

MEMORANDUM

TO: Members of the Ad Hoc Committee to Consider Revised Model Rules for Implementation of the Equal Access to Justice Act
FROM: Alix Tindall Webb
DATE: April 4, 2019
RE: Revisions to the Model Rules for Implementation of EAJA

This project will review and revise the Conference’s 1986 model rules for the implementation of the Equal Access to Justice Act (EAJA). The committee will update the rules to account for changes in law and practice in the intervening thirty years. In addition, the committee will revise the rules in order to promote greater clarity and comprehensibility for the agency officials and private litigants who make use of the rules.

This memo examines the EAJA rules that agencies have promulgated since 1986. All of these agency-promulgated rules draw heavily upon the 1986 model rules issued by the Conference, but they modify them in various respects. Many of these changes may merit revisions to the Conference’s model rules to account for changes in law and practice. This memo should inform the committee’s deliberations as it examines and revises the Conference’s 1986 model rules.

I. BACKGROUND

In 1980, President Jimmy Carter signed EAJA, which authorized the award of attorneys’ fees and other expenses to parties who prevail against the federal government in certain administrative and judicial proceedings.¹ The purpose of this legislation was to, among other things, “diminish the deterrent effect of seeking review of, or defending against, governmental action by providing” the award of certain costs and fees against the United States.²

¹ See Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504 (2018)).

² Equal Access to Justice Act § 202(b)(1).

A. Selected Provisions and Definitions of EAJA

The full text of EAJA, which is codified at section 504 of Title V of the United States Code, appears as an appendix to this memorandum. The following section lays out certain provisions and definitions that bear upon the modifications to the 1986 model rules made by agencies.

Section 504(a)(1) of Title V of the United States Code addresses the award of fees and other expenses in adjudicative proceedings and provides as follows:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.³

Section 504(a)(2) addresses the materials a party seeking an award of fees and other expenses must include in his or her application for such fees and expenses. This section provides:

A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency 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. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.⁴

Subsequent paragraphs of section 504(a) also set forth the circumstances in which an agency adjudicative officer may reduce or deny an award and the circumstances in which the adjudicative officer shall award fees and other expenses relating to defending against an excessive demand by an agency.⁵

Section 504(b) sets forth applicable definitions. For example, the statute defines “fees and other expenses” to include:

³ 5 U.S.C. § 504(a)(1) (2018).

⁴ *Id.* § 504(a)(2).

⁵ *Id.* § 504(a).

the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of \$ 125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)⁶

The statute also defines a "party" as:

(i) an individual whose net worth did not exceed \$ 2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$ 7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 [1986] (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code [26 USCS § 501(a)], or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (a)(4), a small entity as defined in section 601 [5 USCS § 601]⁷

Section 504(b) also defines an "adversary adjudication" as:

(i) an adjudication under section 554 of this title [5 USCS § 554] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31 [31 USCS §§ 3801 et seq.], and (iv) the Religious Freedom Restoration Act of 1993⁸

Section 504(c)(2) of the statute provides that a party other than the United States that is dissatisfied with an EAJA fee determination may within 30 days of that determination "appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication."⁹ Section 504(d) provides that awards

⁶ *Id.* § 504(b)(1)(A).

⁷ *Id.* § 504(b)(1)(B).

⁸ *Id.* § 504(b)(1)(C).

⁹ *Id.* § (c)(2).

“shall be paid by any agency over which the party prevails from any funds made available to the agency. . . .”¹⁰

B. ACUS and EAJA

The Administrative Conference of the United States (ACUS or Conference) has played a role in the administration of EAJA since its promulgation. In addition to its other EAJA-related activities, Section 504(c)(1) of Title V of the United States Code also provides that: “[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.”¹¹ To carry out this statutory charge, the Chairman of the Conference issued its first set of model rules for the implementation of EAJA in 1981.¹² These rules applied exclusively to the award of fees and other expenses in the context of agency adjudications; they did not address EAJA awards in the context of litigation conducted in federal courts. The model rules covered matters such as eligibility, allowable fees and expenses, information required of applicants, procedures for considering applications, and agency and judicial review of award decisions.¹³

In 1985, Congress amended and reauthorized EAJA.¹⁴ Among other things, these amendments to EAJA increased net worth eligibility limits, added small local governmental units as parties eligible for an award, and removed sunset provisions from EAJA as originally enacted in 1980.¹⁵ Responding to these statutory revisions, the Chairman of the Conference issued revised model rules in 1986.¹⁶ Like the 1981 model rules, the 1986 model rules related solely to EAJA awards in the context of agency adjudications and were designed to help agencies amend

¹⁰ *Id.* § (d).

¹¹ *Id.* § (c)(1).

¹² Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981); Implementation of Equal Access to Justice Act, 46 Fed. Reg. 15,895 (Mar. 10, 1981).

¹³ *See* Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. at 32,900; Implementation of Equal Access to Justice Act, 46 Fed. Reg. at 15,895.

¹⁴ Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183 (1985) (codified as amended at 5 U.S.C. § 504 (2018)); *see also* Equal Access to Justice Act; Agency Implementation, 50 Fed. Reg. 46,250 (Nov. 6, 1985).

¹⁵ *Compare* 99 Stat. 183, *with* Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980).

