

## 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

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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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> 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)).

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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

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<sup>3</sup> 5 U.S.C. § 504(a)(1) (2018).

<sup>4</sup> *Id.* § 504(a)(2).

<sup>5</sup> *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.) . . . .<sup>6</sup>

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] . . . .<sup>7</sup>

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 1993 . . . .<sup>8</sup>

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."<sup>9</sup> Section 504(d) provides that awards

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<sup>6</sup> *Id.* § 504(b)(1)(A).

<sup>7</sup> *Id.* § 504(b)(1)(B).

<sup>8</sup> *Id.* § 504(b)(1)(C).

<sup>9</sup> *Id.* § (c)(2).

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

## 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.”<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

In 1985, Congress amended and reauthorized EAJA.<sup>14</sup> 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.<sup>15</sup> Responding to these statutory revisions, the Chairman of the Conference issued revised model rules in 1986.<sup>16</sup> 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

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<sup>10</sup> *Id.* § (d).

<sup>11</sup> *Id.* § (c)(1).

<sup>12</sup> 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).

<sup>13</sup> *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.

<sup>14</sup> 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).

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

<sup>16</sup> 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].”<sup>17</sup>

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.<sup>18</sup> 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.

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<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup> 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.”<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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

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<sup>19</sup> 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)).

<sup>20</sup> 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.

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

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

<sup>23</sup> *Id.* § 231.

paragraph shall be paid only as a consequence of appropriations provided in advance.<sup>24</sup>

SBREFA also amended EAJA by adding to it a definition of the term “demand” for the purposes of the Act.<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup>

## 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.<sup>29</sup> These rules contained revisions to the FTC’s 1981 rules for the implementation of EAJA.<sup>30</sup> 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.”<sup>31</sup>

## 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

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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

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

<sup>31</sup> 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.<sup>32</sup> 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.”<sup>33</sup>

#### 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.<sup>34</sup> 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.”<sup>35</sup>

### 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

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<sup>32</sup> 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).

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

<sup>34</sup> *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).

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



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

SBREFA amended EAJA by adding to it a definition of the term “demand” for the purposes of the Act.<sup>38</sup> 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.”<sup>39</sup>

1986 Model Rules	CFPB Final Rule
<p><b>§ 315.101 Purpose of these rules.</b>            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><b>§ 1071.100 Purpose.</b>  <b>(a) In general.</b> 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>(b) When an eligible party will receive an award.</b> 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>

<sup>36</sup> 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).

<sup>37</sup> 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.*

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

<sup>39</sup> *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.”<sup>40</sup> 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.”<sup>41</sup>

<b>1986 Model Rules</b>	<b>SEC Revised Procedural Rule</b>
<p><b>§ 315.102 When the Act applies.</b>            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><b>§ 201.32 When the Act applies.</b>            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>

<sup>40</sup> 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).

<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup>

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.”<sup>44</sup>

1986 Model Rules	SEC Revised Procedural Rules
<p><b>§ 315.103 Proceedings covered.</b>                      (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><b>§ 201.33 Proceedings covered.</b>                      (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>

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

<sup>43</sup> 5 U.S.C. § 504(b).

<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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”.<sup>47</sup>

1986 Model Rules	CFPB Final Rule
<p><b>§ 315.104 Eligibility of applicants.</b></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><b>§ 1071.103 Eligibility of applicants.</b></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>

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

<sup>46</sup> *Id.*

<sup>47</sup> 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.<sup>48</sup> The provision in section 315.105, paragraph (b), of the 1986 model rules was moved to section 1071.104(a)(2) of the

<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

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.”<sup>51</sup>

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.’”<sup>52</sup> 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.”<sup>53</sup> 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.”<sup>54</sup>

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.”<sup>55</sup> 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

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<sup>49</sup> Small Business Regulatory Enforcement Fairness Act of 1996 § 231.

<sup>50</sup> *Id.*

<sup>51</sup> 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).

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 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.<sup>56</sup> This change was intended to more precisely express Congress’ intent to define “prevailing,” as expressed in the applicable legislative history.<sup>57</sup>

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rules	FTC Final Rules
<p><b>§ 315.105 Standards for awards.</b>            (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><b>§ 1071.104 Standards for awards.</b>            (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><b>§ 201.35 Standards for awards.</b>            (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><b>§ 3.81 General provisions.</b>  <b>(e) Standards for awards.</b>            (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>

<sup>56</sup> *Id.*

<sup>57</sup> *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.<sup>58</sup> 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.”<sup>59</sup> According to the CFPB, “[t]his modification is intended to eliminate the need to promulgate a revised rule whenever the statutory maximum is increased.”<sup>60</sup> 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.”<sup>61</sup> 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.”<sup>62</sup> This change also ensures that expert witness compensation does not exceed the reasonable rate of pay, rather than the highest rate of pay.<sup>63</sup>

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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

<sup>63</sup> *Id.*



<b>1986 Model Rules</b>	<b>CFPB Final Rule</b>	<b>SEC Revised Procedural Rule</b>
<p><b>§315.106. Allowable fees and expenses.</b></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><b>§ 1071.105 Allowable fees and other expenses.</b></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><b>§ 201.36 Allowable fees and expenses.</b></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.”<sup>64</sup> 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.<sup>65</sup>

1986 Model Rules	SEC Revised Procedural Rules
<p><b>§ 315.107 Rulemaking on maximum rates for attorney fees.</b></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>

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

8. § 315.108 Awards against other agencies.

None of the agencies studied modified this rule.

<b>1986 Model Rules</b>	
<b>§ 315.108 Awards against other agencies.</b> 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.<sup>66</sup>

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.”<sup>67</sup> This provision “would delegate authority to the Chief Administrative Law Judge to assign EAJA applications to particular administrative law judges.”<sup>68</sup> 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.”<sup>69</sup>

<b>1986 Model Rules</b>	<b>CFPB Final Rule</b>	<b>SEC Revised Procedural Rules</b>
<b>§ 315.109 Delegations of authority.</b> 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	<b>§ 1071.106 Delegations of authority.</b> The Director may delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.	<b>§ 201.37 Delegations of authority.</b> (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.

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

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

<sup>68</sup> *Id.*

<sup>69</sup> 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.<sup>70</sup> 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.”<sup>71</sup>

<b>1986 Model Rules</b>	<b>NLRB Revised Rules and Regulations</b>
<p><b>§ 315.201 Contents of application.</b>            (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><b>§ 102.147 Contents of application; net worth exhibit; documentation of fees and expenses.</b>            (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>

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

<sup>71</sup> *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.<sup>72</sup> 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).<sup>73</sup> 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><b>§ 315.202 Net worth exhibit.</b></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><b>§ 1071.201 Net worth exhibit.</b></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>

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

<sup>73</sup> *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.<sup>74</sup> 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.”<sup>75</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *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.<sup>76</sup>

1986 Model Rules	CFPB Final Rule
<p><b>§ 315.203 Documentation of fees and expenses.</b>            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><b>§ 1071.202 Documentation of fees and expenses.</b>            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.”<sup>77</sup> In this regard, paragraph (c) of section 107.203 of the CFPB final rule differs

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

<sup>77</sup> 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.”<sup>78</sup>

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.”<sup>79</sup> 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.’”<sup>80</sup> This change was intended to better express Congress’ intent in defining “prevailing,” as expressed in the associated legislative history.<sup>81</sup>

1986 Model Rules	CFPB Final Rule	FTC Final Rules
<p><b>§ 315.204 When an application may be filed.</b>            (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><b>§ 1071.203 When an application may be filed.</b>            (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><b>§ 3.82 Information required from applicants.</b>  <b>(d) When an application may be filed.</b>            (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>

<sup>78</sup> *Id.*

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

<sup>80</sup> *Id.*

<sup>81</sup> *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.”<sup>82</sup> 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.”<sup>83</sup>

1986 Model Rules	CFPB Final Rule
<p><b>§ 315.301 Filing and service of documents.</b> 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><b>§ 1071.300 Filing and service of documents.</b> (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><b>§ 315.302 Answer to application.</b> (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>

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

<sup>83</sup> *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><b>1986 Model Rules</b></p> <p><b>§ 315.303 Reply.</b> 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><b>1986 Model Rules</b></p> <p><b>§ 315.304 Comments by other parties.</b> 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.”<sup>84</sup>

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<sup>84</sup> *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.”<sup>85</sup>

1986 Model Rules	CFPB Final Rule	SEC Revised Procedural Rules
<p><b>§ 315.305 Settlement.</b> 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><b>§ 1071.304 Settlement.</b> 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><b>§ 201.54 Settlement.</b> 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.”<sup>86</sup> 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.”<sup>87</sup>

1986 Model Rules	SEC Revised Procedural Rules
<p><b>§ 315.306 Further proceedings.</b> (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><b>§ 201.55 Further proceedings.</b> (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>

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

<sup>86</sup> *Id.*

<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup>

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

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.*

1986 Model Rules	CFPB Final Rule
<p><b>§ 315.307 Decision.</b>  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><b>§ 1071.306 Recommended decision.</b>  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><b>§ 315.308 Agency review.</b>  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>

<p><b>Alt. 315.308:</b> (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].</p>	
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22. § 315.309 *Judicial review.*

None of the agencies studied modified this rule.

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

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.<sup>92</sup>

<p><b>1986 Model Rules</b></p>	<p><b>SEC Revised Procedural Rules</b></p>
<p><b>§ 315.310 Payment of award.</b> 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.</p>	<p><b>§ 201.59 Payment of award.</b> 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.</p>

<sup>92</sup> Equal Access to Justice Rules, 54 Fed. Reg. at 11,961.

## 5 USCS § 504

Current through PL 116-8, approved 3/8/19

**United States Code Service - Titles 1 through 54 > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES > PART I. THE AGENCIES GENERALLY > CHAPTER 5. ADMINISTRATIVE PROCEDURE > SUBCHAPTER I. GENERAL PROVISIONS**

### § 504. Costs and fees of parties

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(a)

(1) 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.

(2) 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.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(4) 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.

(b)

(1) For the purposes of this section--

(A) "fees and other expenses" includes 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.);

**(B)**"party" means a party, as defined in section 551(3) of this *title* [5 USCS § 551(3)], who is (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];

**(C)**"adversary adjudication" means (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 1993;

**(D)**"adjudicative officer" means 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;

**(E)**"position of the agency" means, 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; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings; and

**(F)**"demand" 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.

**(2)**Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this *title* [5 USCS § 551] apply to this section.

**(c)**

**(1)**After 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. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to *section 2412(d)(3) of title 28, United States Code*.

**(2)**If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, 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. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

**(d)** Fees and other expenses awarded under this subsection [section] shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

**(e)** The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.

**(f)** No award may be made under this section for costs, fees, or other expenses which may be awarded under [section 7430 of the Internal Revenue Code of 1986 \[26 USCS § 7430\]](#).

## History

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(Added Oct. 21, 1980, [P.L. 96-481](#), Title II, § 203(a)(1), (c), [94 Stat. 2325](#), 2327; Aug. 5, 1985, [P.L. 99-80](#), §§ 1, 6, [99 Stat. 183](#), 186; Oct. 21, 1986, [P.L. 99-509](#), Title VI, Subtitle B, § 6103(c), [100 Stat. 1948](#); Nov. 10, 1988, [P.L. 100-647](#), Title VI, Subtitle J, Part III, § 6239(b), [102 Stat. 3746](#); Nov. 16, 1993, [P.L. 103-141](#), § 4(b), [107 Stat. 1489](#); March 29, 1996, [P.L. 104-121](#), Title II, Subtitle C, § 231, [110 Stat. 862](#); Jan. 4, 2011, [P.L. 111-350](#), § 5(a)(1), [124 Stat. 3841](#).)

Annotations

## Notes

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### References in text:

The "Religious Freedom Restoration Act of 1993", referred to in this section, is Act Nov. 16, 1993, [P.L. 103-141](#), [107 Stat. 1488](#), which is classified generally as [42 USCS §§ 2000bb](#) et seq. For full classification of this Act, consult USCS Tables volumes.

### Explanatory notes:

"1986" has been inserted in brackets in subsec. (b)(1)(B) pursuant to § 2 of Act Oct. 22, 1986, [P.L. 99-514](#), which redesignated the Internal Revenue Code of 1954 (Act Aug. 16, 1954, ch 736) as the Internal Revenue Code of 1986. In redesignating the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986, Congress provided, in Act Oct. 22, 1986, [P.L. 99-514](#), § 2(b), [100 Stat. 2095](#), for construction of references to the Internal Revenue Code as follows: except when inappropriate, any reference in any law, Executive Order, or other document to the Internal Revenue Code of 1954 shall include a reference to the Internal Revenue Code of 1986 and any reference to the Internal Revenue Code of 1986 shall include a reference to the provisions of law formerly known as the Internal Revenue Code of 1954.

### Effective date of section:

Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 208, [94 Stat. 2330](#), which appears as a note to this section, provides that this section, as added by such Act, shall take effect Oct. 1, 1981.

**Amendments:**

**1980** . Act Oct. 21, 1980, § 203(c) (effective Oct. 1, 1984), repealed this section. However, this section was revived by § 6 of Act Aug. 5, 1985 which appears as a note to this section.

**1985** . Act Aug. 5, 1985, in subsec. (a), in para. (1), deleted "as a party to the proceeding" following "finds that the position of the agency" and added the sentence beginning "Whether or not . . .", in para. (2), added the sentence beginning "When the United States . . .", and in para. (3), added the sentence beginning "The decision of the agency . . ."; in subsec. (b)(1), substituted subpara. (B) for one which read: " 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded \$ 1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded \$ 5,000,000 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 (26 U.S.C. 501(c)(3))* exempt from taxation under section 501(a) of the Code and 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, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated"; in subpara. (C), inserted "(i)", inserted ", and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 ([41 U.S.C. 605](#)) before an agency board of contract appeals as provided in section 8 of that Act ([41 U.S.C. 607](#))", and deleted "and" following the concluding semicolon, in subpara. (D), substituted "; and" for a concluding period, and added subpara. (E); substituted subsec. (c)(2) for one which read: "A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion."; and substituted subsec. (d) for one which read:

"(d)

(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to [section 2414 of title 28, United States Code](#).

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years."

Such Act further, by § 6 (effective as provided by § 7 of such Act, which appears as a note to this section), revived this section by repealing § 203(c) of Act Oct. 21, 1980. See Other provisions notes.

