.m. to 5:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Babcock, Executive Director, or Mary Candace Fowler, attorney,

Administrative Conference of the United States, 2120 L Street, N.W., Suite 500, Washington D.C. 20037; (202) 254-7020.

**SUPPLEMENTARY INFORMATION:** On October 21, 1980, the President signed the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, authorizing the award of attorneys fees and other expenses to certain parties who prevail against the United States in administrative and judicial proceedings. Under the Act, eligible parties are entitled to an award fees and expenses unless the United States can demonstrate that its position in the litigation was substantially justified, or other circumstances make an award unjust. The Act applies to civil court actions (other than tort actions) brought by or against the United States and to "adversary adjudications" conducted by Federal agencies, defined as administrative adjudications under section 554 of the Administrative Procedure Act, 5 U.S.C. 554, in which the position of the United States is represented by counsel or otherwise. For categories of parties are eligible for fee awards: (1) individuals whose net worth is no more than \$1 million; (2) businesses (including sole owners of unincorporated businesses), associations and organizations with a net worth of no more than \$5 million and no more than 500 employees; (3) organizations that are tax exempt under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with no more than 500 employees, regardless of net worth, and (4) agricultural cooperative associations as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with no more than 500 employees, regardless of net worth.

The act assigns to agencies the responsibility to make fee awards in their own covered proceedings. Under section 203 of the Act (which is codified in 5 U.S.C. 504), each agency is to establish uniform rules for the submission and consideration of applications for awards, after consultation with the Chairman of the Administrative Conference of the United States. We interpret this provision to mean that each agency must give the Chairman a reasonable opportunity to review and suggest changes to its regulations before they are adopted.

We have decided to prepare model regulations in order to facilitate this process. We believe sound, workable

guidelines will simplify the agencies' task and, while not binding on agencies, will encourage the uniformity of procedures, to the extent practicable, contemplated by Congress. The model regulations will also facilitate consultation between agencies and the Chairman of the Administrative Conference, which will focus on agencies' proposed departures from the model rules, and the reasons for them.

The Act is scheduled to become effective on October 1, 1981. The Administrative Conference plans to issue final model regulations in May, 1981, to provide agencies with adequate time to adopt their own regulations before the effective date. To meet this schedule, we have set a 45-day deadline for comments on the draft model rules.

Realistically, agency regulations for processing applications for awards cannot be identical. Each agency's rules will have to correspond to its existing organization and procedures. The awards process may also be affected by the types of covered proceedings handled by an agency and their complexity. The model regulations should both provide a common basic approach to the process of awarding fees and, to the extent possible, incorporate alternative procedures that reflect the differences among agencies.

We invite commenters to help us achieve these goals by evaluating the draft model rules in the context of particular agencies' activities and procedures. We also encourage Federal agencies to solicit the views of their constituencies on the draft, so that we will have some indication of whether these procedures seem to potential applicants to be workable.

In general, as directed by the Act, the draft rules concern the procedures for making awards. They are not intended to establish substantive standards for determination, such as whether the government's position in a proceeding is substantially justified, except to the extent that such standards have been clearly suggested by Congress in the Act or in legislative history. The draft also includes provisions which define or explain the terms used in the statute. We invite comment on whether the draft rules go too far, or not far enough, in fleshing out the substantive provisions of the Act.

The draft model regulations include six subparts covering the following

subjects: (1) general provisions explaining the Act and its standards and eligibility requirements; (2) the fees and expenses allowable under the Act; (3) the contents of applications for awards; (4) procedures for considering application; (5) payment of awards, and (6) procedures for rulemaking to increase the ceiling on hourly rates for attorneys. A detailed explanation of the draft model follows.

The model contains a few terms that require a brief explanation. The Act assigns certain responsibilities for making fee determinations to the "adjudicative officer," defined in 5 U.S.C. 504(b)(1)(D) as "the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication." In the vast majority of cases, of course, this will be an administrative law judge, but it may not always be. We have used the statutory term throughout to refer to this official. In drafting model rules, we have also sought some way of distinguishing between the agency as a deciding or award-paying body and the agency as party to the proceeding. The draft rules generally use "counsel representing the agency" or "agency counsel" to indicate the agency as a party to the proceeding, "the agency" to indicate the agency in its other roles. The terms are used only for convenience, since the Act applies whether or not the person representing the agency in a proceeding is an attorney. In drafting their own rules, agencies could use terms that reflect their own practices, or the actual names of litigating units of the agency.

#### Subpart A—General Provisions

Subpart A contains general provisions explaining the Equal Access to Justice Act and its coverage and some miscellaneous provisions. Several of these are simple and require no extended explanation: § 0.101 states the purpose of the agency's rules; § 0.102 sets forth the effective date of the Act; § 0.107 would include whatever delegations of authority an agency finds necessary to implement the regulations. Other provisions deal with the proceedings covered, eligibility, the standards for awards, and proceedings involving more than one agency.

*Covered Proceedings:* Section 0.103 identifies the types of proceedings subject to the Act. The section describes what is meant by an adversary adjudication and states that certain ratemaking and licensing proceedings are not covered by the Act. As adopted by a particular agency, the section

would also include a list of the specific kinds of proceedings at that agency that are ordinarily covered.

The section reflects our belief that Congress intended the Act to have broad applicability in cases involving the legality of individual conduct rather than prospective, legislative issues. Thus we have interpreted the exceptions to the Act narrowly. Reports from both houses of Congress on S. 265, a bill substantially identical to the Act as passed, state that the exception for licensing proceedings to suspend, annul, modify or condition a license (H. Rep. 96-1418, House Judiciary Committee Report on S. 265, September 26, 1980, at 15; S. Rep. 96-253, Senate Judiciary Committee Report on S. 265, July 20, 1979, at 17), and the proposed rule reflects this approach. Similarly, we have interpreted the ratemaking exception to the Act to include only prospective ratemaking and not proceedings to determine the legality of past rates or practices. Under paragraph (c) of the proposed section, prevailing parties on proceedings including both covered and excluded issues could still seek an award of the fees allocable to the covered issues. In some cases, of course, the issues will be difficult to separate. For example, determination of a future lawful rate and the legality of the present rate may be inextricably linked, or denial of a license renewal may be one of several possible sanctions for alleged illegal conduct. We invite comment on how these situations should be handled under the Act.