¹⁶ Model Rules: Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986) (previously codified at 1 C.F.R. pt. 315); *see also* Equal Access to Justice Act; Agency Implementation, 50 Fed. Reg. at 46,250.

their own rules for the implementation of EAJA, while continuing “to promote the uniformity of procedure contemplated by the [Act].”¹⁷

Since 1986 many agencies have relied upon this revised set of model rules to establish or modify their own rules for the implementation of EAJA. In light of the changes in law and practice in the last thirty years, the Conference has decided to revisit the 1986 model rules and to make appropriate revisions. This will result in a formal recommendation to be considered by the ACUS Assembly (unlike earlier versions of the model rules, which were promulgated by the Office of the Chairman) and, upon its adoption, the Conference will publish that formal recommendation in the Federal Register and transmit it to the agencies with appropriate commentary.

To assist in this process, this memorandum describes the modifications that four federal agencies have made to the 1986 model rules in their adoption of rules for the implementation of EAJA in the context of agency adjudications.¹⁸ The agency rules discussed are those of the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), and the National Labor Relations Board (NLRB). These agency rules should help inform the committee’s discussion of what changes, if any, should be made to the 1986 model rules.

II. POTENTIAL MODIFICATIONS TO THE 1986 MODEL RULES

Several agencies have relied upon the Conference’s 1986 model rules to adopt their own rules for EAJA awards in the context of agency adjudications. This section discusses each of the Conference’s 1986 model rules and examines how four agencies, CFPB, FTC, SEC, and NLRB, have built upon the Conference’s 1986 model rules to adopt their own rules for the implementation of EAJA. This memo focuses on these four agencies because they have well-developed rules which rely extensively upon the 1986 model rules. Obviously there are other agencies that have extensive interaction with EAJA and have developed EAJA rules. We welcome their input throughout this process as the purpose of this project is to consider the input of as many agencies as possible that interact with EAJA.

¹⁷ Equal Access to Justice Act; Agency Implementation, 50 Fed. Reg. at 46,250; *see also* Model Rules: Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. at 16,659.

¹⁸ Although ACUS staff reviewed federal case law related to agency adjudications involving EAJA, the cases turn largely on substantive, rather than procedural, issues that are outside the purview of ACUS.

A. AGENCY ADOPTION OF EAJA RULES

This section discusses the process by which the CFPB, FTC, SEC, and NLRB developed rules for the implementation of EAJA and the extent to which each of these agencies relied upon the 1986 model rules.

1. *CFPB*

In 2014, the CFPB adopted a final rule for the implementation of EAJA.¹⁹ After considering one public comment that was offered on the interim final rule published by the CFPB in 2012, the CFPB adopted the interim final rule “without change.”²⁰ In drafting its final rule implementing EAJA, the CFPB “used the 1986 ACUS model rules as a point of departure, modifying them to put them in plain language, to reflect more recent amendments to the Act, and to make certain changes the Bureau believe[d were] warranted.”²¹ In this regard, the CFPB final rule made several changes to the 1986 model rules to reflect the amendments to EAJA made by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which amended various pieces of existing legislation, including EAJA, and aimed to, among other things, “create a more cooperative regulatory environment” for small businesses.²²

SBREFA amended EAJA in four ways that are relevant to administrative proceedings. First, it amended EAJA to set forth the circumstances in which an adjudicative officer should award fees and other expenses related to defending against an agency’s excessive demand.²³ In this regard, SBREFA amended EAJA to state that:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this

¹⁹ Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071 (2018)).

²⁰ See Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117 (June 29, 2012); Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. at 7,569.

²¹ *Id.*; Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117.

²² *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, § 203, 110 Stat. 847.

²³ *Id.* § 231.

paragraph shall be paid only as a consequence of appropriations provided in advance.²⁴

SBREFA also amended EAJA by adding to it a definition of the term “demand” for the purposes of the Act.²⁵ As a result of SBREFA, a demand in the context of EAJA “means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.”²⁶ The statute also raised EAJA’s cap on “attorney or agent fees” to \$125 per hour from \$75 per hour for the purposes of fees and expenses awarded under the Act.²⁷ Finally, SBREFA amended EAJA by adding “a small entity as defined in” section 601 of Title V of the United States Code, which relates to government organizations and employees, to the Act’s definition of “party.”²⁸

2. *FTC*

In 1986, the FTC issued final rules for the implementation of EAJA that, among other things, took into account the 1985 amendment and reauthorization of EAJA.²⁹ These rules contained revisions to the FTC’s 1981 rules for the implementation of EAJA.³⁰ Although, the FTC’s final rules, like its 1981 rules, were “designed to adopt the procedures established by” the 1986 model rules, they did “contain some changes from the [1986 model rules] which were adopted to harmonize the [1986 model rules] with established Commission adjudicative procedure and terminology.”³¹

3. *SEC*

In 1989, after publishing for comment proposed revised rules implementing EAJA, the SEC adopted revised procedural rules implementing EAJA in light of the 1985 amendments to the

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5 (2018)).

³⁰ *Id.*; *see also* Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Oct. 5, 1981).

³¹ Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. at 48,910; *see also* Miscellaneous Revisions and Corrections, 50 Fed. Reg. at 53,302.