**1986** . Act Oct. 21, 1986 (effective upon enactment on Oct. 21, 1986, as provided by § 6104 of such Act, which appears as [31 USCS § 3801](#) note), in subsec. (b)(1)(C), deleted "and" preceding "(ii)" and inserted ", and (iii) any hearing conducted under chapter 38 of title 31".

**1988** . Act Nov. 10, 1988 (applicable to proceedings commencing after enactment, as provided by § 6239(d), which appears as [26 USCS § 7430](#) note) added subsec. (f).

**1993** . Act Nov. 16, 1993, in subsec. (b)(1)(C), deleted "and" at the end of cl. (ii), substituted ", and" for a semicolon at the end of cl. (iii), and added cl. (iv).

**1996** . Act March 29, 1996 (applicable to civil actions and adversary adjudications commenced on or after enactment, as provided by § 233 of such Act, which appears as a note to this section), in subsec. (a), added para.

(4); and, in subsec. (b)(1), in subpara. (A), substituted "\$ 125" for "\$ 75", in subpara. (B), inserted "or for purposes of subsection (a)(4), a small entity as defined in section 601", in subpara. (D), deleted "and" after the concluding semicolon, in subpara. (E), substituted "; and" for a concluding period, and added subpara. (F).

**2011** . Act Jan. 4, 2011, in subsec. (b)(1)(C)(ii), substituted "section 7103 of title 41" for "section 6 of the Contract Disputes Act of 1978 ([41 U.S.C. 605](#))" and "section 7105 of title 41" for "section 8 of that Act ([41 U.S.C. 607](#))".

#### Short titles:

Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 201, [94 Stat. 2325](#), provides: "This title may be cited as the 'Equal Access to Justice Act'.". For full classification of this title, consult USCS Tables volumes.

#### Other provisions:

**Congressional findings and purpose.** Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 202, provides:

"(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

"(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

"(c) It is the purpose of this title [adding this note, among other things; for full classification, consult USCS Tables volumes]--

"(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

"(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees.".

**Repeal of § 203(c) of Act Oct. 21, 1980.** The provisions of Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 203(c), [94 Stat. 2327](#), which repealed this section, were in turn repealed by Act Aug. 5, 1985, [P.L. 99-80](#), § 6(b)(1), [99 Stat. 186](#), applicable as provided by § 7 of such Act, which appears as a note to this section.

**Repeal of limitations.** Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 207, [94 Stat. 2330](#), effective Oct. 1, 1981, as provided by § 208 of such Act, was repealed by Act Aug. 5, 1985, [P.L. 99-80](#), § 4, [99 Stat. 186](#), applicable as provided by § 7 of such Act, which appears as a note to this section. It provided for payment limitations.

**Effective date and application of Act Oct. 21, 1980.** Act Oct. 21, 1980, [P.L. 96-481](#), Title II, § 208, [94 Stat. 2330](#); as amended Aug. 5, 1985, [P.L. 99-80](#), § 5, [99 Stat. 186](#), applicable as provided by § 7 of such Act, which appears as a note to this section, provides: "This title and the amendments made by this title [for full classification, consult USCS Tables volumes] shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in [section 504\(b\)\(1\)\(C\) of title 5, United States Code](#), and any civil action or adversary adjudication described in [section 2412 of title 28, United States Code](#), which is pending on, or commenced on or after, such date. Awards may be made for fees and other expenses incurred before October 1, 1981, in any such adversary adjudication or civil action.".

**Revival of repealed provisions; repeal of repealing provisions.** Act Aug. 5, 1985, [P.L. 99-80](#), § 6, [99 Stat. 186](#), applicable as provided by § 7 of such Act, which appears as a note to this section, provides:

"(a) Revival of certain expired provisions. [Section 504 of title 5, United States Code](#), and the item relating to that section in the table of sections of chapter 5 of [title 5, United States Code \[5 USCS prec. § 500\]](#), and subsection (d) of [section 2412 of title 28, United States Code](#), shall be effective on or after the date of the enactment of this Act as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act [former note to this section and [28 USCS § 2412](#) note].

"(b) Repeals.

(1) Section 203(c) of the Equal Access to Justice Act [former note to this section] is hereby repealed.

"(2) Section 204(c) of the Equal Access to Justice Act [former [28 USCS § 2412](#) note] is hereby repealed."

**Application of provisions of Act Aug. 5, 1985.** Act Aug. 5, 1985, [P.L. 99-80](#), § 7, [99 Stat. 186](#), provides:

"(a) In general. Except as otherwise provided in this section [this note], the amendments made by this Act [for full classification, consult USCS Tables volumes] shall apply to cases pending on or commenced on or after the date of the enactment of this Act.

"(b) Applicability of amendments to certain prior cases. The amendments made by this Act [for full classification, consult USCS Tables volumes] shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in [section 504\(a\)\(2\) of title 5, United States Code](#), or section 2412(d)(1)(B) of title 28, United States Code [[28 USCS § 2412\(d\)\(1\)\(B\)](#)], as the case may be, shall be deemed to commence on the date of the enactment of this Act.

"(c) Applicability of amendments to prior Board of Contracts Appeals cases. [Section 504\(b\)\(1\)\(C\)\(ii\) of title 5, United States Code](#), as added by section 1(c)(2) of this Act, and [section 2412\(d\)\(2\)\(E\) of title 28, United States Code](#), as added by section 2(c)(2) of this Act, shall apply to any adversary adjudication pending on or commenced on or after October 1, 1981, in which applications for fees and other expenses were timely filed and were dismissed for lack of jurisdiction."

**Funds not available for expenses of intervening parties.** Act Oct. 2, 1992, [P.L. 102-377](#), Title V, § 502, [106 Stat. 1342](#), provides: "None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts."

**Termination of Administrative Conference of the United States.** For termination of the Administrative Conference of the United States, see the provisions of Title IV of Act Nov. 19, 1995, [P.L. 104-52](#), which appears as a note preceding [5 USCS § 591](#).

**Termination of reporting requirements.** For termination, effective May 15, 2000, of provisions in subsec. (e) of this section relating to an annual report to Congress on the amount of fees and other expenses awarded during the preceding fiscal year, see § 3003 of Act Dec. 21, 1995, [P.L. 104-66](#), which appears as [31 USCS § 1113](#) note. See also page 153 of House Document No. 103-7.

**Application of March 29, 1996 amendments.** Act March 29, 1996, [P.L. 104-121](#), Title II, Subtitle C, § 233, [110 Stat. 864](#), provides: "The amendments made by sections 331 and 332 [sections 231 and 232; amending subsecs. (a) and (b) of this section [[5 USCS §§ 331 and 332](#)] and [28 USCS § 2412\(d\)](#)] shall apply to civil actions and adversary adjudications commenced on or after the date of the enactment of this subtitle."

## Case Notes

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## I. IN GENERAL

### 1. Generally

Under Equal Access to Justice Act, Congress has clearly intended that defendants be eligible for fees against government in any civil action unless some other statute specifically says otherwise. [EEOC v Clay Printing Co. \(1994, CA4 NC\) 13 F3d 813, 63 BNA FEP Cas 1101, 63 CCH EPD P 42760](#) (criticized in [Villescas v Richardson \(2001, DC Colo\) 145 F Supp 2d 1228](#)).

NLRB properly invoked FOIA Exemptions 2 and 5 (5 USCS § 552(b)(2) and (5)) to withhold documents containing guidelines concerning its implementation of Equal Access to Justice Act ([5 USCS § 504](#)). [Schiller v NLRB \(1992, App DC\) 296 US App DC 84, 964 F2d 1205, 140 BNA LRRM 2590, 123 CCH LC P 10342](#) (Abrogated in part as stated in [Schoenman v FBI \(2012, DC Dist Col\) 857 F Supp 2d 76](#)).

### 2. Construction

Since Equal Access to Justice Act ([5 USCS § 504](#)) is waiver of sovereign's immunity from claims for attorney fees, it must be construed strictly in favor of [United States. Smedberg Machine & Tool, Inc. v Donovan \(1984, CA7 Ill\) 730 F2d 1089](#).

With regard to applicability of Equal Access to Justice Act, words "adjudication under § 554" constitute shorthand for expression "adjudication determined, by statute, on record and after opportunity for agency hearing." [Escobar Ruiz v Immigration & Naturalization Service \(1987, CA9 Cal\) 813 F2d 283](#), affd, on reh, en banc (1988, CA9) [838 F2d 1020](#).

Legislative history as well as case law show that statute's "special circumstances" language was intended to refer only to substantive issues, not financial eligibility; thus, NLRB was incorrect in its contention that assets of multiemployer association should be aggregated so as to make association members (who prevailed in unfair labor

practice case brought against them by NLRB) ineligible for award of fees. [Grason Electric Co. v NLRB \(1991, CA9\) 951 F2d 1100, 91 Daily Journal DAR 15571, 139 BNA LRRM 2215, 120 CCH LC P 11041.](#)

Where alien mailed motion for attorney's fees on last day of 30-day deadline for fee applications under 28 USCS § 2412(d)(1)(B), motion was untimely because it did not qualify as having been "submitted" for purposes of deadline; as in [5 USCS § 504\(a\)\(2\)](#) and [29 C.F.R. § 102.148\(a\)](#), there was no compelling reason to interpret "submit" differently from "file" for purposes of 28 USCS § 2412(d)(1)(B) deadline. [Arulampalam v Gonzales \(2005, CA9\) 399 F3d 1087.](#)

Proceeding before National Appeals Division that reviewed decision of Farm Service Agency was adjudication required by statute to be determined on record after opportunity for agency hearing within meaning of 5 USCS § 554(a); NAD did not establish freestanding scheme of sort that prevented it from being governed by Administrative Procedure Act; therefore, Equal Access to Justice Act, [5 USCS § 504](#), applied to proceedings before [NAD. Five Points Rd. J.V. v Johanns \(2008, CA7 Ill\) 542 F3d 1121.](#)

Equal Access to Justice Act ([5 USCS §§ 504](#), 28 USCS § 2412(d)) constitutes waiver of sovereign immunity by government in cases pending on October 1, 1981 for attorney's fees incurred before and after that date, when Act became effective, since plain language of statute and legislative history support no other conclusion. [Grand Boulevard Improvement Ass'n v Chicago \(1982, ND Ill\) 553 F Supp 1154.](#)

Award of attorney fees and other expenses pursuant to Equal Access to Justice Act ([5 USCS § 504](#)) involves waiver of sovereign immunity of United States and applicable provisions of Act must therefore be strictly construed. [J.M.T. Machine Co. \(1986, ASBCA\) 86-2 BCA P 18928](#), affd (1987, CA) [826 F2d 1042, 34 CCF P 75326](#) (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

Because EAJA is waiver of sovereign's traditional immunity from claims to recover attorney's fees, it must be construed narrowly. In Matter Of: [Rumaldita Dovalina \(1996, HUD BCA\) 2006-1 BCA P 33129.](#)

### Unpublished Opinions

Unpublished: Veteran's attorneys could recover fees for paralegal and law clerks under Equal Access to Justice Act, 28 USCS § 2412 at adjusted market rate, and not just as costs, similar to recovery of same under [5 USCS § 504. McClain v Peake \(2008, US\) 2008 US App Vet Claims LEXIS 957.](#)

### 3. Purpose

A prevailing party that satisfies Equal Access to Justice Act's (EAJA's) other requirements is not limited in its recovery of paralegal fees to its attorney's cost for such services, but may recover its paralegal fees from government at prevailing market rates. [Richlin Sec. Serv. Co. v Chertoff \(2008\) 553 US 571, 128 S Ct 2007, 170 L Ed 2d 960, 21 FLW Fed S 279.](#)

Equal Access to Justice Act was enacted to lessen likelihood that challenges to bureaucratic action would be deterred by high cost of litigating against government. [Clifton v Heckler \(1985, CA5 La\) 755 F2d 1138](#) (criticized in [N. C. Alliance for Transp. Reform, Inc. v United States DOT \(2000, MD NC\) 104 F Supp 2d 599](#)) and (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

Purpose of Equal Access to Justice Act is to eliminate financial disincentive to challenge unreasonable government actions, not to conserve financial resources. [Richard v Hinson \(1995, CA5\) 70 F3d 415](#), cert den (1996) 518 US 1004, 135 L Ed 2d 1047, 116 S Ct 2522.

Although addition of [5 USCS § 504\(a\)\(4\)](#) was designed to prevent government from issuing high demand as way of pressuring small entities to agree to quick settlements, Congress also wanted to ensure that government is not

unduly deterred from advancing its case in good faith. [Secretary v Georges Colliers, Incorporated \(2005\) 27 FMSHRC 362.](#)

EAJA awards are intended to dissuade government from pursuing weak or tenuous cases; statute is intended to caution agencies to carefully evaluate their cases, not to prevent them from bringing those that have some risk. Wessel v Del Balzo (1993) NTSB EA-3875.

EAJA awards are intended to dissuade government from pursuing weak or tenuous cases; it is intended to caution agencies to carefully evaluate their cases, not to prevent them from bringing those that have some risk. Rafter v Hinson (1995) NTSB EA-4313.

Legislative history of Equal Access to Justice Act is clear that Congress intended it to be remedy for individuals and small businessmen who face tremendous costs of litigation against federal government. [Fidelity Constr. Co. \(1982, DOT BCA\) 82-1 BCA P 15633](#), affd (1983, CA) [700 F2d 1379, 30 CCF P 70827](#), cert den (1983) 464 US 826, 104 S Ct 97, 78 L Ed 2d 103 and (superseded by statute on other grounds as stated in [Maitland Bros. Co. \(1986, ASBCA\) 86-2 BCA P 18796](#)) and (superseded by statute on other grounds as stated in Great Western Utility Corp. (1986, ENG BCA) 86-3 BCA P 19011) and (superseded by statute on other grounds as stated in [Escobar v U.S. INS \(1991, CA4\) 935 F2d 650](#)) and (superseded by statute on other grounds as stated in [Mt. Valley Lumber, Inc. v Dep't of Agric. \(2007\) 2007 CIVBCA LEXIS 153, 2007-2 BCA P 33611](#)).