The Act applies to adversary adjudications "under section 554" of the Administrative Procedure Act. Paragraph (b) of § 0.103 would permit the award of fees and expenses when agencies voluntarily use the formal procedures of section 554 as well as when those procedures are required. We believe this approach will avoid extended debate about whether particular proceedings are "under" section 554. If the proceeding otherwise qualifies as an "adversary adjudication" and involves issues complex enough, or individual rights important enough, to justify the use of formal procedures, we think it is within the intent of the Act. We encourage comment on this question, however.

*Eligible parties:* Section 0.104 deals with eligibility for awards under the Act. The section recites the categories of parties eligible for awards and the applicable limitations on net worth and number of employees. The Act states that eligibility should be determined as of the time the adversary adjudication was initiated, and the rules reflect a

literal interpretation of this provision. In some cases, however, an eligible party may intervene in, or be joined in, a proceeding well after it begins. Should the Act be construed to require determination of a party's eligibility on the date that party begins participation in the proceeding?

We propose to define "employees" to include all persons regularly providing services for remuneration for the applicant as of the date the proceeding began. Should the definition make some special provisions for part-time employees or seasonal workers? Is there any other existing test of "employment"—such as one widely used by a Federal agency—that would be fair and simpler to use? Commenters who object to the definition proposed here should suggest suitable alternatives.

The section also contains three provisions intended to prevent ineligible parties from obtaining fee awards indirectly. We believe that such provisions are consistent with the purpose of the Act, and that they may be especially important since the Act applies even if the party seeking an award has initiated the litigation. However, the Act contains no explicit authority for any of these limits. We invite comment on both the legality and the advisability of the provisions.

Paragraph (f) would make it clear that when an applicant has apparently disposed of assets or incurred financial obligations in order to meet the net worth limitations of the Act, the transfers of assets or the obligations will be disregarded in calculating the applicant's net worth. Transactions for less than reasonably equivalent value would be presumed to be for this purpose.

In paragraph (g), the draft rule deals with the problem of affiliates, such as wholly-owned subsidiaries or businesses under common control. Some or all of these affiliates might be eligible for awards if treated separately, but not if considered together. The draft provision requires aggregation of the net worth and number of employees of affiliated individuals or entities. Although the Act does not explicitly authorize this type of treatment for affiliated entities, permitting such entities to receive awards seem logically inconsistent with the eligibility provisions of the Act. We invite comment on whether this approach is permissible under the statute.

Assuming it is permissible, additional questions remain. The draft rule defines "affiliates" as individuals or entities connected to an applicant by a chain or

ownership or control of a majority interest. Many other definitions are possible, and commenters are invited to suggest alternatives. Instead of providing for aggregation of the net worth and employees of all affiliated entities, regardless of individual size, the rule could cover only entities affiliated with individuals or entities that are themselves ineligible. There may be circumstances in which entities may have interests different from those of their affiliates, and should be treated separately. Should the rules provide for this? Should special provisions be made for non-business organizations? We encourage comments and suggestions on all these issues.

Finally, paragraph (h) of § 0.104 provides that parties will not be eligible for awards when it appears they have participated in proceedings only on behalf of other persons or entities that are ineligible. The rule is designed to prevent ineligible parties planning litigation with the government from using other organizations, which are eligible, to conduct their litigation in order to qualify for fee awards. We note that it is not intended to exclude intervenors on behalf of the "public interest" from eligibility; the legislative history indicates that the Congress considered this question and specifically declined to do so. Rather, it is intended to reach the situation in which an ineligible entity solicits and finances participation by an eligible one. It is very difficult, however, to draw clear lines in this area. As an example, how should the rules treat a trade association whose members include both eligible and ineligible businesses? We invite comment on whether this type of rule should be included at all and, if so, how it can be drafted more precisely.

*Standards for awards:* Section 0.105 sets out the Act's standards for making fee awards. The applicant is ordinarily entitled to an award if the agency's position in the proceeding (or in a significant, separable issue) was not substantially justified, with the burden of proof being on the agency to demonstrate the justification of its position. The draft rule's definition of "substantially justified" reflects the legislative history's explanation that the standard is "reasonableness in the law and fact." H. Rep. 96-1434, Conference Report on H.R. 5612, September 30, 1980, at 22. Because a position that is reasonable at one stage in a proceeding may become unreasonable at a later point—when, for example, new information comes to light—the rule refers to the agency's position at relevant times. Beyond this, we have not

attempted to include in the rules substantive standards for determining when a position is substantially justified. These determinations will, we believe, depend a great deal on the particular substantive laws and litigating postures an agency ordinarily deals with. We welcome comment, however, on whether the grant of rulemaking authority now contained in the Act permits agencies to go further in developing standards, and on whether we should attempt to develop them.

Under paragraph (b) of § 0.105, awards could include fees and expenses incurred before the date a proceeding begins, if they are reasonably necessary to prepare for the proceeding. Paragraph (c) explains the Act's provision that awards may be reduced or denied if applicants unduly protract proceedings, or if special circumstances make an award unjust.

*Awards against other agencies:* There are certain situations in which an agency may be a party to proceedings before another agency. Sometimes this occurs because the deciding agency is institutionally separate from the agency that litigates cases before it. The Occupational Safety and Health Review Commission, for example, is an independent agency that hears cases brought by the Occupational Safety and Health Administration of the Department of Labor. Similarly, the National Transportation Safety Board hears cases in which the Federal Aviation Administration seeks revocation of airman certificates. In other situations, an agency such as the Department of Justice may voluntarily seek to intervene in a proceeding conducted by another agency, in which the deciding agency may also have a litigating unit involved. What happens if these "outside" agencies take unjustified positions that would ordinarily entitle the opposing party to an award?

Narrowly interpreted, the Act seems to contemplate that the deciding agency and the litigating agency will necessarily be the same. We believe, however, that the purpose of the Act would be ill served if these dual-agency situations, particularly those of the first type, were not covered. The burden on the private party will be no less because the litigating agency is one different from the deciding agency. In fact, if both the agency conducting the proceeding and an intervening agency take unjustified positions, the burden on the private party may increase significantly.

Logically, the deciding agency would have to make the award in this situation (since its adjudicative officer handled the underlying proceeding), but the litigating agency or agencies should be

responsible for payment. This presents some difficult jurisdictional questions, however. Does the deciding agency's general authority to issue orders that bind all parties to the case, including a separate litigating agency, extend to an order that the litigating agency is liable for an award of fees? Can an agency limit participation in proceedings before it to agencies willing to honor any fee award made in the proceeding? The answer to this question may vary depending on whether an agency has an explicit statutory right to participate or intervene in another agency's proceedings.