Act.³² According to the SEC, its revised procedural rules depart from the Conference’s 1986 model rules to the same extent that the SEC’s earlier EAJA rules differed from the 1981 ACUS model rules and “where the 1986 Model Rule revisions were not applicable to Commission proceedings or were otherwise unnecessary.”³³

4. *NLRB*

In 1986, the NLRB issued revised rules and regulations to account for the 1985 amendments to EAJA after a notice-and-comment period during which the agency did not receive comments.³⁴ In promulgating these revised rules and regulations, the NLRB gave “due consideration to the model rules of the Administrative Conference of the United States where appropriate.”³⁵

B. ACUS MODEL RULES VS. AGENCY RULES

This section sets forth each of the Conference’s 1986 model rules. Where one or more of the four agencies studied made a revision to one of the 1986 model rules, it identifies that revision and then explains why the agency elected to modify it. Where the agencies reviewed did not alter the ACUS 1986 model rules, a notation to that effect has been made. Both the ACUS language and the language taken from the rules of each of the agencies studied are printed below without alteration.

1. *§ 315.101 Purpose of these rules.*

To implement the changes made by SBREFA to EAJA, the CFPB final rule modifies the “Purpose” section of the ACUS model rules to add a new paragraph (b), “When an eligible party

³² Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01 (2018)). *See also* Equal Access to Justice Rules, 54 Fed. Reg. 11,961 (Mar. 23, 1989); Equal Access to Justice Rules, 47 Fed. Reg. 609 (Jan. 6, 1982).

³³ Equal Access to Justice Rules, 54 Fed. Reg. at 53,050; *see also* Equal Access to Justice Rules, 54 Fed. Reg. at 11,961.

³⁴ *See* Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Oct. 9, 1986) (codified as amended at 29 C.F.R. pt. 102 (2018)). *See also* Procedural Rules Amendments, 51 Fed. Reg. 17,732 (May 15, 1986); Procedural Rules; Implementation of Equal Access to Justice Act, 51 Fed. Reg. 9,467 (Mar. 19, 1986).

³⁵ Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. at 36,223 (internal citation omitted).

will receive an award.”³⁶ This change is intended to, among other things, “clarify the circumstances under which the Bureau’s notice of charges may constitute a demand.”³⁷

SBREFA amended EAJA by adding to it a definition of the term “demand” for the purposes of the Act.³⁸ As a result of SBREFA, a demand in the context of EAJA “means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.”³⁹

1986 Model Rules	CFPB Final Rule
<p>§ 315.101 Purpose of these rules. The Equal Access to Justice Act, 5 U.S.C. 504 (called “the Act” in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency’s position was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.</p>	<p>§ 1071.100 Purpose. (a) In general. The Equal Access to Justice Act (the Act), 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the Bureau of Consumer Financial Protection (the Bureau). An eligible party may receive an award when it prevails over the Bureau, unless the Bureau’s position in the proceeding was substantially justified or special circumstances make an award unjust. This part describes the parties eligible for awards and the proceedings that are covered. This part also explains how to apply for awards, and the procedures and standards that the Bureau will use in ruling on those applications. (b) When an eligible party will receive an award. An eligible party will receive an award when: (1) It prevails in the adversary adjudication, unless the Bureau’s position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the Bureau was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or (2) The Bureau’s demand is substantially in excess of the decision of the adjudicative officer and is</p>

³⁶ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117 (June 29, 2012); *see also* Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Feb. 10, 2014).

³⁷ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117; *see also* Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. at 7,569. Other agencies, like the FTC, also revised its rules of practice to incorporate SBREFA’s statutory requirements, to make “technical and interpretive nonsubstantive changes to the rules governing claims under the Act,” and to “clarify certain provisions of the [FTC’s] existing EAJA rules.” *See, e.g.,* Organization, General Procedures, Rules of Practice for Adjudicative Proceedings, 63 Fed. Reg. 36,339 (July 6, 1998) (codified as amended at 16 C.F.R. pt. 0-1, 3 (2018)). Among other things, “[t]hese clarifying amendments provide[d] . . . additional information concerning filing time limits, procedures, and allowable expenses to assist persons eligible to file claims under EAJA.” *Id.*

³⁸ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, § 231, 110 Stat. 847, 862 (1996).

³⁹ *Id.*

	unreasonable when compared with that decision, under all the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. "Demand" means the express final written demand made by the Bureau prior to initiation of the adversary adjudication, but does not include a recitation by the Bureau of the statutory penalty in the notice of charges or elsewhere when accompanied by an express demand for a lesser amount. The relief requested in the Bureau's notice of charges issued pursuant to 12 CFR 1081.200(b)(3) may constitute the Bureau's demand only where the notice of charges was not preceded by an express final written demand.
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2. § 315.102 *When the Act applies.*

The SEC’s revised procedural rules for the implementation of EAJA modify section 315.102 of the 1986 model rules, “When the Act applies,” to add a sentence designed “to clarify that some proceedings which [were] technically open on October 1, 1981, [were] not subject to the Act.”⁴⁰ In this regard, the SEC revised procedural rules use the phrase “substantially concluded” “to exclude proceedings open but only awaiting completion of remedial action or formal closing or similar action.”⁴¹

1986 Model Rules	SEC Revised Procedural Rule
<p>§ 315.102 When the Act applies. The Act applies to any adversary adjudication pending or commenced before this agency on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in subpart B of these rules, has been filed with the agency within 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.</p>	<p>§ 201.32 When the Act applies. The Act applies to adversary adjudications described in § 201.33 pending or commenced before the Commission on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in these rules, has been filed with the Commission within 30 days after August 5, 1985. Proceedings which have been substantially concluded are not deemed pending under these rules although officially pending for purposes such as concluding remedial actions found in Commission orders or private undertakings.</p>

⁴⁰ Equal Access to Justice Rules, 47 Fed. Reg. 609 (Jan. 6, 1982); *see also* Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Dec. 27, 1989).