#### 4. Cases pending on effective date of statute

Condemnee was not entitled to recover court costs, attorney's fees and litigation expenses in condemnation case decided prior to October 1, 1981, effective date of *Equal Access to Justice Act*. [Reinforcing Iron Workers Local Union 426, etc. v Bechtel Power Corp. \(1981, CA6 Mich\) 634 F2d 258, 106 BNA LRRM 2385, 90 CCH LC P 12546.](#)

Action by congressman to compel Federal Election Commission action on elections violation complaint was "pending" on effective date of Equal Access to Justice Act as amended in 1985, notwithstanding court ruled on case before amendments were signed into law, where application was pending in 1984 under original Act, when court had not yet determined extent of liability in case. [Federal Election Com. v Rose \(1986, App DC\) 256 US App DC 395, 806 F2d 1081.](#)

Equal Access to Justice Act ([5 USCS § 504](#)) authorizes fees for work performed before October 1, 1981 in cases pending on October 1, 1981. [Nunes-Correia v Haig \(1982, DC Dist Col\) 543 F Supp 812.](#)

Plaintiffs entitled to attorney's fees under Equal Access to Justice Act ([5 USCS § 504, 28 USCS § 2412\(b\)](#)), (d) may recover for fees incurred before October 1, 1981, when Act took effect, where case was pending in federal court on that date and summary judgment rendered for plaintiff on October 15, 1981, since Act operates retroactively to cover fees incurred prior to effective date. [Globe, Inc. v United States \(1982, DC Dist Col\) 553 F Supp 7.](#)

Term "pending" is broadly construed, and includes case in which parties are carrying out settlement agreement under supervision of court; when applicable, Act authorizes fee awards for work done before as well as after Act's effective date. [Dubose v Pierce \(1984, DC Conn\) 579 F Supp 937](#), revd on other grounds (1985, CA2 Conn) [761 F2d 913](#), vacated without op, remanded without op (1988) 487 US 1229, 108 S Ct 2890, 101 L Ed 2d 924.

Provision of Equal Access to Justice Act ([5 USCS § 504](#) note) that Act applies to any adversary adjudication and any civil action which is pending on or commenced on or after October 1, 1981 applies to attorney fees generated before effective date of Act as well as after since touchstone for determining if Act applies is whether action was pending on October 1, 1981, not whether services were rendered before or after that date, and nothing in Act or its legislative history indicates that Congress intended to distinguish between fees and expenses generated before or after October 1, 1981 in cases that were pending on that date. [Kay Mfg. Co. v United States \(1983, CA\) 699 F2d 1376, 30 CCF P 70828.](#)



There is no clear statutory authority for Board of Contract Appeals to award recompense for legal fees incurred prior to effective date of Act. [Fidelity Constr. Co. \(1982, DOT BCA\) 82-1 BCA P 15633](#), affd (1983, CA) [700 F2d 1379, 30 CCF P 70827](#), cert den (1983) 464 US 826, 104 S Ct 97, 78 L Ed 2d 103 and (superseded by statute on other grounds as stated in [Maitland Bros. Co. \(1986, ASBCA\) 86-2 BCA P 18796](#)) and (superseded by statute on other grounds as stated in [Great Western Utility Corp. \(1986, ENG BCA\) 86-3 BCA P 19011](#)) and (superseded by statute on other grounds as stated in [Escobar v U.S. INS \(1991, CA4\) 935 F2d 650](#)) and (superseded by statute on other grounds as stated in [Mt. Valley Lumber, Inc. v Dep't of Agric. \(2007\) 2007 CIVBCA LEXIS 153, 2007-2 BCA P 33611](#)).

## 5. Excessive and unreasonable agency demand

Nursing home that successfully challenged sanctions imposed on it by federal agency was not entitled to additional attorneys' fees under Equal Access to Justice Act, [5 USCS § 504\(a\)\(4\)](#), because nursing home prevailed in litigation, and relief under § 504(a)(4) is confined to those cases in which government prevailed but relief it obtained was meager in comparison to relief it had sought. [Park Manor, Ltd. v HHS \(2007, CA7\) 495 F3d 433](#), cert den (2008) 552 US 1099, 128 S Ct 903, 169 L Ed 2d 729.

[5 USCS § 504\(a\)\(4\)](#), which, in adversary adjudication arising from agency action to enforce party's compliance with statutory or regulatory requirement, allows recovery of fees and costs when demand of agency is substantially in excess of decision of adjudicative officer and is unreasonable when compared with such decision, sets forth conjunctive two-prong test (both prongs of which depend on facts and circumstances of each case) for determining whether fees and costs should be awarded; first prong is largely quantitative, focusing on whether, in context of cases under Federal Mine Safety and Health Act ([30 USCS §§ 801](#) et seq.), Secretary of Labor has proposed penalty that is substantially in excess of penalty ultimately assessed by FMSHRC pursuant to [30 USCS § 820\(i\)](#), and second prong is qualitative, presenting issue of whether Secretary has acted reasonably in proposing particular penalty. [Secretary v L & T Fabrication & Construction, Inc. \(2000\) 22 FMSHRC 509](#).

Prevailing party in administrative proceedings may not rely on [5 USCS § 504\(a\)\(4\)](#) to obtain attorney's fees under EAJA; application of statute is limited to non-prevailing parties. [Secretary v Colorado Lava, Inc. \(2005\) 27 FMSHRC 186](#).

"Special circumstances" that exclude award under [5 USCS § 504\(a\)\(4\)](#) are intended to include both legal and factual considerations that may make it unjust to require public to pay attorney's fees even in situations where ultimate award is significantly less than amount demanded. [Secretary v Georges Colliers, Incorporated \(2005\) 27 FMSHRC 362](#).

## 6. Payment of costs and fees

Attorney fee awarded to prevailing party pursuant to [5 USCS § 504](#) is to be paid to party rather than directly to attorney. [FDL Technologies, Inc. v United States \(1992, CA\) 967 F2d 1578, 92 Daily Journal DAR 9957, 38 CCF P 76351](#), reh, en banc, den (1992, CA FC) [1992 US App LEXIS 17398](#) and (criticized in [Stephens v Astrue \(2008, DC Md\) 539 F Supp 2d 802, 130 Soc Sec Rep Serv 380](#)) and (criticized in [McMahon v Astrue \(2009, DC Ariz\) 141 Soc Sec Rep Serv 534](#)).

Federal Offset Statute ([31 USCS § 3728](#)) does not allow for interest where payment request is not presented to Secretary of Treasury as provided therein, but instead is presented to responsible agency as expressly provided in EAJA ([5 USCS § 504\(d\)](#)); where, by law, payments must come from agency's appropriations, Federal Offset Statute plainly does not apply. [Bianchi v United States \(2000\) 46 Fed Cl 363](#).

## 7. Administrative review

FMSHRC has jurisdiction to administratively review ALJ's decision on party's motion for EAJA ([5 USCS § 504](#)) attorney's fees and costs. [Secretary v Contractors Sand and Gravel, Inc. \(1998\) 20 FMSHRC 960.](#)

## 8. --Standard of review

In conducting administrative review of ALJ's decision on party's motion for EAJA ([5 USCS § 504](#)) attorney's fees and costs, FMSHRC will apply substantial evidence standard of review to findings of fact, and de novo standard of review to questions of law. [Secretary v Contractors Sand and Gravel, Inc. \(1998\) 20 FMSHRC 960](#); [Secretary v James M. Ray \(1998\) 20 FMSHRC 1014.](#)

ALJ's decision regarding EAJA attorney's fees and costs is reviewed by [SEC de novo. Re Rita C. Villa \(2000\) 2000 SEC LEXIS 410.](#)

## 9. Judicial review

Burden of proving that fee award should not be made rests with government. [Enerhaul, Inc. v NLRB \(1983, CA11\) 710 F2d 748, 113 BNA LRRM 3636, 98 CCH LC P 10376,](#) reh den (1983, CA11) 718 F2d 1115.

Assuming that [5 USCS § 504\(c\)\(2\)](#), providing for petition for leave to appeal, states jurisdictional prerequisite, statute does not specify that petition be in form of pleading bearing such caption and requirement is met where plaintiffs indicate in complaint that appeal is under [5 USCS § 504](#); District Court has discretion to refuse to entertain appeal for fees under [5 USCS § 504](#) when complainant has not filed petition for leave to appeal. [Smedberg Machine & Tool, Inc. v Donovan \(1984, CA7 Ill\) 730 F2d 1089.](#)

Decision of ALJ denying attorney fees and expenses under [5 USCS § 504](#) to employer fined by Secretary of Labor was not final agency decision and not immediately appealable. [L & T Fabrication & Constr., Inc. v Secretary of Labor \(1999, CA10\) 197 F3d 1289, 1999 CCH OSHD P 31972, 1999 Colo J C A R 6637.](#)

In seeking to dismiss veteran's claim for compensatory damages under Federal Tort Claims Act (FTCA), [28 USCS §§ 2671](#) et seq., against U.S. based on psychiatrist's negligence in his evaluation, government argued that veteran could not sue in district court because sovereign immunity applied; however, Administrative Procedure Act provided waiver of consent and was applicable to final agency actions for which there was no other adequate remedy in court under [5 USCS § 504](#); although veteran had appealed reduction of his veterans benefits (which was based on negligent evaluation) and won favorable outcome, obtaining remedy and thus allowing for no further cause of action, issue before court was different one to which Department of Veterans Affairs (DVA) had issued final decision; furthermore, argument was unpersuasive because in its response denying veteran's claim, DVA pointed veteran to alternatives to appeal decision, including filing suit pursuant to FTCA in federal district court. [Castillo v VA \(2006, DC Puerto Rico\) 433 F Supp 2d 221.](#)

## Unpublished Opinions

Unpublished: Court lacked jurisdiction to review Federal Aviation Administration's (FAA) denial of corporation's request for attorney's fees and costs under [5 USCS § 504](#), part of Equal Access to Justice Act because FAA brought underlying action pursuant to its authority under [49 USCS § 5103\(b\)](#), part of Federal Hazardous Materials Laws (FHMTL), and original jurisdiction for review of FAA's final determination was in district courts under [5 USCS § 704](#); although Congress had enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), *Pub. L. No. 109-59, 119 Stat. 1144*, which provided for judicial review of final agency adjudications under FHMTL in courts of appeals, SAFETEA-LU did not apply retroactively. [Dominion Concepts, Inc. v FAA \(2006, CA9 Wash\) 197 Fed Appx 710.](#)

**10. --Timeliness**

Thirty-day time limitation for filing petition for review in 1985 Equal Access to Justice Act ([5 USCS § 504](#)) applies to case in which fee petition was pending on effective date of Act, thus where petitioner sought review of denial of fee application almost 9 months after issuance of agency order, court lacks jurisdiction to review. [Western Newspaper Pub. Co. v NLRB \(1987, CA7\) 821 F2d 459, 125 BNA LRRM 2906, 106 CCH LC P 12433.](#)

Requirement in Equal Access to Justice Act that dissatisfied party appeal agency decision within 30 days is jurisdictional. [MacDonald Miller Co. v NLRB \(1988, CA9\) 856 F2d 1423, 129 BNA LRRM 2375, 109 CCH LC P 10735.](#)

30-day period in which to appeal agency's fee determination begins to run when determination is made or issued, not when order of determination is served. [Scott v NTSB \(1997, App DC\) 324 US App DC 451, 114 F3d 305.](#)

[5 USCS § 504](#)(c)(2) sets 30-day time limit for court appeals from all final fee decisions by agencies conducting adversary adjudication, whether decision be ruling that certain amount be awarded, or that no amount be awarded because none was warranted on merits, or because requesting party did not prevail, or because application was inadequate, or because application was too late. [J-I-J Constr. Co. v United States \(1987, CA\) 829 F2d 26, 34 CCF P 75359.](#)

Under statute, thirty-day period begins to run when Board of Contract Appeals issues its decision, not when party seeking claim receives copy of that decision; provision in Contract Disputes Act ([41 USCS § 607](#)) allowing contractor to appeal Board's decision to court within 120 days after date of receipt of copy of such decision does not persuade court that Congress meant to say within 30 days after date of receipt of copy of determination. [Adam Sommerrock Holzbau, GmbH v United States \(1989, CA\) 866 F2d 427, 35 CCF P 75614.](#)

**11. --Standard of review**

Judicial review of agency's fee determination is limited, and court may modify determination only if it finds that failure to make award was abuse of discretion. [Enerhaul, Inc. v NLRB \(1983, CA11\) 710 F2d 748, 113 BNA LRRM 3636, 98 CCH LC P 10376.](#) reh den (1983, CA11) 718 F2d 1115.

Administrative agency's fee determination may be modified only if there is abuse of discretion. [Iowa Express Distribution v NLRB \(1984, CA8\) 739 F2d 1305, 116 BNA LRRM 3224, 101 CCH LC P 11173.](#) cert den (1984) 469 US 1088, 105 S Ct 595, 83 L Ed 2d 704, 117 BNA LRRM 3232, 102 CCH LC P 11268, reh den (1985) 470 US 1024, 105 S Ct 1385, 84 L Ed 2d 404.

Agency denial of attorney fees can be reversed only if court finds that agency abused its discretion. [Natchez Coca-Cola Bottling Co. v NLRB \(1985, CA5\) 750 F2d 1350, 118 BNA LRRM 2340, 102 CCH LC P 11332.](#)

Due process challenge to constitutionality of filing requirements involves question of law and is subject to de novo review. [Lord Jim's v NLRB \(1985, CA9\) 772 F2d 1446, 120 BNA LRRM 2708, 103 CCH LC P 11580.](#)

Reviewing court lacks jurisdiction to award fees, and is only empowered to determine if there was abuse of discretion by agency in denying fees. [Morley v Brown \(1985, ND Ohio\) 605 F Supp 1468.](#)

**12. --Award by court**

[5 USCS § 504](#) vests discretionary authority in court to grant request for attorney fees in connection with proceedings before administrative agency. [Kirkland v Railroad Retirement Bd. \(1983, CA2\) 706 F2d 99.](#)

Agency's reliance on legal theory which had been clearly and repeatedly rejected by federal court warrants award of attorney fee by court. [\*Enerhaul, Inc. v NLRB\* \(1983, CA11\) 710 F2d 748, 113 BNA LRRM 3636, 98 CCH LC P 10376](#), reh den (1983, CA11) 718 F2d 1115.

District Court abused its discretion in awarding attorney fees for time spent in Forest Service's administrative appeal process, where administrative proceedings preceded civil action rather than being on post-litigation remand; administrative proceedings were not crucial to vindication of rights. [\*Friends of Boundary Waters Wilderness v Thomas\* \(1995, CA8 Minn\) 53 F3d 881, 26 ELR 20253](#).