The draft rules include a preliminary treatment of this problem. Section 0.106 would condition a litigating agency's right to participate in proceedings before the deciding agency on its willingness to accept the latter agency's determination as to awards. We believe the problem needs a fuller exploration, however, and we encourage comments on whether the Act contemplates awards in these situations, whether deciding agencies have authority to make litigating agencies pay awards, and whether the draft rule is a reasonable approach to the problem.

#### Subpart B—Allowable Fees and Expenses

This subpart states generally the fees and expenses that may be awarded under the Act. § 0.201 covers the fees and expenses of attorneys, agents and expert witnesses. The provision restates the Act's direction that awards should be based on prevailing market rates for services, applying this principle even where the services are provided by employees of the party at a reduced rate. This approach is generally consistent with the legislative history of S. 265. See H. Rep. 96-1418, House Judiciary Committee Report on S. 265, September 26, 1980, at 15. We note, however, that the salary and overhead arrangements of in-house attorneys employed by businesses are usually quite different from those of attorneys in private practice. Should awards for the services of these in-house attorneys be made at the prevailing rates for private attorney's services? Also, how should the rules deal with awards for the services of individuals, or non-attorney employees of businesses, who represent themselves, without legal assistance?

The provision also includes the Act's ceilings on fees: \$75 per hour for attorneys or agents and, for expert witnesses, the agency's maximum rate for the payment of such experts. (Included in brackets is an hourly rate, \$24.09, equivalent to the current

government-wide ceiling of \$50,112.50 per year on employee salaries.)

The provision identified some factors to be used in determining the reasonableness of the fee request—the customary fee of the attorney or agent for similar services, the actual time spent on the case, and the time reasonably spent in light of the difficulty or complexity of the issues in the proceeding. These factors are based loosely on those used by courts in awarding attorneys fees. They differ from those standards (developed primarily in Civil Rights Act cases), however, in that greater emphasis is placed on the "regular rate" of the attorney, agent or expert witness, when that person is in the business of acting as an attorney, agent or expert witness. We propose to include them for general guidance to applicants and to adjudicative officers making awards; they are not intended to provide a hard formula for making determinations on the reasonableness of fees. We would like to know whether commenters believe this approach will be helpful, or whether the standards will raise more questions than they answer.

Section 0.201 provides that reasonable expenses of attorneys, agents and witnesses may be itemized separately from hourly charges, but does not identify the types of expenses covered. "Reasonable expenses" is intended to include the types of expenses customarily charged to clients, such as travel expenses or photocopying, but not items ordinarily included in hourly fees, such as secretarial services. It is intended, moreover, to include only the reasonable portion of such expenses, not items such as first class airfare or duplicating costs far above prevailing rates. Should the rules specifically list the type of expenses that may be included? Should they explicitly cover fees and expenses of paralegals?

Section 0.202 covers awards for the cost of studies, reports and tests. The rule restates the Act's provision that awards may include the reasonable cost of these items when they are necessary for the preparation of the party's case. If the charge for an item exceeds a reasonable cost for the preparation of similar items, the applicant could recover the reasonable portion of the cost. Parties may sometimes enter evidence that is cumulative or studies that are far more elaborate than necessary to make their points. The phrase "reasonable cost" is also intended to be a safeguard against the possibility that agencies would have to pay for such unnecessary items.

What standards for awards should be applied when two or more parties are

jointly represented by the same attorneys, but not all of the parties are eligible for an award of fees? Award could be based on the actual amount the eligible party has agreed to pay for the representation. Alternatively, an agency making an award could determine a reasonable fee for the entire representation, and then award some proportionate share based on the total number of parties jointly represented or on the proportion of the actual fees the eligible party has agreed to pay. Should the model rules specify one of these approaches, and if so, which one?

#### Subpart C—Form of Application

Subpart C identifies the information to be included in an application for an award of fees and expenses. The Act itself requires submission of "an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. 504(a)(2). The Act also requires the applicant to allege that the position of the agency was not substantially justified.

The goal of the draft provision is to solicit sufficient information on these subjects for agency personnel to make an informed determination on the application without unduly burdening the applicant. The provisions divide the application into three parts: the basic application (§ 0.301), the statement of net worth (§ 0.302), and statements of fees and expenses (§ 0.303).

In the basic application, the applicant is to identify itself, the proceeding, and the issues on which it believes it has prevailed and as to which the agency's position was not substantially justified. The applicant then states its type (e.g., individual, agricultural cooperative, etc.) and provides basic information on eligibility: the number of employees on the date the proceeding began, for applicants other than individuals; a description of affiliated individuals or entities, if any, for applicants other than individuals and sole owners of unincorporated businesses; and a statement that the applicant's net worth when the proceeding began did not exceed the ceiling for its type, for all applicants except tax exempt organizations and agricultural cooperatives. In lieu of the net worth declaration, a tax exempt organization would be required either to state that it was included in the current edition of IRS Bulletin 78 (which identifies most

qualified tax exempt organizations) when the proceeding began, or, if the organization is a religious organization which is not required to seek IRS approval of its tax exempt status, to submit a description of the organization and an explanation of its belief that it is exempt. An agricultural cooperative would have to include a copy of its charter or articles of incorporation and bylaws to demonstrate its eligibility. The application is to be signed by the applicant or a responsible official of the applicant, who must state that it is true and complete and that he or she is aware that making a false statement in the application is a felony under 18 U.S.C. 1001.

The applicant would not be required to include documentary proof of its statements as to number of employees, affiliated corporations, or tax-exempt status. We believe the statement, subject to the penalties of 18 U.S.C. 1001, should be adequate in the first instance. An agency could request documentation if there were any reason to question the accuracy of the statements made. We invite comments on whether additional documentation should be required on these items in the initial application.

All applicants except tax exempt organizations and agricultural cooperatives would also have to file a statement of net worth under § 0.302. The statement would list the applicant's assets and liabilities, grouped as described in the rule. We solicit comments on whether the groups identified in the rule will provide sufficiently detailed information to permit an informed decision on eligibility, and also on whether they will be convenient and workable for applicants.

The legislative history of S. 265, which was substantially identical to the Act as passed, states that assets should be valued at their acquisition cost, rather than their fair market value. H. Rep. 96-1418, House Judiciary Committee Report on S. 265, September 26, 1980, at 15; S. Rep. 96-253, Senate Judiciary Committee Report on S. 265, July 20, 1979, at 17. We believe this reflects a Congressional intent to permit the lowest possible valuation of assets, which in most cases will be the acquisition cost. Sometimes, however, fair market value will be lower than acquisition cost. It seems unfair, for example, to require an applicant to value common stock at acquisition cost if the value of the stock has dropped considerably since purchase. The draft rule thus would permit valuation of assets at the lower of acquisition cost or fair market value. On the other hand, a system in which only acquisition cost is

used will be easier to administer, since fair market value may often be difficult to prove. We invite comments on whether the draft rule's approach is fair, whether it is workable, and whether it accurately reflects the intent of Congress.