⁴¹ Equal Access to Justice Rules, 47 Fed. Reg. at 609; *see also* Equal Access to Justice Rules, 54 Fed. Reg. at 53,050. This modification is presumably irrelevant for the purpose of revising the 1986 model rules.

3. § 315.103 Proceedings covered.

The SEC revised procedural rules modify section 315.103 of the 1986 model rules, “Proceedings covered,” “to reflect the fact that the Commission does not conduct rate-making or licensing proceedings,” as well as “the Commission’s view that the Act does not authorize an agency to award fees against another agency or department of government as set forth in the Model Rules.”⁴² The SEC presumably made this change to reduce any confusion that might arise by including the language from the 1986 model rules stating that rate-making and licensing proceedings are not covered under EAJA, when the SEC does not itself conduct such proceedings.⁴³

The SEC’s modifications to the 1986 model rules also omit section 315.103(b) of those rules, which provides for “designation of a proceeding as an adversary adjudication for purposes of the Act even though not listed,” because, among other things, according to the SEC, “[t]here is [a] serious question whether the Act would permit payment of fees if the proceedings are not required to be under 5 U.S.C. 554 but are nonetheless voluntarily so conducted.”⁴⁴

1986 Model Rules	SEC Revised Procedural Rules
<p>§ 315.103 Proceedings covered. (a) The Act applies to adversary adjudications conducted by this agency. These are (i) adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding, and (ii) appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before agency boards of contract appeals as provided in section 8 of that Act (41 U.S.C. 607). Any proceeding in which this agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For this agency, the types of proceedings generally covered include: [to be supplied by the agency] Alt. 315.103(a): [for use by contract appeals boards] The Act applies to appeals of decisions of</p>	<p>§ 201.33 Proceedings covered. (a) The Act applies to adversary adjudications conducted by the Commission. These are on the record adjudications under 5 U.S.C. 554 in which the position of an Office or Division of the Commission as a party, not including amicus participation, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. See Appendix, 17 CFR 201.60. (b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.</p>

⁴² Equal Access to Justice Rules, 47 Fed. Reg. at 609; *see also* Equal Access to Justice Rules, 54 Fed. Reg. at 53,050.

⁴³ 5 U.S.C. § 504(b).

⁴⁴ Equal Access to Justice Rules, 47 Fed. Reg. 609 (Jan. 6, 1982); *see also* Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Dec. 27, 1989).

<p>contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before this board as provided in section 8 of that Act (41 U.S.C. 607).</p> <p>(b) This agency's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.</p>	
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4. § 315.104 Eligibility of applicants.

To conform with the SBREFA amendments to EAJA, the CFPB final rule modifies section 315.104 of the ACUS 1986 model rules, which pertains to “Eligibility of applicants” by adding a new paragraph, paragraph (6), to the corresponding section of the CFPB final rule.⁴⁵ The effect of this change is to include within the list of eligible EAJA applicants “any small entity, as that term is defined under 5 U.S.C. 601(6),” which pertains to government organization and employees.⁴⁶ SBREFA amended EAJA by adding “a small entity as defined in” section 601 of Title V of the United States Code to the Act’s definition of “party”.⁴⁷

1986 Model Rules	CFPB Final Rule
<p>§ 315.104 Eligibility of applicants.</p> <p>(a) 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). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.</p> <p>(b) The types of eligible applicants are as follows:</p> <p>(1) An individual with a net worth of not more than \$2 million;</p> <p>(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;</p> <p>(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;</p> <p>(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; and</p>	<p>§ 1071.103 Eligibility of applicants.</p> <p>(a) 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). The applicant must show that it meets all conditions of eligibility set out in this subpart.</p> <p>(b) The types of eligible applicants are as follows:</p> <p>(1) An individual with a net worth of not more than \$ 2 million;</p> <p>(2) The sole owner of an unincorporated business who has a net worth of not more than \$ 7 million, including both personal and business interests, and not more than 500 employees;</p> <p>(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;</p> <p>(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; or</p>

⁴⁵ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117 (June 29, 2012).

⁴⁶ *Id.*

⁴⁷ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, § 231, 110 Stat. 847, 862 (1996).

<p>(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.</p> <p>(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.</p> <p>Alt. 315.104(c): [for use by contract appeals boards] For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.</p> <p>(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.</p> <p>(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.</p> <p>(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.</p> <p>(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.</p>	<p>(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$ 7 million and not more than 500 employees.</p> <p>(6) For purposes of receiving an award for fees and expenses for defending against an excessive Bureau demand, any small entity, as that term is defined under 5 U.S.C. 601(6).</p> <p>(c) For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.</p> <p>(d) An applicant who owns an unincorporated business will be considered an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.</p> <p>(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.</p> <p>(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual or group of individuals, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate of that business for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.</p> <p>(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.</p>
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5. § 315.105 Standards for awards.

To conform with the SBREFA amendments to EAJA, the CFPB final rule replaces paragraph (b) of section 315.105 of the 1986 model rules pertaining to awards.⁴⁸ The provision in section 315.105, paragraph (b), of the 1986 model rules was moved to section 1071.104(a)(2) of the

⁴⁸ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117.