Where party seeks award from court pursuant to 28 USCS § 2412 for fees and expenses of litigating petition for review of agency action, court should also award appropriate fees and expenses incurred in underlying agency litigation to same extent authorized in [5 USCS § 504\(a\)](#); therefore, because corporation would be entitled to recover fees for non-attorney representatives had it proceeded under [5 USCS § 504](#), it was equally entitled to recover such fees pursuant to 28 USCS § 2412(d). [\*Am. Wrecking Corp. v Sec'y of Labor\* \(2004, App DC\) 361 US App DC 97, 364 F3d 321, 20 BNA OSHC 1678](#).

### 13. Miscellaneous

Under Equal Access to Justice Act, Congress has clearly intended that defendants be eligible for fees against government in any civil action unless some other statute specifically says otherwise; thus, where Age Discrimination in Employment Act has no express provision for award of attorney fees, but incorporates certain remedial and procedural provisions of Fair Labor Standards Act, and EEOC shows no other statute to prevent court from turning to EAJA, court will award fees. [\*EEOC v Clay Printing Co.\* \(1994, CA4 NC\) 13 F3d 813, 63 BNA FEP Cas 1101, 63 CCH EPD P 42760](#) (criticized in [\*Villescas v Richardson\* \(2001, DC Colo\) 145 F Supp 2d 1228](#)).

Where company and union successfully defended unfair labor practice charge brought by NLRB and where their applications for attorney's fees and expenses under [5 USCS § 504\(a\)\(1\)](#) were denied, court affirmed denial because NLRB's overall position was substantially justified. [\*Hovey Elec., Inc. v NLRB\* \(2001, CA6\) 22 Fed Appx 509, 170 BNA LRRM 3024](#).

Awarding fees to both of brothers' attorneys and their agent would be unreasonable because brothers did not need three representatives. [\*Lane v USDA\* \(2002, CA8 ND\) 294 F3d 1001](#).

[5 USCS § 504](#), which authorizes courts to award fees in certain adversary adjudications before administrative agencies, reinforces conclusion that 28 USCS § 2412(d)(1) does not authorize compensation for hours expended in administrative proceedings. [\*Habitat Educ. Ctr., Inc. v Bosworth\* \(2006, ED Wis\) 62 Env't Rep Cas 1363](#).

In case where flight instructor had been charged with falsely signing FAA flight form, instructor responded in proceeding and denied allegations, and Administrator withdrew its pleading and order of revocation, fact that instructor signed EAJA fee waiver when Administrator withdrew its pleading and order, does not negate instructor's entitlement to such fees, since it was possible that in order to terminate proceeding, FAA used its power and influence to coerce waiver to which it was not entitled. Re Mark J. Cross (1990) NTSB Docket No. 90-EAJA-SE-10020.

Hearing is threshold factor in determining whether party has standing to pursue EAJA application. Applications of Mark K. Turner and Stephen J. Coonan (2009) NTSB EA-5467.

## II. PREVAILING PARTY

### 14. Generally

Party is no less prevailing party because it achieves goal by way of consent decree rather than judicial decision. [Jones v MacMillan Bloedel Containers, Inc. \(1982, CA8 Ark\) 685 F2d 236, 29 BNA FEP Cas 939, 29 CCH EPD P 32801.](#)

Settlement of controversy does not bar fee award since legislative history establishes that party need not prevail on all counts after trial on merits in order to obtain fee award. [Environmental Defense Fund, Inc. v Watt \(1983, CA2 NY\) 722 F2d 1081, 20 Env't Rep Cas 1167, 14 ELR 20070.](#)

[5 USCS § 504\(a\)\(4\)](#) applies only when government has prevailed. [Turner v NTSB \(2010, App DC\) 391 US App DC 90, 608 F3d 12.](#)

Prevailing party in administrative proceedings may not rely on [5 USCS § 504\(a\)\(4\)](#) to obtain attorney's fees under EAJA; application of statute is limited to non-prevailing parties. [Secretary v Colorado Lava, Inc. \(2005\) 27 FMSHRC 186.](#)

Although EAJA does not define prevailing party, term requires that final result represent in real sense disposition that furthers fee claimant's interest. Nicolai v Del Balzo (1993) NTSB EA-3951.

Since fee-shifting statutes should be interpreted consistently, prevailing party standard for purposes of [5 USCS § 504](#) is same as it is for application of [28 USCS § 2412](#). Applications of Mark K. Turner and Stephen J. Coonan (2009) NTSB EA-5467.

#### **15. Partial success**

Application should have been examined to determine if partial award of attorneys fees was appropriate with respect to each allegation and fact that action of agency may have been supported does not justify denial of partial award where other allegations had to be disproved by petitioner because absent official notice that it was meritless, each allegation would not disprove itself. [Alphin v National Transp. Safety Bd. \(1988, App DC\) 268 US App DC 138, 839 F2d 817.](#)

Under Equal Access to Justice Act, party who receives any partial judgment is "prevailing party" and may recover pro rata apportionment of its fees; thus, where contractor refuted government's allegations of accord and satisfaction, and contractor's attorneys devoted 30 percent of their time to that issue, contractor is entitled to 30 percent of its total attorney fees. [Community Heating & Plumbing Co. v Garrett \(1993, CA FC\) 2 F3d 1143, 39 CCF P 76558.](#)

Party need not prevail as to every issue in order to receive award of fees and expenses; partial awards are contemplated under EAJA. Swafford and Coleman v Hinson (1996) NTSB EA-4426.

Plaintiff bid protestor was not prevailing party for purposes of award of attorney's fees Equal Access to Justice Act, where court's remand order to government agency was predicated on mootness of merits of issue, competitor's Small Business Administration status. [Ryan v United States \(2007\) 75 Fed Cl 769.](#)

#### **16. Net worth**

Equal Access to Justice Act does not violate equal protection rights of individuals with net worth over 2 million dollars by reimbursing attorney fees only for those successful petitioners whose net worth is under 2 million. [Richard v Hinson \(1995, CA5\) 70 F3d 415, cert den \(1996\) 518 US 1004, 135 L Ed 2d 1047, 116 S Ct 2522.](#)

Attorney fees will not be granted where prevailing party's net worth, as shown by bankruptcy statement, and his failure to use generally accepted accounting principles in assigning contingent assets and liabilities, exceeds \$ 2

million dollars. [\*Kuhns v Board of Governors of Federal Reserve System \(1991, App DC\) 289 US App DC 154, 930 F2d 39.\*](#)

National Transportation Safety Board has no authority to ignore terms of EAJA, or to declare that it is unconstitutional; thus, individual could not claim that net worth restriction of [5 USCS § 504\(b\)\(1\)\(B\)](#) was unconstitutional and denied him equal protection. *Richard v Hinson (1995) NTSB EA-4336.*

## 17. --Aggregation

Members of multiemployer association who were prevailing parties in unfair labor practice case are entitled to attorney fees, and assets of all members of association will not be aggregated for purpose of determining individual entitlement. [\*Grason Electric Co. v NLRB \(1991, CA9\) 951 F2d 1100, 91 Daily Journal DAR 15571, 139 BNA LRRM 2215, 120 CCH LC P 11041.\*](#)

Aggregating assets of petitioner corporation, which by itself would have been eligible for attorney fees under Equal Access to Justice Act, and its parent corporation, making petitioner ineligible for attorney fees, was improper where petitioner was separate corporate entity litigating on its own behalf. [\*Tri-State Steel Constr. Co. v Herman \(1999, CA6\) 164 F3d 973, 18 BNA OSHC 1602, 1998 CCH OSHD P 31736, 1999 FED App 11P.\*](#)

## 18. Particular cases

Amendment to Equal Access to Justice Act (EAJA), [5 USCS § 504](#), which clarifies definition of "prevailing party" for purposes of determining whether attorney's fees may be awarded in case of eminent domain proceedings, applies where attorney's previously filed fee applications were pending on day amendment became law, since EAJA expressly states that its amendments shall apply to cases pending on or commencing on or after date of its enactment, legislative history of EAJA amendments indicates that effective-date language means what it literally says, applying EAJA's clarifying changes would not work manifest injustice, and numerous cases have reached same conclusion; accordingly, attorney's fees are barred in present case, since, under amendment's definition, private parties did not "prevail" where final valuation in eminent domain proceeding was far closer to that suggested by government than that suggested by private parties. [\*United States v 6.93 Acres of Land \(1988, CA1 Mass\) 852 F2d 633.\*](#)

Award of prevailing party attorney's fees under Equal Access to Justice Act to land owner was properly reversed by Environmental Appeals Board, where EPA's position in underlying enforcement action, although ultimately not persuasive, was substantially justified. [\*Bricks, Inc. v EPA \(2005, CA7\) 426 F3d 918, 61 Env't Rep Cas 1425, 35 ELR 20218.\*](#)

Cleaning company was not entitled to award of attorneys' fees under [5 USCS § 504\(a\)](#) because cleaning company was not "prevailing party" in agency proceeding during which mine-safety administration merely withdrew its withdrawal order issued under [30 USCS § 814\(g\)\(1\)](#); no legal right of cleaning company had been vindicated. [\*Jeroski v Fed. Mine Safety & Health Review Comm'n \(2012, CA7\) 697 F3d 651.\*](#)

Petitioner pilots were not prevailing parties for purposes of [5 USCS § 504\(a\)\(1\)](#); once Federal Aviation Administration withdrew its complaints, pilots were no longer subject of proceedings to suspend their licenses, and order of ALJ dismissing cases was just administrative housekeeping measure, not form of relief. [\*Turner v NTSB \(2010, App DC\) 391 US App DC 90, 608 F3d 12.\*](#)

Aviation company was prevailing party because FAA dismissal of its complaint with prejudice had res judicata effect. [\*Green Aviation Mgmt. Co., LLC v FAA \(2012, App DC\) 400 US App DC 151, 676 F3d 200,\*](#) request gr, costs/fees proceeding (2012, App DC) [2012 US App LEXIS 13319.](#)

ALJ properly denied mine operator's application for attorney's fees because operator was not "prevailing party" where that term did not include party that failed to secure judgment on merits or court-ordered consent decree, but nonetheless achieved desired result due to voluntary change in conduct of Mine Safety and Health Review Commission or Secretary of Labor, operator failed to present "good reason" not to apply Buckhannon interpretation of "prevailing party," although ALJ's order was silent on subject, it was properly viewed as dismissal without prejudice, and nothing in record suggested that ALJ's dismissal had res judicata effect or barred Secretary from re-issuing citations against operator. [Cactus Canyon Quarries, Inc. v Fed. Mine Safety & Health Review Comm'n & Sec'y of Labor \(2016, App DC\) 820 F3d 12](#), reh, en banc, den (2016, App DC) [2016 US App LEXIS 10135](#).

Immigrants from Russia, who were eventually granted permanent resident status by government after government voluntarily granted that status subsequent to immigrants filing their complaint in court, were not entitled to recover costs and fees under Equal Access to Justice Act, [5 USCS § 504](#) and [28 USCS § 2412](#), because immigrants were not prevailing party where governments' voluntary change in conduct lacked necessary judicial imprimatur on change. [Babel v United States Dep't of Homeland Sec. \(2004, ND Ill\) 321 F Supp 2d 963](#).

Delay of 13 years suffered by individual while awaiting final decision by Commodity Futures Trading Commission does not justify award of attorney's fees under EAJA, even though individual prevailed on merits. In re Buckwalter (1994, CFTC) [CCH Comm Fut L Rep P 26,096](#).

For purposes of determining prevailing party status, as general matter, charges voluntarily withdrawn by FAA Administrator prior to hearing will not give rise to EAJA award; further, sanction reduction will not, in and of itself, justify EAJA award. Application of Patrick Sean Rice (2009) NTSB EA-5474.

### 19. --Contractors and subcontractors

[5 USCS § 504](#) does not waive sovereign immunity as to subcontractor who successfully sues United States through sponsorship of general contractor. [Southwest Marine ex rel. Universal Painting & Sandblasting Corp. v United States \(1994, CA9 Cal\) 43 F3d 420, 94 CDOS 9412, 94 Daily Journal DAR 17418, 39 CCF P 76728](#).

General Services Administration Board of Contract Appeals erred in interpreting [5 USCS § 504](#) to preclude award of attorney fees and expenses to contractor whose insurer was responsible for paying contractor. [Ed A. Wilson, Inc. v GSA \(1997, CA FC\) 126 F3d 1406, 42 CCF P 77219](#).

### 20. --Immigration

Prevailing parties in suit against INS are entitled to attorney fees, and separate finding that government's position in fee litigation itself was not substantially justified was unnecessary. [Commissioner, INS v Jean \(1990\) 496 US 154, 110 S Ct 2316, 110 L Ed 2d 134, CCH Unemployment Ins Rep P 15427A, 20 ELR 20910](#) (criticized in [State ex rel. Steffen v Peterson \(2000\) 2000 SD 39, 607 NW2d 262](#)) and (criticized in [Limone v United States \(2011, DC Mass\) 815 F Supp 2d 393](#)).

Organization that argued successfully for injunction preventing deportation of individual and established her eligibility to remain in country was eligible for award of fees from court proceedings but not for administrative proceedings. [Full Gospel Portland Church v Thornburgh \(1991, App DC\) 288 US App DC 356, 927 F2d 628](#), reh, en banc, den (1991, App DC) [1991 US App LEXIS 22513](#) and reh den (1991, App DC) [1991 US App LEXIS 22514](#) and cert den (1992) [502 US 1030, 116 L Ed 2d 773, 112 S Ct 867](#).

## III. SUBSTANTIAL JUSTIFICATION

## A. In General

### 21. Generally

Attorney fees may be awarded against United States under Equal Access to Justice Act only where position of United States is not substantially justified. [Cornella v Schweiker \(1984, CA8 SD\) 728 F2d 978](#) (superseded by statute on other grounds as stated in [Peterson v United States R. Retirement Bd. \(1986, CA8\) 785 F2d 245](#)) and (criticized in [Turner v Astrue \(2010, ED Ky\) 764 F Supp 2d 864, 157 Soc Sec Rep Serv 8](#)).

Position of United States which is to be substantially justified includes government's position at both prelitigation and litigation levels since limitation of consideration to government's position at litigation would absolve outrageous underlying governmental action so long as Justice Department litigators acted reasonably. [Iowa Express Distribution v NLRB \(1984, CA8\) 739 F2d 1305, 116 BNA LRRM 3224, 101 CCH LC P 11173](#), cert den (1984) 469 US 1088, 105 S Ct 595, 83 L Ed 2d 704, 117 BNA LRRM 3232, 102 CCH LC P 11268, reh den (1985) 470 US 1024, 105 S Ct 1385, 84 L Ed 2d 404.