For the convenience of applicants who may have prepared a financial statement for another purpose (such as to obtain a bank loan or to file with an income tax return) near the time the proceeding started, the rule would permit the filing of net worth information in any other form that is sufficient to make an eligibility determination. The applicant would have to include a statement describing any adjustments necessary for the material to reflect net worth on the date the proceeding began. The optional form is designed primarily for applicants whose net worth is well below the ceiling. For these applicants a precise figure is obviously irrelevant, and, consequently, there is need for less detail on this point. This provision is, in effect, a form of "tiering" of the kind encouraged by the Regulatory Flexibility Act, Pub. L. 96-354, 5 U.S.C. 601-612.

Finally, the net worth statement is to include either a description of any transfers of assets or obligations incurred within the three months before the beginning of the proceeding that reduced the applicant's net worth below the applicable net worth ceiling, or a statement that none occurred. One possible disadvantage of this provision as drafted is that it will be difficult to enforce. If an applicant, whether deliberately or because of an error made in good faith, incorrectly reports that no such transactions occurred, the agency will have no readily available information with which to evaluate this assertion. A broader provision, requiring the reporting of all transfers made or obligations incurred, all those that reduce net worth, or all those involving assets or obligations above a certain value, would afford information with which the agency, rather than the applicant, could determine whether these transactions brought the applicant within the eligibility limit, and whether they were undertaken with that purpose. On the other hand, a broader provision would be more burdensome on applicants, and would unnecessarily inconvenience those applicants who were clearly eligible at all times during the three-month period and who nevertheless would be required to report their transfers. Which approach is preferable? If the reporting requirement should be broader, how broad should it

be? Also, is the three-month period a reasonable one?

The applicant could request confidential treatment for its statement of net worth by submitting it in a sealed envelope. Under the rule, a statement so submitted would not be disclosed to the public except to enforce 18 U.S.C. 1001 (if the applicant is prosecuted for making a false official statement) or as required by law. In practical terms, "as required by law" means an agency would not disclose the information unless it received a request under the Freedom of Information Act, 5 U.S.C. 552, and then determined that the material could not be withheld under the exemptions to that Act. (In this case, the one most likely to apply would be Exemption 4, 5 U.S.C. 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential.") We have included this provision because we believe applicants should not have to forfeit their privacy to any greater extent than is legally required in order to receive an award. It is unclear, however, whether these statements can usually be withheld under the Freedom of Information Act, and we solicit comment on this issue.

The third section in the subpart explains what must be included in statements of fees and expenses. The provision would require a separate itemized statement of work performed, and fees and expenses claimed, for each attorney (or firm), witness, or agent for whose services an award is requested, verified by the person (or representative of the firm) who performed the services. The application would not have to include documentation of expenses incurred, but records of those expenses would have to be kept in accordance with the Internal Revenue Service's requirements for documentation of business expenses, so that the expenses could be verified on request by the agency. We invite comment on whether the section is specific enough to elicit the information necessary to determine the reasonableness of a request for a free award.

#### *Subpart D—Procedures for Considering Fee Applications*

Proposed subpart D contains the procedures that would govern the consideration of applications for awards. We believe these procedures should achieve two objectives. First, they should be easy to integrate with agencies' existing procedures. Inevitably, the model rules will not conform exactly to existing agency procedures, which vary enormously. They may also duplicate provisions in

an agency's general procedural regulations. In some places the draft rules make explicit cross-references to material presumably included in an agency's existing regulations; in others, they do not, although they could. Ultimately, each agency will probably adopt rules that vary from the model rules in order to conform with existing practice; many may be able to shorten this section significantly by reference to existing procedures. We encourage commenters to consider subpart D in this light, offering suggestions as to where the rules should defer to existing practice and where, on the contrary, separate uniform standards for this Act are more appropriate.

The proceedings on the fee application should also be as brief and simple as possible. Each party must have a full and fair opportunity to challenge the other party's assertions and to present opposing evidence. But the applicant must be allowed to receive any award to which it is entitled within a reasonable period of time. Procedures should not permit the agency to frustrate the purpose of the Act by pursuing unreasonable or unnecessary objections to a legitimate application. Nor should unfounded challenges to an agency's showing of substantial justification be permitted to drive up the costs of administering the Act. It should be kept in mind that the time spent by the applicant's counsel in successfully prosecuting an application will also be compensable; thus an additional incentive for establishing procedures that are as simple as possible exists here. We invite comments on whether proposed subpart D adequately balances these interests.

The proposed rules in subpart D provide for two responsive pleadings: counsel representing the agency from which an award is sought may answer the application, and the applicant may reply to the answer. The application and responsive pleadings are to be filed and served under the agency's usual rules. The rules would encourage decision on a written record whenever possible. Responsive pleadings that rely on facts not in the record would have to be accompanied by affidavits or by requests for further proceedings to develop the necessary evidence. On request or on his or her own initiative, the adjudicative officer could order such proceedings, including informal conferences, oral argument, additional written submissions, or evidentiary hearings, when necessary to provide an adequate record for decision.

The draft rules direct the adjudicative officer to issue a decision on the fee

application as soon as possible after the conclusion of the proceedings conducted, including written findings in accordance with the mandate of the Act. When applicable, the decision is also to include an allocation of responsibility for payment of an award among agencies participating in the proceeding. This situation may arise when both a litigating unit of an agency conducting a proceeding and an intervening agency have taken unjustified positions. The rules do not include specific standards for such allocation, since we believe the adjudicative officer should make this determination based on the history of the particular proceeding. Should the rules more closely limit the adjudicative officer's discretion in this area? The model rules provide for discretionary agency review of the award determination. They also include a cross-reference to the Act's provision for judicial review.

The draft rules contain various deadlines for the filing of pleadings. The time allowed in many cases is somewhat short; even with these deadlines, however, a deserving applicant might have to wait a long time before obtaining an award. The 30-day deadline for filing an application is set by the statute, and the draft rules reflect our belief that the agencies cannot legally extend this deadline. We intend, however, that the other deadlines could be extended as necessary according to agencies' normal procedures. In this context, do the time limits provided seem reasonable? Should the model rules encourage agencies to use their own standard time limits for responsive pleadings instead?