CFPB final rule. SBREFA amended EAJA to set forth the circumstances in which an adjudicative offer shall award fees and other expenses related to defending against an agency's excessive demand.⁴⁹ In this regard, SBREFA amended EAJA to state:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.⁵⁰

The new CFPB paragraph (b) is meant to clarify “that although the Bureau bears the burden of proof that its position was substantially justified, the fact that the Bureau did not prevail in the underlying proceeding does not create a presumption that its position was not substantially justified.”⁵¹

The SEC revised procedural rules also modify section 315.05 of the 1986 model rules by retaining a “reference to a substantially justified position as one ‘reasonable in law and fact.’”⁵² According to the SEC, “[t]he case law and the legislative history indicate that the test is inevitably one of reasonableness, the only question being one of degree.”⁵³ The SEC made this modification because, in the SEC's view, “[t]o abandon the formulation ‘reasonable in law and fact’ would suggest imposing a heavier burden on the staff than the legislative history and case law justify.”⁵⁴

The FTC final rules also modify the wording of the “Standards for awards” section of the 1986 model rules to “specify when an applicant may receive an award after ‘prevailing’ on less than the entire proceeding.”⁵⁵ In this regard, the FTC final rules provide that the applicant must have prevailed on a “substantive issue in the proceeding that is sufficiently significant and

⁴⁹ Small Business Regulatory Enforcement Fairness Act of 1996 § 231.

⁵⁰ *Id.*

⁵¹ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117; *see also* Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Feb. 10, 2014).

⁵² Equal Access to Justice Rules, 54 Fed. Reg. 11,961 (Mar. 23, 1989).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Oct. 5, 1981).

discrete to merit treatment as a separate unit,” rather than “a ‘significant and discrete substantive portion of the proceeding’” under the 1986 model rules.⁵⁶ This change was intended to more precisely express Congress’ intent to define “prevailing,” as expressed in the applicable legislative history.⁵⁷

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rules	FTC Final Rules
<p>§ 315.105 Standards for awards. (a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an ineligible prevailing applicant because the agency's position was substantially justified is on the agency counsel. (b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.</p>	<p>§ 1071.104 Standards for awards. (a) For a prevailing party: (1) An eligible prevailing applicant may receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit, unless the position of the Bureau was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant because the Bureau's position was substantially justified is on counsel for the Bureau. However, no presumption arises that the Bureau's position was not substantially justified simply because the Bureau did not prevail. (2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust. (b) For a party defending against an excessive demand: (1) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary</p>	<p>§ 201.35 Standards for awards. (a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified. The position of the Office or Division includes, in addition to the position taken by the Office or Division in the adversary adjudication, the action or failure to act by the Office or Division upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on counsel for an Office or Division of the Commission, which must show that its position was reasonable in law and fact.</p>	<p>§ 3.81 General provisions. (e) Standards for awards. (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with an entire proceeding, or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact. (2) An award will be reduced or denied if the applicant has unduly or</p>

⁵⁶ *Id.*

⁵⁷ *Id.*

	adjudication related to defending against the portion of a Bureau demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case. (2) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.		unreasonably protracted the proceeding or if special circumstances make the award sought unjust.
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6. §315.106 Allowable fees and expenses.

The CFPB final rule makes certain modifications to the 1986 model rules relating to fees and expenses.⁵⁸ In this regard, the section of the CFPB final rule pertaining to allowable fees and other expenses differs from the corresponding 1986 model rule section, section 315.106(b), in that “[u]nlike the model rule . . . [it] does not specify a rate for attorney fees, but instead refers back to the corresponding statutory provision in EAJA that sets forth the maximum hourly rate for attorney fees.”⁵⁹ According to the CFPB, “[t]his modification is intended to eliminate the need to promulgate a revised rule whenever the statutory maximum is increased.”⁶⁰ The CFPB final rule also modifies this model rule “to permit recovery of expert fees at the ‘reasonable rate at which the Bureau pays witnesses with similar expertise’ instead of the ‘highest rate’ paid by the Bureau.”⁶¹ This change ensures that expert witness compensation does not exceed the reasonable rate of pay, rather than the highest rate of pay.

Similarly, the SEC revised procedural rules modify section 315.106 of the 1986 model rules, “Allowable fees and expenses,” to replace the words “highest rate” with the words “reasonable rate.”⁶² This change also ensures that expert witness compensation does not exceed the reasonable rate of pay, rather than the highest rate of pay.⁶³

⁵⁸ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Equal Access to Justice Rules, 47 Fed. Reg. 609 (Jan. 6, 1982).

⁶³ *Id.*

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rule
<p>§315.106. Allowable fees and expenses.</p> <p>(a) Awards 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 reduced rate to the applicant.</p> <p>(b) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which this agency pays expert witnesses, which is [to be supplied by the agency]. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.</p> <p>(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:</p> <p>(1) If the attorney, agent or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;</p> <p>(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;</p> <p>(3) The time actually spent in the representation of the applicant;</p> <p>(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and</p> <p>(5) Such other factors as may bear on the value of the services provided.</p>	<p>§ 1071.105 Allowable fees and other expenses.</p> <p>...</p> <p>(b) No award for the fee of any attorney or agent under this rule may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the reasonable rate at which the Bureau pays witnesses with similar expertise. However an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.</p>	<p>§ 201.36 Allowable fees and expenses.</p> <p>...</p> <p>(b) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the reasonable rate at which the Commission pays witnesses with similar expertise. However, an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses. . . .</p>

(d) The reasonable 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 the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.		
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7. § 315.107 Rulemaking on maximum rates for attorney fees.