Government position is "substantially justified" if it is solid and well-founded. [Taylor v Heckler \(1987, CA3 Pa\) 835 F2d 1037](#), CCH Unemployment Ins Rep P 17815.

Conclusion that because agency had presented enough evidence to establish violation it was substantially justified in initiating and continuing proceedings against petitioner is not standard required by [5 USCS § 504](#) which expressly requires examination into "administrative record, as whole" and any lesser examination, such as viewing government's case in vacuum would defeat purposes of statute. [Alphin v National Transp. Safety Bd. \(1988, App DC\) 268 US App DC 138, 839 F2d 817](#).

Substantial justification may be demonstrated even where charges have been withdrawn or action has been dismissed. *Caruso v Hinson* (1994) NTSB EA-4165; *Eden v Hinson* (1994) NTSB EA-4218.

### 22. Reasonableness in law and fact

Test for determining whether government's position is substantially justified is essentially one of reasonableness. [Environmental Defense Fund, Inc. v Watt \(1983, CA2 NY\) 722 F2d 1081, 20 Env't Rep Cas 1167, 14 ELR 20070](#).

Government must show that there is reasonable basis in fact for facts alleged including, that there exist reasonable basis in law for theory it propounds, and that facts alleged will reasonably support legal theory advanced. [United States v 2,116 Boxes of Boned Beef, etc. \(1984, CA10 Kan\) 726 F2d 1481](#), cert den (1984) 469 US 825, 105 S Ct 105, 83 L Ed 2d 49, reh den (1984) 469 US 1068, 105 S Ct 557, 83 L Ed 2d 442 and (superseded by statute on other grounds as stated in [United States v Estridge \(1986, CA8 Mo\) 797 F2d 1454, 86-1 USTC P 9282, 57 AFTR 2d 1006](#)) and (superseded by statute on other grounds as stated in [Haitian Refugee Ctr. v Meese \(1986, CA11 Fla\) 791 F2d 1489](#)) and (superseded by statute on other grounds as stated in [Tax Analysts v United States \(1987\) 11 Cl Ct 802, 87-1 USTC P 9202, 60 AFTR 2d 5219](#)) and (criticized in [Ortloff v United States \(2003, CA7 Wis\) 335 F3d 652](#)).

Test is whether government's position has reasonable basis in law and fact. [Westerman, Inc. v NLRB \(1984, CA6\) 749 F2d 14, 117 BNA LRRM 3267, 102 CCH LC P 11276](#).

Agency's position is substantially justified if it has reasonable basis in law and fact. [Temp Tech Industries, Inc. v NLRB \(1985, CA7\) 756 F2d 586, 118 BNA LRRM 3004, 102 CCH LC P 11396](#).

Test of substantial justification is practical test, whether agency's position was reasonable both in law and fact. [Derickson Co. v NLRB \(1985, CA8\) 774 F2d 229, 120 BNA LRRM 2571, 103 CCH LC P 11568](#).



Test of whether position of United States is substantially justified is essentially one of reasonableness in law and in fact; government must show that its position was clearly reasonable, well founded in law and fact, solid though not necessarily correct. [SEC v Kluesner \(1987, CA8 Minn\) 834 F2d 1438, CCH Fed Secur L Rep P 93562](#).

For government's position to be substantially justified, position must be reasonable in fact and law; thus, legal theory propounded must be reasonable, facts alleged must have reasonable basis in truth, and facts alleged must reasonably support legal theory. Nicolai v Del Balzo (1993) NTSB EA-3951.

With respect to substantial justification, which means that government must show that its position is reasonable in both fact and law, determination of reasonableness involves initial assessment of whether sufficient, reliable evidence exists to pursue matter. Application of James W. Beauchamp (2008) NTSB EA-5422.

### 23. Failure to prevail

Merely because issues have been decided adversely to secretary in other circuits does not necessarily make position on same issues in circuit which has not ruled on issue unreasonable. [Cornella v Schweiker \(1984, CA8 SD\) 741 F2d 170](#).

Government's failure to prevail does not give rise to presumption that government is not substantially justified in its position. [Westerman, Inc. v NLRB \(1984, CA6\) 749 F2d 14, 117 BNA LRRM 3267, 102 CCH LC P 11276](#).

Agency's failure to prevail on merits does not preclude finding that its position was nonetheless substantially justified under EAJA. Thomas v Hinson (1995) NTSB EA-4345.

EAJA substantial justification standard is less stringent than that applied at merits phase of FAA proceeding, where FAA Administrator must prove his case by preponderance of reliable, probative and substantial evidence; thus, FAA's failure to prevail on merits does not preclude finding that its position was nonetheless substantially justified under EAJA. Wieland and Perry v Hinson (1995) NTSB EA-4406.

### 24. Presumptions and burden of proof

Government bears burden of proving substantial justification of its position. [Foley Constr. Co. v U.S. Army Corps of Engineers \(1983, CA8 Iowa\) 716 F2d 1202, 31 CCF P 71506](#), cert den (1984) 466 US 936, 104 S Ct 1908, 80 L Ed 2d 457, reh den (1984) 467 US 1246, 104 S Ct 3525, 82 L Ed 2d 832 and (superseded by statute on other grounds as stated in [SEC v Kluesner \(1987, CA8 Minn\) 834 F2d 1438, CCH Fed Secur L Rep P 93562](#)).

Government bears burden of demonstrating justification for its position. [Environmental Defense Fund, Inc. v Watt \(1983, CA2 NY\) 722 F2d 1081, 20 Env't Rep Cas 1167, 14 ELR 20070](#).

United States has burden of showing substantial justification of its position. [Cornella v Schweiker \(1984, CA8 SD\) 728 F2d 978](#) (superseded by statute on other grounds as stated in [Peterson v United States R. Retirement Bd. \(1986, CA8\) 785 F2d 245](#)) and (criticized in [Turner v Astrue \(2010, ED Ky\) 764 F Supp 2d 864, 157 Soc Sec Rep Serv 8](#)).

Government's failure to prevail does not give rise to presumption that government is not substantially justified in its position; government is not required to establish that decision to litigate issue was based on substantial probability of prevailing. [Westerman, Inc. v NLRB \(1984, CA6\) 749 F2d 14, 117 BNA LRRM 3267, 102 CCH LC P 11276](#).

Agency bears burden of demonstrating justification for its position and must make strong showing to meet burden; unless agency meets burden of demonstrating substantial justification, denial of attorney fees and expenses by agency is abuse of discretion; revocation of settlement agreement with employer is not substantially justified where

general counsel was on notice that alleged violation was de minimis in nature at time settlement agreement was revoked. [Derickson Co. v NLRB \(1985, CA8\) 774 F2d 229, 120 BNA LRRM 2571, 103 CCH LC P 11568.](#)

Government position is "substantially justified" if it is solid and well-founded, and burden of proving that each of its positions was substantially justified belongs to government. [Taylor v Heckler \(1987, CA3 Pa\) 835 F2d 1037, CCH Unemployment Ins Rep P 17815.](#)

Under EAJA there is rebuttable presumption that prevailing party in litigation against government is entitled to fees, and government can rebut such presumption by demonstrating that its position was substantially justified; burden is on government to present substantial justification for its actions. [In re Midland Banana & Tomato Co., Inc., et al. \(1995\) 55 Agric Dec 590.](#)

To establish substantial justification, government must show that there is reasonable basis in truth for facts alleged in pleadings, that there exists reasonable basis in law for theory it propounds, and that facts alleged will reasonably support legal theory advanced. [C&M Airways, Inc. v Busey \(1991\) EA-3332, 1991 NTSB LEXIS 89.](#)

## B. Particular Cases

### 25. Commodity Futures Trading Commission

Commodity Futures Trading Commission's Division of Enforcement was substantially justified in using adjudicatory proceeding to determine whether "cash forward" contracts, pursuant to which corporation engaged in trading precious commodities, were illegal futures contracts under Commodity Exchange Act ([7 USCS §§ 1 et seq.](#)). [First Nat'l Monetary Corp. v Commodity Futures Trading Com. \(1988, CA6\) 860 F2d 654.](#)

Reversal by Commodity Commission of ALJ's finding that commodity broker was guilty of price squeezing did not warrant award of attorney fees where investigation by Department of Agriculture was reasonable in view of facts that Department was not required to prove cash control, banker controlled significant cash supply, and where factual matters were disputable before trial and Department relied on expert witnesses in deciding to prosecute; standard for determining award of fees is "reasonableness" rather than "substantially justified." [Frey v Commodity Futures Trading Com. \(1991, CA7\) 931 F2d 1171, reh, en banc, den \(1991, CA7\) 1991 US App LEXIS 12273.](#)

Establishing individual's motive to engage in wash sale ([7 USCS § 6c\(a\)](#)) is not necessary part of successful enforcement suit, and in order to obscure his unlawful purpose, wash trader will seek to achieve his goal in manner that preserves appearance that transaction was result of lawful market activity; thus, CFTC must rely on circumstantial evidence to prove individual engaged in wash sale, and due to this, fact that CFTC relies on circumstantial evidence to prosecute case does not render its position "not substantially justified" for purposes of award of attorney's fees under EAJA ([5 USCS § 504](#)). [In re Buckwalter, et al. \(1993, CFTC\) CCH Comm Fut L Rep P 25,752.](#)

Floor brokers, who were charged with using technique of prearranged trading known as "ginzy" while executing series of butterfly spread trades in Treasury bond futures, in violation of [7 USCS § 6c\(a\)\(A\)](#) and (B), were not entitled to award of EAJA ([5 USCS § 504](#)) attorney's fees, even though they prevailed at hearing and on appeal, because Commodity Futures Trading Commission was substantially justified in law and in fact at all stages of proceeding; undisputed facts gave rise to plausible inference of noncompetitive trading that was supported by expert's well-reasoned analysis. [In re Griffin, et al. \(1995, CFTC\) CCH Comm Fut L Rep P 26,458.](#)

Individual, who was subject to Commodity Futures Trading Commission (CFTC) complaint which alleged that he had engaged in activities that required him to register as associated person of futures commission merchant under [7 USCS § 6k\(1\)](#), was not entitled to attorney's fees and costs under EAJA ([5 USCS § 504](#)), despite fact that complaint was dismissed, because CFTC had reasonable basis in fact to believe that individual was associated with

futures commission merchant as officer, partner or employee in capacity involving solicitation or acceptance of customers' orders. In re Mayer (1996, CFTC) [CCH Comm Fut L Rep P 26,792](#).

## 26. Contractors and subcontractors

Contractor's application for attorney's fees under Equal Access to Justice Act ([5 USCS § 504](#), [28 USCS § 2412](#)) is denied, notwithstanding that contractor prevailed on legal issue involved in dispute, where Government's position in questioning bonuses paid contractor and another was substantially justified, in view of fact that contractor's accounting and bookkeeping practices made his position appear, on its face, untenable and justified litigation of close legal question. [Burt Associates, Inc. \(1982, ASBCA\) 83-1 BCA P 16213](#).

Government's position that contractor should have assumed that expansion joint was required by principal apparent purpose of contract was not substantially justified where there was no ambiguity on face of specification addendum deleting expansion joint, as, though deletion may have lessened useful life of roof and increased future maintenance costs, it was not critical to structural integrity of building. [Roberts Constr. Co. \(1986, ASBCA\) 86-2 BCA P 18846](#).

Government's actions in collecting overpayment to contractor without following procedures required by Debt Collection Act ([5 USCS § 5514](#)) were substantially justified in light of legal uncertainty concerning applicability of Act, and thus contractor was not entitled to attorney fees under Equal Access to Justice Act ([5 USCS § 504](#)). [Pat's Janitorial Service, Inc. \(1986, ASBCA\) 86-2 BCA P 18995](#).

Navy's position in withholding payments to contractor was not substantially justified within meaning of Equal Access to Justice Act ([5 USCS § 504](#)) where underlying dispute resulted from diminution in Navy's requirements for garbage pickups, Navy did not show that it ever had reasonable factual basis upon which to base its assumption that fraud was occurring, and Navy began withholding funds from payments due contractor without report from FBI, or anything substantive in record to indicate fraud. [North Chicago Disposal Co. \(1986, ASBCA\) 86-3 BCA P 19052](#).

Government's position was substantially justified where theory upon which contractor ultimately prevailed was untimely asserted, government simply enforced clear and unambiguous language of liquidated damages provision of contract, albeit provision was subsequently held unenforceable, there was uncertainty and lack of precedence and authority on key issue, and it was unlikely that any government concession on issue would have concluded matter and avoided litigation. [Great Western Utility Corp. \(1986, ENG BCA\) 86-3 BCA P 9011](#).

## 27. Federal Aviation Administration and National Transportation Safety Board

There was not substantial evidence to support decision of National Transportation Safety Board that FAA's decision to proceed against pilot, prevailing party, was substantially sustained where there was no explanation for odd series of events that, in words of ALJ, gave rise to strong suspicion that "something was wrong in state of Denmark"; and where FAA chose to ignore certain facts and simply failed to discover others. [Smith v National Transp. Safety Bd. \(1993, CA8\) 992 F2d 849](#).

Even though ALJ found no violation of FAA regulations resulting from respondent's nine separate solo flights, respondent was not entitled to attorney's fees, since Administrator's allegation of violation was substantially justified, in that Administrator had reasonable basis in truth for alleged violations, Administrator had reasonable basis in law for legal theory underlying charges, and Administrator's alleged facts did reasonably support advanced legal theory. [Darius v Busey \(1990\) NTSB EA-3217](#).

FAA Administrator's position can be substantially justified, for purpose of awarding EAJA fees, even though underlying complaint was dismissed as stale, because it would be inconsistent with purpose of EAJA to assume, without evaluating case in its entirety, that because complaint was dismissed as stale, Administrator must have

commenced action without substantial justification; there is no provision in EAJA for automatic award of fees and costs in each case that is dismissed on procedural grounds. *Pine and Ter Keurst* (1992) NTSB EA-3724.

Position of FAA Administrator was not substantially justified, for purpose of awarding EAJA fees in case involving pilot who had violated aircraft manual by landing overweight, because Administrator, who was on notice that pilot planned to offer emergency defense, was obliged not to pursue matter if emergency defense was reasonable. *Scott v Hinson* (1994) NTSB EA-4274.

EAJA substantial justification standard is less stringent than that applied at merits phase of FAA proceeding, where FAA Administrator must prove his case by preponderance of reliable, probative and substantial evidence; thus, FAA's failure to prevail on merits does not preclude finding that its position was nonetheless substantially justified under EAJA. *Wieland and Perry v Hinson* (1995) NTSB EA-4406.