The rules also direct adjudicative officers to hold necessary proceedings and issue decisions on applications for awards as promptly as possible. We considered setting a time limit, such as 30 days after filing of the last document or conclusion of the hearing, for issuance of the adjudicative officer's award determination, but concluded that such a limit might not adequately provide for situations in which an officer's current case load is very heavy or the issues presented in proceedings on the award are especially difficult. Should there be a specific deadline for decisions?

The rules would strongly encourage settlement on awards. They provide that counsel representing the agency may defer filing an answer objecting or consenting to an award for 30 days if he or she has agreed with the applicant to negotiate a settlement. This provision is not intended to limit settlement negotiations to 30 days, but only to

provide that amount of time for informal discussions before the agency must take a formal position on the merits of the application.

The rules also state (in § 0.406) that awards may be settled either in connection with a settlement of the underlying issues in the proceeding or separately. Simultaneous settlement of the merits of a proceeding and of related attorneys' fee claims may potentially create a conflict of interest between parties and their attorneys. We believe, however, that when an award of fees is a likely possibility in a proceeding, attorneys fees will inevitably be a consideration in settlement negotiations. Permitting a settlement of both aspects of the proceeding at once will be more direct and efficient than requiring a two-part settlement. We invite comments on the advisability of this approach.

The rule provides that proposed settlements involving awards would be handled according to an agency's standard settlement procedures. We believe that this approach will be more efficient and sensible than setting up a special settlement procedure for awards of fees. Since, however, some agencies' existing settlement procedures do not involve adjudicative officers, there is a potential conflict between this approach and the Act's direction that the adjudicative officer determine whether the position of the agency was substantially justified. We believe this conflict is more apparent than real, since in a settlement situation counsel for the agency has effectively agreed not to contest the allegation that its position lacked substantial justification. We invite comments, however, on whether this interpretation of the Act is correct, as well as on whether, as a matter of policy, the model rules should establish a separate procedure under which proposed settlements involving fee awards are always submitted to the adjudicative officer for review. If the rules do establish a separate settlement procedure, should they limit the power of the adjudicative officer, or of the agency, to disapprove a proposed settlement agreed to by counsel for the litigating arm of the agency?

A few features of subpart D require more explanation. § 0.402 of the draft specifies when applications can be filed. The Act requires the submission of applications within 30 days of a final disposition in the adversary adjudication. The section attempts to explain when such a final disposition may occur, as well as when an applicant may have prevailed before that time (when the agency has taken final action on a significant, separable issue in the

proceeding). The legislative history reveals Congress' intent to define "prevailing" broadly, as it has been in case law under existing statutes:

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. An award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker v. Mathews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1133 (9th Cir. 1974). H. Rep. 96-1434, Conference Report on H.R. 5612, September 30, 1980, at 21-22.

To guide our efforts to apply these standards in an administrative context, we invite comment on whether a party to an administrative proceeding can prevail on an issue before final disposition of that issue, and on what clear guidelines can be developed to explain when this occurs. This question should be considered in light of another provision of the Act, section 504(c)(1), which states that if a court reviews the agency's decision in the adversary adjudication, only the court can make a fee award.

Under § 0.405, parties to proceedings other than the applicant and the agency could file comments on an application or on the agency's answer. In multiparty proceedings, other parties may feel they have some stake in whether the applicant receives an award. Additionally, their views on the reasonableness of the request or on the justification of the agency's position as a party to the proceeding may be helpful. On the other hand, these parties do not have a direct financial interest in the award determination, and they should not be permitted to prolong award proceedings simply to inconvenience an applicant who may be a competitor or have interests generally adverse to theirs. Unless the adjudicative officer believes that the public interest requires additional exploration of matters in the comments, these parties would not be permitted to participate further in award proceedings. Is this a reasonable, fair way of handling third-party participation? Should other parties be allowed to participate at all?

Under § 0.409, either the agency unit that is a party to the proceeding or the applicant may seek review of the adjudicative officer's determination on the application. The agency would have discretion to deny review; it could also decide to review the decision on its own initiative. The rule provides that the agency would apply its ordinary

standard of review, except that the adjudicative officer's determination on three questions—whether the agency's position was substantially justified, whether the applicant unduly prolonged the proceeding, and whether special circumstances make an award unjust—would be reversible only for abuse of discretion. The Act explicitly assigns determination of these three issues to the adjudicative officer rather than the agency, without stating whether the agency can review the determination. For a decision by an adjudicative officer to be completely unreviewable by the agency, however, would be inconsistent with traditional agency practice. The draft model rule is intended to achieve the Congressional intent in a way that takes into account the usual decision-making process of agencies. We invite comment on how well it succeeds.

#### Subpart E—Payment

This subpart of the draft explains how an applicant who has received a favorable determination on an application may obtain payment. To avoid any appearance of footdragging or unnecessary delay by the agency, it would commit the agency to pay within 60 days after the applicant shows it is entitled to payment. The rule also states that an agency will not pay an award if any party has sought court review of the agency's action on the award or in the underlying proceeding. This appears to be required by the Act (5 U.S.C. 504(c)(1)), which provides that if a court reviews the agency's decision in the underlying proceeding, *only* the court may make an award. Note that this statutory provision seems to withhold from the agency the ability to make any payment to an applicant if any party to the proceeding asks for judicial review of the underlying decision, even if the applicant has not initiated the appeal. Can the statute be construed in any way, consistent with its terms, that will avoid this result?

Should the model rules also provide for interim fee payments to parties who are so short of funds that they may be unable to complete a proceeding at the agency level without an award? Such a rule would promote the purpose of the Act in hardship cases; however, it may well be beyond the scope of the authority granted agencies by the statute. An interim payment program could also prove very challenging to administer. If interim fee payments should be allowed, what standard of need should be applied? How strong a showing should the applicant have to make that it is likely to prevail and that the agency's position is likely to be found not substantially justified? What,

if any, security should the recipient of an interim payment have to provide to guarantee repayment in case the recipient is later found not to be entitled to the award?

#### Subpart F—Rulemaking on Maximum Rates for Attorneys' Fees

The Act provides that agencies may, by rule, provide for payment of attorneys at rates higher than \$75 per hour, if necessary because of inflation or because of factors such as the limited number of qualified attorneys available. The subpart includes basic provisions restating the statutory provision and describing the process for filing a petition for rulemaking. The subpart does not cover the interrelationship between such a rulemaking proceeding and any adversary adjudications occurring contemporaneously. Should higher rates adopted in a rulemaking be applied to all awards made after adoption of the rule, or only to awards for services provided after adoption of the rule? Should the model rules cover this issue at all?