The SEC revised procedural rules omit section 315.107 of the 1986 model rules, “Rulemaking on maximum rates for attorney fees,” which provides “that attorney fees may be awarded at a rate higher than \$75 per hour.”⁶⁴ By making this change, the SEC declined to raise the \$75-per-hour limit on attorney fees by rule and to instead amend its rules when appropriate.⁶⁵

1986 Model Rules	SEC Revised Procedural Rules
<p>§ 315.107 Rulemaking on maximum rates for attorney fees.</p> <p>(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may adopt regulations providing that attorney 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. This agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.</p> <p>(b) Any person may file with this agency a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with [cross-reference to, or description of, standard agency procedure for rulemaking petitions.] The petition should identify the rate the petitioner believes this 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. This 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.</p>	<p>Omitted.</p>

⁶⁴ *Id.*

⁶⁵ *Id.*

8. § 315.108 Awards against other agencies.

None of the agencies studied modified this rule.

1986 Model Rules	
§ 315.108 Awards against other agencies. If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.	The agencies reviewed did not modify this section of the 1986 model rules.

9. § 315.109 Delegations of authority.

The CFPB interim rule makes certain changes to the 1986 model rules to promote simplicity. Specifically, it strikes much of the verbiage in 1986 model rule section 315.109 on “Delegation of Authority” for clarity.⁶⁶

The SEC also modifies the “Delegation of Authority” section of the 1986 model rules by adding to its rules a “provision[] not in the Model rules.”⁶⁷ This provision “would delegate authority to the Chief Administrative Law Judge to assign EAJA applications to particular administrative law judges.”⁶⁸ The SEC made this change because “past experience within the Commission suggest[ed] that it would be desirable expressly to delegate responsibility for the initial assignment of EAJA applications.”⁶⁹

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rules
§ 315.109 Delegations of authority. This agency delegates to [identify appropriate agency unit or officer] 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 statutes or types of proceedings.] This agency may by order delegate authority to take final action on matters pertaining to the Equal	§ 1071.106 Delegations of authority. The Director may delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.	§ 201.37 Delegations of authority. (a) The Commission may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases. (b) Unless the Commission shall order otherwise, applications for awards of fees and expenses made pursuant to this subject shall be assigned by the Chief Administrative Law Judge to an administrative law judge for determination.

⁶⁶ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117 (June 29, 2012).

⁶⁷ Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Dec. 27, 1989).

⁶⁸ *Id.*

⁶⁹ Equal Access to Justice Rules, 54 Fed. Reg. 11,961 (Mar. 23, 1989).

Access to Justice Act in particular cases to other subordinate officials or bodies. Alt. 315.109: [Contract appeals boards may omit this section.]		
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Subpart B -- Information Required From Applicants

10. *§ 315.201 Contents of application.*

The NLRB revised rules and regulations modify section 315.201(a) of the 1986 model rules to specify the information required for an application for an award under EAJA.⁷⁰ In the preamble to its revised rules and regulations, the NLRB described its modification to rule 102.147. Specifically, the NLRB stated that it modified this rule to specify “that the employee information from the applicant’s affiliates, as well as the applicant, must be included in the application.”⁷¹

1986 Model Rules	NLRB Revised Rules and Regulations
<p>§ 315.201 Contents of application. (a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. (b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if: (1) It attaches a copy of a ruling by the Internal Revenue Service that it 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 applicant's belief that it qualifies under such section; or (2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).</p>	<p>§ 102.147 Contents of application; net worth exhibit; documentation of fees and expenses. (a) An application for an award of fees and expenses under the Act shall identify the applicant and the adversary adjudication for which an award is sought. The application shall state the particulars in which the applicant has prevailed and identify the positions of the General Counsel in that proceeding that the applicant alleges were not substantially justified. Unless the applicant is an individual, the application shall also state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business. . . .</p>

⁷⁰ Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Oct. 9, 1986).

⁷¹ *Id.*

<p>(c) The application shall state the amount of fees and expenses for which an award is sought.</p> <p>(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.</p> <p>(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also 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.</p>	
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11. § 315.202 *Net worth exhibit.*

The CFPB final rule consolidates portions of the provisions in the 1986 model rules relating to the net worth exhibit, sections 315.201 and 315.202, into a single section.⁷² Specifically, the CFPB final rule moves portions of paragraph (b) of 1986 model rules section 315.201 to CFPB final rule section 1071.201(b).⁷³ As a result, paragraph (b) of 1986 model rule section 315.202 “regarding the presumptively public nature of” the net worth exhibit became section 107.201(c) of the CFPB final rule.

1986 Model Rules	CFPB Final Rule
<p>§ 315.202 Net worth exhibit.</p> <p>(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 315.104(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.</p> <p>(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information</p>	<p>§ 1071.201 Net worth exhibit.</p> <p>(a) The application shall also include a detailed exhibit showing that the applicant's net worth did not exceed \$ 2 million (if an individual) or \$ 7 million (for all other applicants, including their affiliates) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.</p> <p>(b) However, an applicant may omit this exhibit if:</p> <p>(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in <i>section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3))</i> 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 applicant's belief that it qualifies under such section;</p>

⁷² Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. 39,117 (June 29, 2012).