To find that Administrator of FAA was substantially justified in routine EAJA case (i.e. one in which charges are not sustained following adjudication), it must be found that Administrator's position was reasonable in fact and law (i.e. that he had reasonable factual and legal basis for believing that alleged violations had occurred); however, in case decided on procedural ground rather than on merits, determination as to substantial justification must focus not on adequacy of underlying legal theory and strength or weakness of evidence that would have been submitted had charges been litigated, but on judgment to pursue matter that might not weather procedural challenge to Administrator's right *vel non* to litigate charges. *Neel v Daschle* (1997) NTSB EA-4517.

## **28. --Evidence and witnesses**

Administrator was substantially justified in position taken where, although Administrator failed to avail himself of exculpatory material disclosed to him one month prior to hearing, material was not crucial to issues to be determined, and although Administrator's principal complaining witness had bias, bias was not established with certainty that would require Administrator to investigate its existence before he began case. *McCrary v Emgen* (1986) NTSB EA-2365.

Government's position was not substantially justified in case where flight instructor had been charged with falsely signing FAA flight form, instructor responded in proceeding and denied allegations, and Administrator withdrew its pleading and order of revocation, since there was no direct evidence against instructor, and none to justify elements of allegations of conspiracy, fraud and deceit. *Re Mark J. Cross* (1990) NTSB Docket No. 90-EAJA-SE-10020.

In case involving alleged deviation from plane's assigned altitude without first receiving amended clearance, where air traffic controllers testified that they had not given pilot clearance to descend from assigned altitude, and pilot testified that he had been given such clearance, position of FAA was substantially justified, even though ALJ determined that controllers were lying and that FAA should have recognized that they reported deviation in order to cover up their own error, since it was reasonable for FAA to found its case on available evidence and attempt to persuade ALJ that controllers' statements were worthy of belief; simply because ALJ found pilot's testimony more credible does not, *ipso facto*, mean that controllers' testimony was inherently incredible. *Smith v Richards* (1992) NTSB EA-3648.

When key factual issues hinge on witness credibility, FAA is substantially justified (absent some additional dispositive evidence) in proceeding to hearing where credibility judgments can be made on those issues. *Martin v Hinson* (1994) NTSB EA-4280.

Substantial justification for FAA's position cannot be found lacking simply because ALJ did not credit testimony of FAA's witnesses. *Thomas v Hinson* (1995) NTSB EA-4345.

FAA Administrator can show substantial justification for action that rests exclusively on opinion testimony of FAA inspector, as long as inspector's opinion has not been rejected by National Transportation Safety Board as being without merit. *In re Young* (1995) NTSB EA-4335.

When key factual issues in FAA proceeding hinge on witness credibility, FAA Administrator is substantially justified, absent some additional dispositive evidence, in proceeding to hearing where credibility judgments can be made on those issues; substantial justification for FAA's position cannot be found lacking simply because ALJ discredited testimony of particular witness. *Petersen v Hinson* (1996) NTSB EA-4490.

### **29. --Suspension or revocation of certificates**

In case involving revocation of career airline mechanic's certificate, ALJ properly found that Administrator's position was not substantially justified, such that fees could be awarded to applicant, where case consisted of multitude of confusing and ambiguous maintenance records from company no longer in business, and individual who originally made allegations would not support his statements by testimony on witness stand. *Phillips v Busey* (1990) NTSB EA-3125.

ALJ properly denied EAJA attorney fees and expenses to applicants in action involving suspension of aircraft maintenance and inspection certification, since FAA Administrator's position throughout proceedings was substantially justified, in that Administrator had reasonable basis both in law and fact to initiate action, Administrator withdrew complaints shortly after principal witness recanted prior statement, and Administrator acted fairly throughout proceedings. *Carr and Thomas v Busey* (1990) NTSB EA-3192.

FAA Administrator was not substantially justified in his decision to litigate case involving suspension of aircraft dispatcher certificate based on allegations that dispatcher had violated regulations by dispatching aircraft into North Atlantic Minimum Navigation Performance Specifications airspace when that aircraft was not approved to operate therein, where NTSB found that dispatcher had breached no duty under regulations and could not be held liable for any failure by aircraft's crew to request appropriate deviation authorization from air traffic, and proceeding did not constitute appropriate occasion for FAA to attempt to define scope of dispatcher's responsibility for aircraft he has released. *Hampton v Harris* (1992) NTSB EA-3557.

FAA Administrator did not have reasonable basis in law for seeking revocation of individual's commercial pilot certificate, where individual had already suffered intensely and uniquely from mistake that was not shown to reflect, and did not appear to implicate, broad or general inability to exercise airman privileges with requisite care, judgment and responsibility, and Administrator pursued sanction for which he cited no close precedent and offered essentially no argument that his enforcement responsibilities would not have been adequately discharged by order less severe than revocation. *Grzybowski v Hinson* (1994) NTSB EA-4301.

Administrator of FAA failed to establish that he was substantially justified in ordering suspension of applicant's operating certificate and air worthiness certificate of its aircraft based on Administrator's position that applicant violated regulations by unobtrusively making audio and video recordings of Administrator's inspection of applicant's records at its place of business, since Administrator had no reasonable basis in law or fact for view that regulations proscribed unobtrusive taping of inspection of records, and thus applicant was entitled to award for attorney fees and other expenses under [5 USCS § 504](#). *Conner Airlines, Inc. v Engen* (1987) NSTB EA-2531.

In action involving revocation of carrier's operating certificate for alleged violations of Federal Aviation Regulations, government's position was not substantially justified, since in light of CAB precedent, government's factual allegations, even if true, did not support finding of violation of regulations. [C&M Airways, Inc. v Busey \(1991\) EA-3332, 1991 NTSB LEXIS 89](#).

### **Unpublished Opinions**

Unpublished: Substantial evidence supported National Transportation Safety Board's conclusion that Federal Arbitration Administration (FAA) reasonably decided to revoke mechanic's certificate, including (1) testimony of another mechanic that many parts were not in overhauled state, (2) photographs that showed various parts in dirty state inconsistent with recent engine overhaul, and (3) testimony that mechanic's logbook was not consistent with appearance and wear of various engine parts; FAA was not required to take mechanic's statements at fair value

and court denied mechanic's petition for review of Board's decision to reverse award of fees to him under [5 USCS § 504\(a\)\(1\)](#). *Beauchamp v FAA* (2010, CA4) 384 Fed Appx 259.

### 30. National Labor Relations Board

National Labor Relations Board (NLRB) position in backpay proceeding that discharged employee had no interim earnings was not substantially justified, notwithstanding argument that Board did not have burden of proof on issue of interim earnings and that it prevailed on petitioner's other defenses, since agency's position is substantially justified only when it has reasonable basis in law and fact, and Board agent had affirmative evidence in form of tax returns clearly indicating that discharged employee had interim earnings. [Phil Smidt & Son, Inc. v NLRB](#) (1987, CA7) 810 F2d 638, 124 BNA LRRM 2417, 105 CCH LC P 12183.

NLRB properly denied plaintiff's request for attorney's fees, since General Counsel was substantially justified in litigating two alleged violations of [National Labor Relations Act. M.P.C. Plating, Inc. v NLRB](#) (1992, CA6) 953 F2d 1018, 139 BNA LRRM 2259, 120 CCH LC P 11060.

Employer is entitled to attorney fees where General Counsel was not justified in continuing to pursue theory which, although initially justified, became unsupportable after presentation of merits of case. [Quality C.A.T.V., Inc. v NLRB](#) (1992, CA7) 969 F2d 541, 141 BNA LRRM 2058, 122 CCH LC P 10302.

Although General Counsel for NLRB may have exhibited poor judgment in pursuing claim beyond ALJ's decision and in filing 13 exceptions to ALJ's thorough and careful opinion, court cannot say that NLRB lacked substantial evidence to support its decision where it is possible to draw set of inferences from circumstances that would support General Counsel's position. [Europlast, Ltd. v NLRB](#) (1994, CA7) 33 F3d 16, 147 BNA LRRM 2010, 128 CCH LC P 11152.

Employer, prevailing party in suit by employee claiming he was fined for union activity, was entitled to attorney fees where General Counsel's case was "notable for its flimsiness." [Hess Mech. Corp. v NLRB](#) (1997, CA4) 112 F3d 146, 155 BNA LRRM 2016, 133 CCH LC P 11789.

For purposes of award of attorney's fees and expenses under Equal Access to Justice Act ([5 USCS § 504](#)), where General Counsel of NLRB is compelled by existence of substantial credibility issue to pursue litigation, and therefore to present evidence, which, if credited, would constitute prima facie case, General Counsel's case has reasonable basis in fact and law and is substantially justified. [Horizon Contract Glazing, Inc.](#) (2009) 353 NLRB 1094, 186 BNA LRRM 1057, 2008-9 CCH NLRB P 15206.

### 31. --Unfair labor practices

National Labor Relations Board correctly denied transfer and storage company's petition for further proceedings to address specific evidence in support of contention that general counsel was not substantially justified in bringing unfair labor practice case, where administrative law judge held in favor of company on every allegation, to establish its right to fees and expenses incurred in defending allegations, since § 504 "substantial justification" requires only that determination be based on factual record made before agency. [United States v Johnson](#) (1986, CA7 III) 805 F2d 753, 22 Fed Rules Evid Serv 44.

NLRB was substantially justified in pursuing its complaint against employer of hiring discrimination based on union membership, thereby giving district court ground to deny attorney fees under Equal Access to Justice Act, where it possessed 6 points of evidence tending to establish prima facie case of unlawful discrimination as well as statement made by employer's receptionist supporting case of discrimination. [Blaylock Elec. v NLRB](#) (1997, CA9) 121 F3d 1230, 137 CCH LC P 10327, corrected (1997, CA9) [97 CDOS 6597](#), [97 Daily Journal DAR 10732](#), 156 BNA LRRM 2065.

Where substantial evidence justified General Counsel to National Labor Relations Board in filing complaint and proceeding to hearing of unfair labor practice allegations but protective mantle of "substantial justification" was lost at conclusion of hearing and there was no justification for preparing elaborate post-trial briefs when it should have been abundantly evident that case against employer had been wrecked at trial, employer was entitled to attorneys' fees only for period beginning after close of evidence and conclusion of hearing. [Leeward Auto Wreckers, Inc. v NLRB \(1988, App DC\) 268 US App DC 318, 841 F2d 1143, 127 BNA LRRM 2990, 108 CCH LC P 10378.](#)

Union's application in unfair labor practice proceeding for fees and expenses pursuant to EAJA ([5 USCS § 504](#)) was dismissed by National Labor Relations Board, since union failed to show that it was eligible for relief under EAJA, and General Counsel was substantially justified in issuing complaint and proceeding to trial because his position advanced novel but credible extension or interpretation of law. [Teamsters Local Union No. 741 \(1996\) 321 NLRB 886, 153 BNA LRRM 1001, 1997-98 CCH NLRB P 16105.](#)

### 32. Miscellaneous

Nursing home that successfully challenged sanctions imposed on it by federal agency was not entitled to additional attorneys' fees under Equal Access to Justice Act, [5 USCS § 504\(a\)\(1\)](#) because agency's imposition of interim sanctions was based on state agency report, which was sufficient to establish substantial justification for sanctions. [Park Manor, Ltd. v HHS \(2007, CA7\) 495 F3d 433](#), cert den (2008) 552 US 1099, 128 S Ct 903, 169 L Ed 2d 729.

Attorney fees would be granted where agency's position was not substantially justified because it was wholly unsupported by text, legislative history, and underlying policy of governing statute, and would have produced "incredible result." [F.J. Vollmer Co. v Magaw \(1996, App DC\) 322 US App DC 193, 102 F3d 591](#) (criticized in [Atlantic Fish Spotters Ass'n v Daley \(2000, CA1 Mass\) 205 F3d 488](#)) and (criticized in [Conn. State Dep't of Soc. Servs. v Thompson \(2003, DC Conn\) 289 F Supp 2d 198](#)) and (criticized in [United States v Scheingold \(2003, DC NJ\) 293 F Supp 2d 447, 2004-1 USTC P 50116, 92 AFTR 2d 7205](#)).

Department of Labor was not substantially justified in imposing fines against gravel company for failing to comply with grounding requirements where its crusher was grounded by its frame, grounding met definition in regulations, and Secretary did not test crusher for grounding. [Contractor's Sand & Gravel, Inc. v Federal Mine Safety & Health Review Comm'n \(2000, App DC\) 339 US App DC 324, 199 F3d 1335, 1999 CCH OSHD P 32001.](#)

Comptroller of Currency erred in denying application under [5 USCS § 504](#) seeking attorney's fees for applicant's successful defense in action against him under Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 102 Stat. 183, because Comptroller was not "substantially justified" in bringing underlying administrative proceedings against applicant. [Loumiet v Office of Comptroller of Currency \(2011, App DC\) 397 US App DC 112, 650 F3d 796](#), costs/fees proceeding, request gr (2012, App DC) [2012 US App LEXIS 5893](#).