These draft model regulations have been developed with the assistance of an interagency task force composed of volunteers from a number of Federal departments and agencies. The views and suggestions of task force members have been extremely helpful to the Office of the Chairman, and we gratefully acknowledge them. The text of the draft model regulations follows.

### PART 0—MODEL RULES FOR IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT

#### Subpart A—General Provisions

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#### Subpart B—Allowable Fees and Expenses

- 0.201 Attorney, agent and expert witness fee.
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#### Subpart C—Form of Application

- 0.301 Contents of basic application.
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#### Subpart D—Procedures for Considering Applications

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- 0.407 Further proceedings.
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#### Subpart F—Rulemaking on Maximum Rates for Attorney's Fees

- 0.601 General.
- 0.602 Petitions for rulemaking.

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 [5 U.S.C. 504(c)(1)]; 5 U.S.C. 575(c)(2).

#### Subpart A—General Provisions

##### § 0.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 and 504 note, provides for awarding attorney fees and other adjudication expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. Parties may be able to receive awards when they prevail over the agency, unless the agency's position in the proceeding was substantially justified. These rules define eligible parties and identify the kinds of proceedings covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.

##### § 0.102 When the Act applies.

The Act applies to any adversary adjudication pending before the agency at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final agency action occurs.

##### § 0.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this agency. An adversary adjudication is an adjudication under 5 U.S.C. 554 in which the position of this or any other agency, or any component of an agency, is represented by an attorney or other representative who enters an appearance and participates in the proceeding. The Act specifically excludes proceedings for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, but proceedings to determine the reasonableness of past rates or terms and conditions of service and proceedings to modify or revoke licenses are included if they are "adversary adjudications." For this

agency, cases ordinarily covered are: [Here list].

(b) If this agency orders a particular matter to be determined as an adversary adjudication under the procedures set out in 5 U.S.C. 554, the Act will apply, and this agency will so state in its order designating the matter for hearing.

(c) If a proceeding includes both issues covered by the Act and issues specifically excluded, such as a case involving the modification of a license as well as the renewal of a license, any awards made will include only fees and expenses related to covered issues.

#### § 0.104 Eligibility of applicants.

(a) In order to be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). For the purpose of determining eligibility, the "party" shall be the person or entity identified in the order or notice initiating the proceeding or permitting intervention in it. All conditions of eligibility set out in this subpart and in subpart C must be satisfied.

(b) The types of eligible applicants are as follows:

(1) Individuals with a net worth of not more than \$1 million;

(2) Sole owners of unincorporated businesses if the owner has a net worth of \$5 million or less and not more than 500 employees;

(3) Charitable or other organizations exempted from taxation by section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) having not more than 500 employees;

(4) Cooperative associations as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141(a)) having not more than 500 employees, and

(5) All other partnerships, corporations, associations or public or private organizations having \$5 million or less net worth and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) Whether an applicant who owns an unincorporated business will be considered as an "individual" or a "sole owner of an unincorporated business" will be determined by whether the applicant's participation in the proceeding is related primarily to individual interests or to business interests.

(e) The employees of an applicant include all those persons regularly providing services for remuneration for

the applicant on the date on which the proceeding was initiated, whether or not at work on that date.

(f) An applicant's net worth includes the value of any assets disposed of for the purpose of meeting an eligibility standard and excludes any obligations incurred for this purpose. Transfers of assets or obligations incurred for less than reasonable equivalent value will be presumed to have been made for this purpose.

(g) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. "Affiliates" are other individuals, corporations or other entities directly or indirectly connected to the applicant by a chain of ownership or control of a majority of the voting shares or other interest.

(h) An applicant is not eligible if it appears from the facts and circumstances that it has participated in the proceeding only on behalf of other persons or entities that are ineligible.

#### § 0.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses unless the position of an agency during the proceeding, or with respect to an ancillary or subsidiary issue in the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit, was substantially justified. To avoid an award, the agency must carry the burden of proof that its position at relevant times was reasonable in fact and law.

(b) Awards for fees and expenses incurred before the date on which a proceeding was initiated are allowable only if the applicant can demonstrate that they were reasonably incurred in preparation for the proceeding.

(c) Awards will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if other special circumstances make an award unjust.

#### § 0.106 Awards against other agencies.

No other agency may intervene or otherwise participate as a party in proceedings of this agency covered by this part unless it has agreed that it will pay any fee awards for which this agency determines it is liable under these rules, subject to judicial review.

#### § 0.107 Delegations of authority.

[This section is necessary only if a department or agency now delegates authority to take final agency action, in adjudications to which this Act will apply, to subsidiary officers or bodies.] The [Department Review Board] is hereby delegated the authority to take

final action on matters pertaining to the Equal Access to Justice Act 5 U.S.C. 504, in actions arising under [List acts or types of cases.] The [Agency, Secretary] may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

### Subpart B—Allowable Fees and Expenses

#### § 0.201 Attorney, agent and expert witness fees.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses. Awards will be calculated on this basis even if the services were provided by an employee of the applicant or were made available free or at a reduced rate.

(b) Under the Act, an award for the fees of an attorney or agent may not exceed \$75.00 per hour, regardless of the actual rates charged by the attorney or agent. An award for the fees of an expert witness may not exceed the highest rate at which this agency pays expert witnesses, which is [\$24.09 per hour], regardless of the actual rates charged by the witness. These limits apply only to fees; an award may include the reasonable expenses of the attorney, agent, or witness as a separate item.

(c) In determining the reasonableness of the fees sought for attorneys, agents or expert witnesses, the adjudicative officer shall consider factors bearing on the request, such as:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for like services;

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

(3) The time actually spent in the representation of the applicant, and

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding.

#### § 0.202 Studies, analyses, engineering reports, tests and projects.

The reasonable cost (or the reasonable portion of the cost) of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded to the extent that:

(a) The charge for the service does not exceed the prevailing rate payable for similar services, and

(b) The study or other matter was necessary to the preparation of the party's case.

**Subpart C—Form of Application****§ 0.301 Contents of basic application.**

(a) Applications shall be in writing and shall contain (1) the name of the applicant and the identification of the proceeding, (2) a declaration that the applicant believes that it has prevailed, and an identification of each issue as to which the position of an agency or agencies in the proceeding was not substantially justified, (3) a statement of the applicant's type (in terms of the types of applicants described § 0.104), (4) for each applicant other than an individual as defined in § 0.104, a statement of the number of its employees on the date on which the proceeding was initiated, (5) for each applicant other than an individual or a sole owner of an unincorporated business, a description of any affiliated individuals or entities, as the term "affiliated" is defined in § 0.104, or a statement that none exist, (6) where applicable, a statement that the applicant has a net worth not more than the ceiling established for its type, as of the date on which the proceeding was initiated, and (7) any other matter that the applicant believes appropriate.