⁷³ *Id.*

<p>from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) [1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant . seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with this agency's established procedures under the Freedom of Information Act [insert cross reference to agency FOIA rules].</p>	<p>(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a));</p> <p>(3) In the case of an application for an award related to an allegedly excessive demand by the Bureau, it demonstrates that it is a small entity as that term is defined by 5 U.S.C. 601(6).</p> <p>(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 522(b)(1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on Bureau counsel but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be handled in accordance with the Bureau's established procedures under the Freedom of Information Act, 12 CFR subpart B.</p>
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12. § 315.203 *Documentation of fees and expenses.*

The CFPB final rule modifies section 315.203 of the 1986 model rules, relating to “Documentation of fees and expenses,” to conform with the SBREFA amendments to EAJA.⁷⁴ The effect of this modification is to require that “a claim for fees and expenses involving an excess demand” be accompanied by “full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable.”⁷⁵

⁷⁴ *Id.*

⁷⁵ *Id.*

SBREFA amends EAJA to set forth the circumstances in which an adjudicative officer shall award fees and other expenses related to defending against an agency’s excessive demand. In this regard, SBREFA amends EAJA to state that:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.⁷⁶

1986 Model Rules	CFPB Final Rule
<p>§ 315.203 Documentation of fees and expenses. The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, 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 for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, pursuant to § 315.306 of these rules.</p>	<p>§ 1071.202 Documentation of fees and expenses. The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand by the Bureau, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, 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 for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.</p>

13. *§ 315.204 When an application may be filed.*

The CFPB final rule modifies section 315.204 of the 1986 model rules, “When an application may be filed.”⁷⁷ In this regard, paragraph (c) of section 107.203 of the CFPB final rule differs

⁷⁶ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, § 231, 110 Stat. 847, 862 (1996).

⁷⁷ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117.

from the corresponding 1986 model rule in that it defines the date of final CFPB disposition. According to the CFPB, this “is significant for paragraph (a)” of section 107.203 of the CFPB final rule, which states “that a party may file an application for an award within thirty days of the [CFPB’s] final disposition of the adversary adjudication as to which the award is sought.”⁷⁸

The FTC final rules also modify the wording of the “When an application may be filed” section of the 1986 model rules to “specify when an applicant may receive an award after ‘prevailing’ on less than the entire proceeding.”⁷⁹ In this regard, the FTC final rules provide that the applicant must have prevailed on a “substantive issue in the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit,” rather than “a ‘significant and discrete substantive portion of the proceeding.’”⁸⁰ This change was intended to better express Congress’ intent in defining “prevailing,” as expressed in the associated legislative history.⁸¹

1986 Model Rules	CFPB Final Rule	FTC Final Rules
<p>§ 315.204 When an application may be filed. (a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after this agency's final disposition of the proceeding. (b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become a final and unappealable, both within the agency and to the courts. (c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a</p>	<p>§ 1071.203 When an application may be filed. (a) An application may be filed not later than 30 days after the final disposition of the proceeding to which the application relates. (b) If review or reconsideration is sought or taken of a decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. (c) For purposes of this subpart, <i>final disposition</i> means the later of-- The date that the Director's final order issued pursuant to § 1081.405 is final and unappealable, both within the agency and to the courts; or The date that the Bureau issues any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, that is not subject to a petition for reconsideration.</p>	<p>§ 3.82 Information required from applicants. (d) When an application may be filed. (1) An application may be filed whenever the applicant has prevailed in the entire proceeding or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit, but in no case later than 30 days after the Commission's final disposition of the proceeding. (2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. (3) For purposes of this rule, final disposition means the later of (i) the date on which the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to § 3.51(a); (ii) issuance of an order disposing of any petitions for</p>

⁷⁸ *Id.*

⁷⁹ Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Oct. 5, 1981).

⁸⁰ *Id.*

⁸¹ *Id.*

<p>court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.</p>		<p>reconsideration of the Commission's final order in the proceeding; (iii) if no petition for reconsideration is filed, the last date on which such petition could have been filed pursuant to § 3.55; or (iv) issuance of a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.</p>
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Subpart C -- Procedures for Considering Applications

14. § 315.301 *Filing and service of documents.*

The CFPB final rule adds a new paragraph, paragraph (b), to the section of that rule that corresponds with section 315.301 of the 1986 model rules, “Filing and service of documents.”⁸² This new section (b) requires an applicant “to serve a copy of the application for fees and expenses on the General Counsel of the Bureau.”⁸³

1986 Model Rules	CFPB Final Rule
<p>§ 315.301 Filing and service of documents. Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 315.202(b) for confidential financial information.</p>	<p>§ 1071.300 Filing and service of documents. (a) Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in proceedings under part 1081. (b) In addition, a copy of each application for fees and expenses shall be served on the General Counsel of the Bureau.</p>

15. § 315.302 *Answer to application.*

None of the agencies studied modified this rule.

1986 Model Rules	
<p>§ 315.302 Answer to application. (a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.</p>	<p>The agencies reviewed did not modify this section of the 1986 model rules.</p>

⁸² Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117.

⁸³ *Id.*

<p>(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.</p> <p>(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 315.306.</p>	
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16. § 315.303 *Reply.*

None of the agencies studied modified this rule.

<p>1986 Model Rules</p> <p>§ 315.303 Reply. Within 15 days after service of an answer, 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 §315.306.</p>	<p>The agencies reviewed did not modify this section of the 1986 model rules.</p>
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17. § 315.304 *Comments by other parties.*

None of the agencies studied modified this rule.