Administrative Law Judge did not abuse his discretion in determining that dockmasters who had been cited by Coast Guard for allegedly docking boats without requisite license were not entitled to recovery of costs and fees under Equal Access to Justice Act, [5 USCS § 504](#), where Coast Guard was "substantially justified" under [5 USCS § 504\(a\)\(1\)](#) in issuing citations even though Coast Guard had not formulated nationwide policy governing licensing of dockmasters, because (1) Administrative Law Judge had decided two cases establishing clear legal foundation for issuing citations, and (2) local officials were justified in enforcing consistent interpretation of governing law in region. [Bruch v United States Coast Guard \(1990, ED Pa\) 749 F Supp 688, 1994 AMC 112.](#)

Denial of attorney's fees to tool manufacturer under [5 USCS § 504](#) will not be disturbed, even though EPA initially charged it with 4 counts of violations of [42 USCS § 6924](#) and regulations thereunder, but ultimately settled for dismissal of 3 counts and mere \$ 3,000 civil penalty, because, even after state's issuance of special waste permit in 1994, EPA was substantially justified in pursuing enforcement action concerning problems with industrial waste pile from 1990-1992. [Hoosier Spline Broach Corp. v United States EPA \(1999, SD Ind\) 112 F Supp 2d 763.](#)

Government's position that requirement for products of manufacturer's latest design and products in satisfactory commercial or industrial use at least 2 years prior to bid opening could be met by products which had to be substantially modified or redesigned to meet other specification requirements was not reasonable, as disputed products were neither out-of-inventory items nor standard products. [T.H. Taylor, Inc. \(1986, ASBCA\) 86-3 BCA P 19257.](#)

Application for attorneys' fees under [5 USCS § 504](#) should not have been granted on grounds that General Counsel's position in underlying unfair labor practice case was not substantially justified; although union was prevailing party and met eligibility requirements for award, General Counsel had reasonable basis in fact and law to pursue litigation. [AFGE, Local 987 and Nedra Bradley \(1999\) 55 FLRA No. 71.](#)

For purposes of award of EAJA attorney's fees in proceeding brought pursuant to Occupational Safety and Health Act ([29 USCS §§ 651](#) et seq.), fact that Secretary of Labor withdrew citation items does not raise presumption that Secretary's position was without substantial justification. [Secretary of Labor v Valley Constr. Co. \(1994, OSHRC ALJ\) 17 BNA OSHC 1418, 1995 CCH OSHD P 30854.](#)

Government did not show substantial justification under Equal Access to Justice Act ([5 USCS § 504](#)) for failure to disclose information to dismissed employee, to certify that no alternative reassignment employment positions were available, or to show special circumstances that would make award of attorneys' fees and expenses to employee as prevailing party unjust in proceedings before Merit System Protection Board and in subsequent appeal to [Federal Circuit. Gavette v Office of Personnel Management \(1986, CA\) 785 F2d 1568](#), costs/fees proceeding, and on other grounds (1986, CA) [808 F2d 1456](#), costs/fees proceeding, judgment entered (1986, CA) [788 F2d 753](#) and (criticized in [EEOC v Great Steaks, Inc. \(2012, CA4 NC\) 667 F3d 510, 114 BNA FEP Cas 289](#)).

Where ALJ issued decision in which he dismissed complaint filed by Postal Service because Postal Service had failed to prove either falsity of representations made by respondents or that respondents were engaged in scheme within meaning of [39 USCS § 3005](#), and such decision was upheld on appeal, position of Postal Service was not substantially justified, and respondents were entitled to award of attorney's fees under Equal Access to Justice Act ([5 USCS § 504](#)). In re Equisystems, California, Inc., et al. (9/15/93) PS Docket No. 33/115.

Although it did not prevail, EPA was substantially justified in pursuing underlying enforcement action against feedlot, and feedlot was not entitled to attorneys' fees and other expenses under EAJA, where EPA possessed significant amount of direct and inferential evidence from which it could reasonably believe that feedlot discharged pollutants into U.S. waters but court found that, for purposes of satisfying preponderance of evidence standard, evidence fell short; EPA's position was reasonably based in fact and in law. Docket No. CWA-07-2007-0078 (USEPA Office of ALJs, Apr. 9, 2010) 2010 EPA ALJ LEXIS 4.

In Clean Water Act case, government's reliance on inferential evidence to prove actual discharge does not indicate, ipso facto, that evidence is insufficiently weighty to substantially justify enforcement proceeding, since evidentiary standard for proving "substantial justification" under EAJA remains one of reasonableness in law and in fact. In re: Lowell Vos Feedlot (USEPA Environmental Appeals Board, May 9, 2011) 2011 EPA App. LEXIS 18.

In view of large body of direct and circumstantial evidence, EPA plainly had reasonable basis in law and in fact to believe that feedlot operator had discharged pollutants into U.S. waters, in violation of Clean Water Act, and fact that record contained contradicting evidence that ultimately outweighed government's evidence after hearing did not by itself undermine finding of substantial justification for purposes of EAJA. In re: Lowell Vos Feedlot (USEPA Environmental Appeals Board, May 9, 2011) 2011 EPA App. LEXIS 18.

### **Unpublished Opinions**

Unpublished: Administrative Law Judge (ALJ) properly denied employer's application for legal fees and expenses under Equal Access to Justice Act, [5 USCS § 504](#), because even though employer prevailed based on affirmative defense of employee misconduct, there was substantial evidence that ALJ could conclude that agency was



substantially justified in charging employer with OSHA violation. [Aquatek Sys. v OSHRC \(2007, CA5 Tex\) 223 Fed Appx 404, 21 BNA OSHC 1909.](#)

#### IV. APPLICATIONS FOR COSTS AND FEES

##### A. In General

##### 33. Generally

Congress, in enacting Equal Access to Justice Act, permitted each agency to establish procedures for processing of applications that are consistent with its existing organization; requirement that applications be filed in central office rather than in regional offices is consistent with existing procedures and does not violate due process. [Lord Jim's v NLRB \(1985, CA9\) 772 F2d 1446, 120 BNA LRRM 2708, 103 CCH LC P 11580.](#)

ALJ did not err in accepting FAA Administrator's late-filed answer to EAJA application, since applicant would not be prejudiced thereby. *Grant v Del Balzo* (1993) NTSB EA-3919.

Hearing is threshold factor in determining whether party has standing to pursue EAJA application. Applications of Mark K. Turner and Stephen J. Coonan (2009) NTSB EA-5467.

##### 34. Contents of application

Award of attorney fees under [5 USCS § 504](#) will not be considered where party seeking fees did not submit application showing that it was prevailing party and was eligible. *Boland Marine & Mfg. Co. v Rihner* (1995, CA5) 41 F3d 997, 31 FR Serv 3d 1069.

Application should have been examined to determine if partial award of attorneys fees was appropriate with respect to each allegation and fact that action of agency may have been supported does not justify denial of partial award where other allegations had to be disproved by petitioner because absent official notice that it was meritless, each allegation would not disprove itself. [Alphin v National Transp. Safety Bd. \(1988, App DC\) 268 US App DC 138, 839 F2d 817.](#)

Trial brief request for attorney's fees under § 504 was prayer in pleading, which did not contain itemized statement of hours worked nor charges made nor other allegations that would support such award and which was premature inasmuch as final judgment had not been entered in case, and was not proper application. [J.M.T. Mach. Co. v United States \(1987, CA\) 826 F2d 1042, 34 CCF P 75326](#) (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

##### B. Timeliness

##### 35. Generally

30-day period for filing application begins to run after final disposition, not after receipt of notice of final disposition; application for fees is deemed submitted upon receipt by agency, and not upon mailing of application to agency. [Monark Boat Co. v NLRB \(1983, CA8\) 708 F2d 1322, 113 BNA LRRM 2896, 97 CCH LC P 10196](#) (criticized in [Secretary of Labor v Tri-State Steel Constr. Co. \(1996, OSHRC\) 17 BNA OSHC 1769, 1996 CCH OSHD P 31145](#)) and (Abrogated as stated in [Lindstrom v Astrue \(2009, ND Iowa\) 2009 US Dist LEXIS 1827](#)).

Thirty-day period for filing claim for attorney fees begins to run on date of final disposition, not on date party receives actual notice of disposition; agency regulation that claim for attorney fees must be received by agency within 30 days is consistent with due process. [Lord Jim's v NLRB \(1985, CA9\) 772 F2d 1446, 120 BNA LRRM 2708, 103 CCH LC P 11580.](#)

National Labor Relations Board lacked jurisdiction to grant extension of time to file application for attorneys' fees under [5 USCS § 504](#) and neither "unique circumstances" or principles of estoppel permit Board to entertain application. [Long Island Radio Co. v NLRB \(1988, CA2\) 841 F2d 474, 127 BNA LRRM 2987, 108 CCH LC P 10371.](#)

Applicant for attorneys' fees and costs under [5 USCS § 504](#) may supplement timely filed application after statutory filing period in order to comply with documentation requirements set forth in regulations, as long as applicant asserts his eligibility in application and provides some information to support those assertions; in other words, applicant is not required to file "complete" application by statutory filing deadline. Docket No. CWA-07-2007-0078 (USEPA Office of ALJs, Apr. 9, 2010) 2010 EPA ALJ LEXIS 4.

Although applicant for attorneys' fees and costs mistakenly cited [28 USCS § 2412](#) rather than [5 USCS § 504](#) as authority for award, application was not subject to dismissal, and applicant was allowed to amend application to cite correct provision, since agency was not prejudiced by error, as relevant provisions of statutes are virtually identical, and application sufficiently put agency on notice that applicant was seeking award under EAJA and that agency bore burden of demonstrating that its position in underlying adjudication was substantially justified. Docket No. CWA-07-2007-0078 (USEPA Office of ALJs, Apr. 9, 2010) 2010 EPA ALJ LEXIS 4.

### 36. Jurisdictional nature of requirement

Requirement that claim for attorneys' fees under Equal Access to Justice Act ([5 USCS § 504](#)) be made within 30 days of final disposition of adjudication is jurisdictional and without exception or provision for exercise of agency discretion. [Monark Boat Co. v NLRB \(1983, CA8\) 708 F2d 1322, 113 BNA LRRM 2896, 97 CCH LC P 10196](#) (criticized in [Secretary of Labor v Tri-State Steel Constr. Co. \(1996, OSHRC\) 17 BNA OSHC 1769, 1996 CCH OSHD P 31145](#)) and (Abrogated as stated in [Lindstrom v Astrue \(2009, ND Iowa\) 2009 US Dist LEXIS 1827](#)).

30-day limitation period for submitting application is jurisdictional. [Columbia Mfg. Corp. v NLRB \(1983, CA9\) 715 F2d 1409, 114 BNA LRRM 2626, 98 CCH LC P 10443.](#)

Thirty-day period for filing claim for attorney fees is jurisdictional. [Lord Jim's v NLRB \(1985, CA9\) 772 F2d 1446, 120 BNA LRRM 2708, 103 CCH LC P 11580.](#)

Thirty-day EAJA filing deadline for agency adjudications is jurisdictional. In re Buckwalter, et al. (1992, CFTC) [CCH Comm Fut L Rep P 25,609.](#)

30-day period established by [5 USCS § 504](#) is jurisdictional prerequisite. [Monark Boat Co. \(1982\) 262 NLRB 994, 110 BNA LRRM 1431, 1982-83 CCH NLRB P 15045](#), affd (1983, CA8) [708 F2d 1322, 113 BNA LRRM 2896, 97 CCH LC P 10196](#) (criticized in [Secretary of Labor v Tri-State Steel Constr. Co. \(1996, OSHRC\) 17 BNA OSHC 1769, 1996 CCH OSHD P 31145](#)) and (Abrogated as stated in [Lindstrom v Astrue \(2009, ND Iowa\) 2009 US Dist LEXIS 1827](#)).

EAJA's 30-day time limit for filing application for attorney's fees is jurisdictional; thus, application that was due on January 29, but was filed on January 30, was untimely. Holloway v Hinson (1994) NTSB EA-4155.

Filing provisions of [5 USCS § 504\(a\)\(2\)](#) and [28 USCS § 2412\(d\)\(1\)\(B\)](#) are jurisdictional. B & E Mail Transport, Inc. (1983) PSBCA No. 972.

### 37. Final disposition

Court rejects view that filing separate attorney's fees requests based on two distinct challenges to agency action would not result in duplicative fee litigation; no "final disposition" exists within meaning of [5 USCS § 504](#) for purpose of claim for attorney fees and for purpose of avoiding piecemeal litigation until entire decision is final and unappealable. [Dole v Phoenix Roofing, Inc. \(1991, CA5\) 922 F2d 1202, 14 BNA OSHC 2025, 1991 CCH OSHD P 29233](#), on remand, remanded on other grounds (1991, OSHRC) [1991 CCH OSHD P 29310](#).

Occupational Safety and Health Review Commission's decision, which found that Equal Access to Justice Act (EAJA) required that application of attorney's fees under [5 USCS § 504](#) had to be filed 30 days from date on which order of agency became final and appealable was reversed because Court of Appeals found that EAJA's "final disposition" was interpreted as final and unappealable, where all rights to appeal ran before start of 30-day period for filing for attorney's fees. [Safar Contr., Inc. v Sec'y of Labor \(2003, CA3\) 325 F3d 422, 20 BNA OSHC 1041](#).

Thirty day Equal Access to Justice Act (EAJA) deadline that applies in agency proceedings should be analogous to 30-day EAJA deadline that applies in judicial proceedings; "final" as used in [5 USCS § 504\(a\)\(2\)](#) means "final and unappealable." [Adams v SEC \(2002, App DC\) 351 US App DC 99, 287 F3d 183](#).

For purposes of determining timeliness of application for fees pursuant to Equal Access to Justice Act ([5 USCS § 504](#)), where dispositive decision on merits is rendered, decision generally becomes final within 120 days of receipt of board's decision, as, upon expiration of 120-day period, right to appeal to Court of Appeals for Federal Circuit is extinguished. *Great Western Utility Corp.* (1986, ENG BCA) 86-3 BCA P 9011.

Board of contract appeals' judgment was final for purposes of commencing 30 day time limitation for filing application for attorney fees and expenses under Equal Access to Justice Act ([5 USCS § 504](#)) where, by its own plain, unambiguous terms, final judgment, based on stipulated settlement, was final and unappealable, first of attorney's subsequent motions treated board's order as undisputed and conclusive final judgment, and second motion concerning government's claim to deduction from stipulated settlement amount constituted new dispute over terms of settlement agreement, rather than modification or amendment of board's order, and thus application for fees and expenses filed nearly 6 months after board entered final judgment was untimely. [J-I-J Constr. Co. \(1986, ENG BCA\) 86-3 BCA P 19126](#).

Respondent in Postal Service complaint proceeding is not entitled to award of attorneys' fees and expenses under Equal Access to Justice Act ([5 USCS § 504](#)), where application was not filed until 31 days after judicial officer's order granting respondent's motion to vacate earlier order and suspend proceedings indefinitely, based on consent agreement signed one day earlier and filed 3 days later, since judicial officer's order following parties' consent agreement, not signing or filing of agreement, constitutes final disposition of adversary adjudication within meaning of § 504. *Fort Morgan Vapor Jet* (April 27, 1983) PS Docket No. 12/64.

### **38. --Premature applications**

Application for attorney fees was premature where made less than 120 days after receipt of Board of Contract Appeals decision, as either party to appeal before board may, under 41 USCS § 607g, seek review of decision within 120 days after receipt of such decision, and thus judgment by board may not be considered final until appeal period has expired. [Yazzie Constr. Co. \(1986, IBCA\) 86-2 BCA P 18964](#).

When decision disposing of issues on appeal is entered, but Board of Indian Appeals retains jurisdiction to review response to its decision, application for attorney fees under Equal Access to Justice Act ([5 USCS § 504](#)), filed before entry of decision or order finally concluding litigation may be (1) dismissed without prejudice as premature, (2) stayed until completion of all proceedings, or (3) decided with opportunity for additional action in accordance with decision following completion of all proceedings. [In Re Attorney's Fees Request of DNA \(1983\) 90 ID 389](#).