(b) Applications filed by a tax exempt organization described in § 0.104 shall also contain either (1) a statement that the applicant was listed, on the date of the initiation of the proceeding, in the then-current edition of IRS Bulletin 78, "Organizations qualified under section 170(c) of the Internal Revenue Code of 1954," or (2) if the applicant is a tax exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a brief description of the organization and a statement of the basis for its belief that it is exempt. Qualified tax exempt organizations are not required to file a statement of net worth.

(c) Applications filed by a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) shall also include a copy of the cooperative's charter or articles of incorporation and of its bylaws. Qualified cooperatives are not required to file a statement of net worth.

(d) All applications shall be signed by the applicant, or a responsible and knowledgeable official of an applicant that is not an individual. The individual signing the application shall state that the application and the statement of net worth (if any) are true and complete to the best of his or her information and belief, and that he or she understands that the application and statement are official statements subject to section 1001 of the United States Criminal Code

(18 U.S.C. 1001), which provides that making a false official statement is a felony punishable by fine and imprisonment. The individual signing the application shall also provide the address and telephone number at which he or she can be contacted to verify or explain any information in the application.

**§ 0.302 Statements of net worth.**

(a) A statement of net worth must be filed by all applicants except qualified tax exempt organizations and cooperatives.

(b) If the applicant wishes its statement of net worth to be kept confidential, it should submit its statement with its application in a sealed envelope marked with the applicant's name and labeled "Confidential Statement of Net Worth". If a statement of net worth is so labeled it will not be disclosed to the public except as may be required by law, or for the purpose of enforcing 18 U.S.C. 1001, and after 10 days notice to the applicant.

(c) The statement must be filed and served with the application. It need not be served on parties to the proceeding other than the counsel for the agency over which the applicant asserts that it has prevailed.

(d) The statement may be in either standard or optional form.

(1) The standard form statement will include a listing of all the assets and liabilities of the applicant and any affiliates (as defined in § 0.104(g)) as of the date the proceeding was initiated.

(i) Assets must be grouped in the following categories, and the value must be given for each category: cash on hand and in banks; time deposits; bonds, stocks and other securities; debts owed to the applicant (including accounts receivable); merchandise inventory; furniture and fixtures; machinery and equipment; vehicles, aircraft and vessels; real property; intangibles, and all other assets. Individuals and sole proprietors of unincorporated businesses must also list a value for all personal property, including household effects. Each asset may be valued at the lower of either acquisition cost or fair market value as of the date on which the proceeding was initiated.

(ii) Liabilities will be grouped in the following categories: installment debt; accounts payable; unpaid principal of notes and bonds; mortgage and other secured debt; accrued and unpaid taxes, and all other liabilities. Stockholders equity, partnership capital and the like are not liabilities for the purpose of the statement.

(iii) The applicant's and any affiliates' net worth (total assets less total liabilities) shall be stated.

(2) An optional form statement may be in any form convenient to the applicant that provides full disclosure and is sufficient to determine whether the applicant qualifies under the standards set out in this part. For example, if the applicant prepared a financial statement to obtain a bank loan at approximately the same time that the proceeding was initiated, the applicant may submit a copy of that statement, accompanied by a description of any additions or adjustments needed to disclose the applicant's net worth, as defined here, at the time the proceeding was initiated. Or, if the applicant is a business corporation or partnership, it may wish to submit copies of Schedule L to its Federal income tax returns filed at the beginning of the year in which the proceeding was initiated and at the beginning of the next year. Again, the applicant must accompany the copies with a statement describing any additions or adjustments necessary to determine whether the applicant was qualified, under the standards set forth in this part, on the date on which the proceeding was initiated. The agency or adjudicative officer has discretion to require an applicant to file a standard form statement if the optional form is not believed to provide sufficient disclosure.

(3) all statements of net worth shall describe any transfers of assets from or obligations incurred by the applicant or any affiliate, occurring in the three month period prior to the date on which the proceeding was initiated, that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were none, the applicant shall so state.

**§ 0.303 Statements of fees and expenses.**

(a) All applications shall be accompanied by an itemized statement or statements of the fees and expenses of attorneys, expert witnesses, and agents, incurred in connection with the proceeding, for which an award is sought.

(b) A separate itemized statement, showing the hours spent in working in connection with the proceeding by each individual and a description of what was accomplished, the rate at which fees were computed, the total claimed, and the total amount agreed to be paid by the applicant, must be submitted for each person, firm or other entity for which the applicant seeks an award.

(c) The rules governing the allowance of fees and expenses, set forth in subpart B of this part, shall be followed. Expenses must be verifiable in accordance with the standards published by the Internal Revenue Service for the documentation of business expenses.

(d) Each separate statement must be verified by the person, firm or other entity performing services for which an award is sought, in accordance with the requirements set forth in paragraph (d) of § 0.301.

#### Subpart D—Procedures for Considering Applications

##### § 0.401 Filing and service of documents.

All applications for an award of fees, answers, replies, comments, and other pleadings and documents related to applications shall be filed in the same manner as other pleadings in the proceeding and served on all parties to the proceeding [cross-reference to agency's general rule on filing and service of documents in hearing proceedings], except as provided in § 0.302(c) for Confidential Statements of Net Worth.

##### § 0.402 When applications can be filed.

(a) The Act provides that an application for an award may not be made later than thirty days after final agency action on the proceeding. This agency does not have the power to allow exceptions for later filings, and thus the applicant must file and serve the application no later than 30 days after the later of (1) the date on which this agency declines to review an initial decision or other proposed disposition of the proceeding by an adjudicative officer, or (2) the date on which the agency issues an order disposing of petitions to reconsider the agency's final action, or (3) if no petitions for reconsideration were filed, the date on which they were due.

(b) An application may be made at any time, before the last filing date as determined under paragraph (a) of this section, that the applicant believes that it has prevailed. An applicant has prevailed when the agency has taken favorable action of one of the types specified in subparagraphs (1) through (3) of paragraph (a) of this section with respect either to the entire proceeding or to an ancillary or subsidiary issue in the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit.

##### § 0.403 Answers to applications.

(a) *General.* Within 15 days after service of the application, counsel

representing the agency against which an award is sought shall file an answer of one of the types described in paragraphs (b) through (d) of this section. Unless counsel requests and is granted an extension of time for filing, failure to file an answer within the 15-day period will be treated as a consent to the award requested.