<p>1986 Model Rules</p> <p>§ 315.304 Comments by other parties. Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 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.</p>	<p>The agencies reviewed did not modify this section of the 1986 model rules.</p>
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18. § 315.305 *Settlement.*

The CFPB final rule modifies section 315.305, “Settlement,” of the 1986 model rules “to make explicit that no application for recovery of fees and expenses may be filed if the settlement of the underlying proceeding provides that each side shall bear its own expenses.”⁸⁴

⁸⁴ *Id.*

An SEC revision to the “Settlement” section of the 1986 model rules would make “explicit that settlements may include a waiver of all EAJA fees.”⁸⁵

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rules
<p>§ 315.305 Settlement. The application 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 underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency’s standard settlement procedure. 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.</p>	<p>§ 1071.304 Settlement. The applicant and Bureau counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the Bureau’s standard settlement procedures. If a prevailing party and Bureau counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.</p>	<p>§ 201.54 Settlement. The applicant and counsel for the Office or Division of the Commission may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the Commission’s standard settlement procedure. See 17 CFR 201.8. If a prevailing party and counsel for the Office or Division of the Commission agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement provides that each side shall bear its own expenses, and the settlement is accepted, no application may be filed.</p>

19. § 315.306 *Further proceedings.*

The SEC revised procedural rules depart from the 1986 model rules in that they propose a “provision[] not in the Model rules” that “would delegate authority to the Chief Administrative Law Judge to assign EAJA applications to particular administrative law judges.”⁸⁶ The SEC made this change because “past experience within the Commission suggest[ed] that it would be desirable expressly to delegate responsibility for the initial assignment of EAJA applications.”⁸⁷

1986 Model Rules	SEC Revised Procedural Rules
<p>§ 315.306 Further proceedings. (a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written</p>	<p>§ 201.55 Further proceedings. (a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or counsel for the Office or Division of the Commission, or on his or her own initiative, the administrative law judge may order further proceedings, such as an informal conference,</p>

⁸⁵ Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Dec. 27, 1989).

⁸⁶ *Id.*

⁸⁷ Equal Access to Justice Rules, 54 Fed. Reg. 11,961 (Mar. 23, 1989).

<p>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 evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.</p> <p>(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.</p>	<p>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) an evidentiary hearing. The administrative law judge may order all proceedings that are otherwise available under Rule 8(d) of the Commission’s Rules of Practice. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the Commission’s position was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. . . .</p>
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20. § 315.307 *Decision.*

The CFPB final rule modifies section 315.307 of the 1986 model rules, “Decision,” to conform with the SBREFA amendments to EAJA.⁸⁸ This modification has the effect of including in the “Decision” section of the CFPB final rule a description of the information that a decision involving an allegedly excessive CFPB demand should include.⁸⁹

SBREFA amended EAJA to, among other things, set forth the circumstances in which an adjudicative officer shall award fees and other expenses related to defending against an agency’s excessive demand.⁹⁰ In this regard, SBREFA amended EAJA to state:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.⁹¹

⁸⁸ Equal Access to Justice Act Implementation Rule, 77 Fed. Reg. at 39,117.

⁸⁹ *Id.*

⁹⁰ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, § 231, 110 Stat. 847, 862 (1996).

⁹¹ *Id.*

1986 Model Rules	CFPB Final Rule
<p>§ 315.307 Decision. The adjudicative officer shall issue an initial decision on the application within [to be supplied by the agency] days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant’s eligibility and status as a prevailing party, and 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 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. Alt. 315.307 [for use by contract appeals boards] The Board shall issue its decision on the application within [to be supplied by the agency] days after completion of proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings [Continue as in 315.307, from the second sentence to the end.]</p>	<p>§ 1071.306 Recommended decision. The adjudicative officer shall issue a recommended decision on the application within 60 days after the time for filing a reply, or where further proceedings are held, within 60 days after completion of such proceedings. (a) For a decision involving a prevailing party: The decision shall include written findings and conclusions on the applicant’s eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall include, if at issue, findings on whether the agency’s position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. (b) For a decision involving an allegedly excessive Bureau demand: The decision on the application shall include written findings and conclusions on the applicant’s eligibility and an explanation of the reasons why the Bureau's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.</p>

21. *§ 315.308 Agency review.*

None of the agencies studied modified this rule.

1986 Model Rules	
<p>§ 315.308 Agency review. Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.</p>	<p>The agencies reviewed did not modify this section of the 1986 model rules.</p>

Alt. 315.308: (for use by contract appeals board) Reconsideration. Either party may seek reconsideration of the decision on the fee application in accordance with [cross-reference to rule on reconsideration of contract appeals board decisions].	
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22. *§ 315.309 Judicial review.*

None of the agencies studied modified this rule.

1986 Model Rules	
§ 315.309 Judicial review. Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).	The agencies reviewed did not modify this section of the 1986 model rules.

23. *§ 315.310 Payment of award.*

The section of the SEC revised procedural rules pertaining to the payment of awards differs from the corresponding 1986 model rule in that the SEC revised procedural rules allow payment to a prevailing EAJA applicant where an appeal of his or her underlying case is made, if that appeal concerns issues that differ from those upon which an EAJA award was made.⁹²

1986 Model Rules	SEC Revised Procedural Rules
§ 315.310 Payment of award. An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency’s final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within 60 days.	§ 201.59 Payment of award. An applicant seeking payment of an award shall submit to the Comptroller of the Commission a copy of the Commission’s final decision granting the award, accompanied by a sworn statement that the applicant will not seek review of the decision in the United States courts. The Commission will pay the amount awarded to the applicant as authorized by law, unless judicial review of the award has been sought by the applicant.

⁹² Equal Access to Justice Rules, 54 Fed. Reg. at 11,961.