(b) *Consent.* If the agency counsel does not object to the award requested, he or she shall file an answer consenting to the award.

(c) *Negotiation.* If the agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file an answer stating their intent to negotiate a settlement. Within 30 days thereafter the agency counsel shall file an answer consenting or objecting to an award, or a proposed settlement on the application.

(d) *Objection.* If the agency counsel objects to the award requested, he or she shall file an answer objecting, which shall explain in detail the agency counsel's position and identify the facts relied on in support. If the objection is based on any alleged facts not already in the record of the proceeding, the agency counsel shall include with the objection either supporting affidavits or a request for further proceedings under § 0.407.

##### § 0.404 Replies.

Within 15 days after service of an objection, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under section § 0.407.

##### § 0.405 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application or an answer within 15 days after service of the application or answer. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires additional exploration of matters raised in the comments.

##### § 0.406 Settlements.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the issues in the underlying proceeding, or after the underlying proceeding has been concluded, according to [cross-reference to agency's general rule on settlements]. If a prevailing party and agency counsel

agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

##### § 0.407 Further proceedings.

(a) *General.* Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or the agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, including an informal conference, oral argument, additional written submissions or an evidentiary hearing, as provided in this section. Further proceedings should not be considered routine and, where necessary, will be conducted as promptly as possible.

(b) *Informal conferences; oral argument.* The adjudicative officer may schedule an informal conference to discuss an application or an oral argument on any issues related to the application whenever he or she believes the conference or argument may be helpful in resolving or in encouraging settlement of the issues.

(c) *Written submissions.* The adjudicative officer may order an applicant, agency counsel, or a party filing comments under § 0.405 to make additional written evidentiary submissions whenever he or she believes they are necessary to provide a record adequate to decide the issues related to the application. A request that the adjudicative officer order written submissions shall specifically identify the information sought and shall explain why the information is necessary to decide the issues.

(d) *Hearings.* The adjudicative officer shall hold an oral evidentiary hearing only on disputed issues of material fact that cannot be adequately resolved through written submissions. A request for hearing shall specifically identify the disputed issues and the evidence to be presented at the hearing and shall explain why an oral evidentiary hearing is necessary to resolve the issues. The procedures for the hearing are those that apply to the underlying proceeding.

##### § 0.408 Decisions.

The adjudicative officer shall issue a decision on the application as promptly as possible after the filing of the last document or the conclusion of the hearing. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, but shall not disclose the net worth of the applicant. The decision on the reasonableness of the

amount requested shall include an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings or whether other special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

#### § 0.409 Finality; agency review.

(a) *Finality of adjudicative officer's decision.* Unless the applicant or agency counsel seeks review under paragraph (b) of this section or the agency issues an order taking review of the decision on its own initiative, the adjudicative officer's decision on the application shall become a final decision of the agency 30 days after it is issued.

(b) *Agency review.* Either the applicant or the agency counsel may seek review of the adjudicative officer's decision on the fee application by filing and serving [exceptions or a petition for review] within [20] days after issuance of the decision. The agency may also decide to review an adjudicative officer's decision on its own initiative. Whether to review a decision is a matter within the discretion of the agency. Procedures on review will be those described in [cross-reference to agency's regular review procedures]. The standard of review will be that ordinarily applied to [recommended or] initial decisions, except that an adjudicative officer's determination on the justification of the agency's position as a party, on whether the applicant unduly prolonged the proceeding and on whether other special circumstances make an award unjust will be reversible only for abuse of discretion. The agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

#### § 0.410 Judicial review.

Judicial review of final agency decisions on awards may be obtained as provided in 5 U.S.C. 504 (c)(2).

#### Subpart E—Payment

##### § 0.501 Payment of awards.

An applicant seeking payment of an award shall submit to the [Comptroller or other paying official of the paying

agency a copy of the agency's final award along with a statement that it will not seek review (or further review) of the agency decision, or on the award, in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the applicant the amount awarded within 60 days after receiving the applicant's submission, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

#### Subpart F—Rulemaking on Maximum Rates for Attorneys Fees

##### § 0.601 General.

If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the agency may adopt regulations providing that attorneys fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this part. The agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

##### § 0.602 Petitions for rulemaking.

Any person may file with the agency a petition for rulemaking to increase the maximum rate for attorneys fees. The petition [should be filed in accordance with agency's rule on petitions for rulemaking] [should be filed with the (appropriate office) of the agency, where it will be given a docket number and placed in a public file]. The petition should identify the rate the petitioner believes the agency should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

(Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 [5 U.S.C. 504(c)(1)]; 5 U.S.C. 575(c)(2))

Dated: March 4, 1981.

Reuben B. Robertson,  
Chairman.

[FR Doc. 81-7415 Filed 3-9-81; 8:45 am]

BILLING CODE 6110-01-M

#### DEPARTMENT OF COMMERCE

##### International Trade Administration

##### Bucknell University; Decision on Application for Duty-Free Entry of Scientific Article

The following is a decision on an application for duty-free entry of a scientific article pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897) and the regulations issued thereunder as amended (15 CFR 301).

A copy of the record pertaining to this decision is available for public review between 8:30 A.M. and 5:00 P.M. in Room 3109 of the Department of Commerce Building, 14th and Constitution Avenue, NW, Washington, D.C. 20230.

Docket No. 80-00380. Applicant: Bucknell University, Lewisburg, PA 17837. Article: Microthermometry Apparatus. Manufacturer: Chaixmecca Ltd., France. Intended use of article: See notice on page 68984 in the *Federal Register* of October 17, 1980.

Comments: No comments have been received with respect to this application.

Decision: Application approved. No instrument or apparatus of equivalent scientific value to the foreign article, for such purposes as this article is intended to be used, is being manufactured in the United States.

Reasons: The foreign article has a temperature range of  $-180^{\circ}$  Centigrade ( $^{\circ}$ C) to  $+600^{\circ}$ C. The National Bureau of Standards advises in its memorandum dated December 12, 1980 that (1) the capability of the foreign article described above is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign article for the applicant's intended use.

The Department of Commerce knows of no other instrument or apparatus of equivalent scientific value to the foreign article, for such purposes as this article is intended to be used, which is being manufactured in the United States.

(Catalog of Federal Domestic Assistance Program No. 11.105, Importation of Duty-Free Educational and Scientific Materials)

Frank W. Creel,

Acting Director, Statutory Import Programs Staff.

[FR Doc. 81-7200 Filed 3-9-81; 8:45 am]

BILLING CODE 3510-25-M