Trial brief request for attorney's fees under § 504 was prayer in pleading, which did not contain itemized statement of hours worked nor charges made nor other allegations that would support such award and which was premature

inasmuch as final judgment had not been entered in case, and was not proper application. [J.M.T. Mach. Co. v United States \(1987, CA\) 826 F2d 1042, 34 CCF P 75326](#) (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

### 39. Tolling and waiver

Thirty-day EAJA filing deadline for agency adjudications may not be waived by parties or courts. In re Buckwalter, et al. (1992, CFTC) [CCH Comm Fut L Rep P 25,609](#).

EAJA's 30-day time limit for filing application for attorney's fees may not be waived. Holloway v Hinson (1994) NTSB EA-4155.

EAJA permits equitable tolling, but such must be applied sparingly. [Secretary of Labor v Tri-State Steel Constr. Co. \(1996, OSHRC\) 17 BNA OSHC 1769, 1996 CCH OSHD P 31145](#).

### 40. Particular cases

Application for attorneys' fees made 33 days after administrative law judge dismissed unfair labor practice complaint is untimely since application not filed within 30 day time limitation. [Columbia Mfg. Corp. v NLRB \(1983, CA9\) 715 F2d 1409, 114 BNA LRRM 2626, 98 CCH LC P 10443](#).

Where alien mailed motion for attorney's fees on last day of 30-day deadline for fee applications under 28 USCS § 2412(d)(1)(B), motion was untimely because it did not qualify as having been "submitted" for purposes of deadline; as in [5 USCS § 504\(a\)\(2\)](#) and [29 C.F.R. § 102.148\(a\)](#), there was no compelling reason to interpret "submit" differently from "file" for purposes of 28 USCS § 2412(d)(1)(B) deadline. [Arulampalam v Gonzales \(2005, CA9\) 399 F3d 1087](#).

Applicant failed to file application for fees and expenses within 30-day period after Board of Contract Appeals' decision had become final, as required by Equal Access to Justice Act ([5 USCS § 504](#) (EAJA)), and thus did not bring itself within limited circle of cases to which EAJA was made retroactively applicable. [J.M.T. Machine Co. \(1986, ASBCA\) 86-2 BCA P 18928](#), affd (1987, CA) [826 F2d 1042, 34 CCF P 75326](#) (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

Application for fees and expenses under Equal Access to Justice Act ([5 USCS § 504](#)) was not timely where filed more than 7 months after receipt of board of contract appeals' opinion and in excess of 2 months after expiration of 150-day filing period, comprised of 120-day period allowed for review and 30-day period allowed after issuance of final decision for application for fees. Great Western Utility Corp. (1986, ENG BCA) 86-3 BCA P 9011.

Prevailing employer's application for award of attorney's fees and other costs incurred during unfair labor practice proceeding filed more than 30 days after entry of final order is denied. [Monark Boat Co. \(1982\) 262 NLRB 994, 110 BNA LRRM 1431, 1982-83 CCH NLRB P 15045](#), affd (1983, CA8) [708 F2d 1322, 113 BNA LRRM 2896, 97 CCH LC P 10196](#) (criticized in [Secretary of Labor v Tri-State Steel Constr. Co. \(1996, OSHRC\) 17 BNA OSHC 1769, 1996 CCH OSHD P 31145](#)) and (Abrogated as stated in [Lindstrom v Astrue \(2009, ND Iowa\) 2009 US Dist LEXIS 1827](#)).

ALJ properly dismissed application for EAJA attorney fees and expenses since it was not filed within 30 days after ALJ's decision in underlying action. Higginbotham v Busey (1990) NTSB EA-3180.

Application for EAJA attorney's fees must be filed no later than 30 days after National Transportation Safety Board's (NTSB) final disposition (defined as date on which unappealed initial decision becomes administratively final) of proceeding; thus, ALJ properly determined that application filed on 12/28/92 was untimely, despite claimant's argument that 30-day period did not begin to run until expiration of 20-day period that NTSB had to take review on

its own motion pursuant to [49 CFR § 821.43](#), since ALJ had issued decision dismissing FAA Administrator's emergency order of revocation on 11/16/92, and 20 days provided by NTSB rule did not apply to emergency proceedings. *Mason v Hinson* (1994) NTSB EA-4183.

Contractor's application for recovery of fees and other expenses will be denied for lack of jurisdiction, notwithstanding decision in his favor before Postal Service Board of Contract Appeals, where application was filed more than 30 days after final adjudication of case, since filing provisions of [5 USCS § 504\(a\)\(2\)](#) and [28 USCS § 2412\(d\)\(1\)\(B\)](#) are jurisdictional; denial of application is also justified on grounds that agency's position was substantially justified on appeal. *B & E Mail Transport, Inc.* (1983) PSBCA No. 972.

Application for award of attorney fees under EAJA was properly dismissed as untimely, where judicial officer's decision (dated 4/30/92) upholding decision of ALJ dismissing complaint against applicants was sent by certified mail to applicants' lead counsel's address of record (which was that of his law firm), law firm forwarded decision (received on 5/5/92) unopened to counsel, who had left firm while matter was pending, counsel received decision on 6/8/92, and applicants, through new counsel, filed notice of substitution of counsel and EAJA application on 7/8/92, because date for computing period for filing EAJA application began to run from 5/5/92, when law firm received decision; any delay in actual receipt of decision was attributable solely to applicants' failure to file notice of change of counsel (as required by [39 CFR § 952.16\(d\)](#)). *In re Robert Smith, et al.* (11/16/93) PS Docket No. 34/170.

## V. RECOVERABLE COSTS AND FEES

### 41. Generally

There is no legal or policy bar to granting EAJA fees in context of contingent fee arrangements. *Scott v Hinson* (1996) NTSB EA-4472.

To be recoverable under EAJA, attorney's fees must actually be incurred. *Application of Robert C. Peacon* (2001) NTSB EA-4921.

### 42. Legal services and pro bono cases

Attorney fee awards may be made to persons represented by pro bono legal organizations. [Cornella v Schweiker \(1984, CA8 SD\) 728 F2d 978](#) (superseded by statute on other grounds as stated in [Peterson v United States R. Retirement Bd. \(1986, CA8\) 785 F2d 245](#)) and (criticized in [Turner v Astrue \(2010, ED Ky\) 764 F Supp 2d 864, 157 Soc Sec Rep Serv 8](#)).

NTSB decision denying attorney fees was arbitrary and capricious because it failed to consider Alabama state law that was essential to its determination of whether petitioner had incurred fees under EAJA; Alabama law provided that petitioner was legally responsible for paying his attorneys under theory of quantum meruit. [Roberts v NTSB \(2015, App DC\) 776 F3d 918](#).

Equal Access to Justice Act ([5 USCS § 504](#)) applies to cases in which legal services are provided to non-fee-paying clients. [Dubose v Pierce \(1984, DC Conn\) 579 F Supp 937](#), rev'd on other grounds (1985, CA2 Conn) [761 F2d 913](#), vacated without op, remanded (1988) *487 US 1229, 108 S Ct 2890, 101 L Ed 2d 924*.

Pro bono representation and representation by legal services organization do not constitute "special circumstances" within meaning of [5 USCS § 504\(a\)\(1\)](#) so as to make award of attorney's fees under Equal Access to Justice Act unjust. [In Re Attorney's Fees Request of DNA \(1983\) 90 ID 389](#).

Individual in proceeding before National Transportation Safety Board was not entitled to award of fees even though he was prevailing party, because individual's attorney had stated during proceeding that individual had no funds to pursue matter and that he was personally funding litigation. Application of Robert C. Peacon (2001) NTSB EA-4921.

#### **43. Pro se litigant**

Pro se litigant was not entitled to attorney's fees under [5 USCS § 504](#), since litigant was not attorney, did not present expert witness, did not incur any expense in obtaining report concerning his need for psychiatric evaluation, and no "fair market value" could be attached to fact that he appeared at hearing. Whittle v Engen (1985) NTSB EA-2243.

Applicant for EAJA attorney fees and expenses, although prevailing party in aviation safety enforcement action, is properly denied fees where applicant is non-attorney who proceeded on his own behalf throughout action. Byrne v Busey (1990) NTSB EA-3197.

Employer's petition in Occupational Safety and Health Administration proceeding for attorney's fees pursuant to EAJA was denied, because president of employer company represented employer throughout administrative proceedings on pro se basis, and pro se litigants are not entitled to [EAJA fees. Secretary of Labor v Megawest Fin. \(1995, OSHRC ALJ\) 17 BNA OSHC 1598.](#)

#### **44. Experts and expert witnesses**

ALJ's denial of compensation under Equal Access to Justice Act, [5 USCS § 504](#), for work performed by legal secretary, and for postage and related expenses, was to be reversed, but ALJ properly denied fees sought for employee of applicant who testified at hearing and for other employee and for consultant who did not testify and did not enter appearance for applicant at any time during proceeding, since employee who testified did not serve as expert witness but only as percipient witness, and none of 3 represented applicant as attorney or agent. Conner Air Lines, Inc. v Whittington (1989) NTSB EA-2920.

In connection with defense of action brought by FAA Administrator and withdrawn before hearing, individual is entitled to expert consultant fees at rate of \$ 34.38 per hour, rather than requested rate of \$ 95.00 per hour, since such is highest rate FAA currently pays its witnesses. Application of George Sandy (1992) NTSB EA-3543.

#### **45. Postage and mailing costs**

Award of attorney fees under [5 USCS § 504](#) for attorney's expenses for postage was proper. Rooney v Engen (1985) NTSB EA-2250.

ALJ's denial of compensation under Equal Access to Justice Act, [5 USCS § 504](#), for work performed by legal secretary, and for postage and related expenses, was to be reversed, but ALJ properly denied fees sought for employee of applicant who testified at hearing and for other employee and for consultant who did not testify and did not enter appearance for applicant at any time during proceeding, since employee who testified did not serve as expert witness but only as percipient witness, and none of 3 represented applicant as attorney or agent. Conner Air Lines, Inc. v Whittington (1989) NTSB EA-2920.

Mailing expenses are legitimate expenses under EAJA and may be recovered so long as they are not already incorporated in representative's fee structure. Nicolai v Del Balzo (1993) NTSB EA-3951.

#### **46. Secretarial costs**

Award of attorney fees under [5 USCS § 504](#) for attorney's expenses for secretarial charges was proper. *Rooney v Engen* (1985) NTSB EA-2250.

ALJ's denial of compensation under Equal Access to Justice Act, [5 USCS § 504](#), for work performed by legal secretary, and for postage and related expenses, was to be reversed, but ALJ properly denied fees sought for employee of applicant who testified at hearing and for other employee and for consultant who did not testify and did not enter appearance for applicant at any time during proceeding, since employee who testified did not serve as expert witness but only as percipient witness, and none of 3 represented applicant as attorney or agent. *Conner Air Lines, Inc. v Whittington* (1989) NTSB EA-2920.

#### **47. Telephone costs**

Award of attorney fees under [5 USCS § 504](#) for attorney's expenses for long distance telephone charges was proper. *Rooney v Engen* (1985) NTSB EA-2250.

Telephone expenses are legitimate expenses under EAJA and may be recovered so long as they are not already incorporated in representative's fee structure. *Nicolai v Del Balzo* (1993) NTSB EA-3951.

#### **48. Travel costs**

Award of attorney fees under [5 USCS § 504](#) for travel expenses of applicant's attorney was proper, but travel expenses for applicant from new residence in Michigan to hearing site in Texas was not expense contemplated by Equal Access to Justice Act. *Rooney v Engen* (1985) NTSB EA-2250.

Travel expenses are legitimate expenses under EAJA and may be recovered so long as they are not already incorporated in representative's fee structure. *Nicolai v Del Balzo* (1993) NTSB EA-3951.

Travel expenses are recoverable under EAJA ([5 USCS § 504\(b\)\(1\)\(A\)](#)); thus, cited employer who prevailed in OSHA proceeding was entitled to recover for mileage to and from administrative hearings and for parking fees at hearings. [Ruhlin Co. \(1995, OSHRC\) 17 BNA OSHC 1068, 1995 CCH OSHD P 30678.](#)

#### **49. Interest on award**

Since payment of interest on judgment against United States is waiver of sovereign immunity, waiver must be expressed; thus, where Congress has not provided for payment of interest on awards of attorney fees at administrative level, under [5 USCS § 504](#), waiver will not be implied. [Lekas \(1986, DOC App\) 4 ORW 477.](#)

Federal Offset Statute ([31 USCS § 3728](#)) does not allow for interest where payment request is not presented to Secretary of Treasury as provided therein, but instead is presented to responsible agency as expressly provided in EAJA ([5 USCS § 504\(d\)](#)); where, by law, payments must come from agency's appropriations, Federal Offset Statute plainly does not apply. [Bianchi v United States \(2000\) 46 Fed Cl 363.](#)

#### **50. Amount of fees**

Prevailing party that satisfies other requirements of Equal Access to Justice Act may recover its paralegal fees from government at prevailing market rates under [5 USCS § 504\(a\)\(1\)](#), rather than reasonable cost to law firm of such services. [Richlin Sec. Serv. Co. v Chertoff \(2008\) 553 US 571, 128 S Ct 2007, 170 L Ed 2d 960, 21 FLW Fed S 279.](#)

Degree of success achieved as result of litigation is one factor to consider in assessing amount of attorney's fees to be awarded prevailing party, as well as time required to pursue case and size of award of damages; however, none of these factors is controlling and none is to be given such weight that resulting fee award fails to be reasonable; relationship between amount of attorney's fees requested and monetary compensation received is relevant but should not be given undue importance in calculating attorney's fees award. [Jones v MacMillan Bloedel Containers, Inc. \(1982, CA8 Ark\) 685 F2d 236, 29 BNA FEP Cas 939, 29 CCH EPD P 32801.](#)

Award of 2/17 of amounts school requested for attorneys fees and expenses against NLRB was improper and award of 50 percent of fees and expenses requested should have been made, where there were 3 claims and one was dismissed as legally deficient and other 2 were settled thereafter. [Brandeis School v NLRB \(1989, CA2\) 871 F2d 5, 130 BNA LRRM 3084, 111 CCH LC P 11051.](#)

Where FAA sought to revoke pilot's license and National Transportation Safety Board reduced revocation to 180-day suspension, and where pilot failed to provide requested breakdown of fees incurred, there was substantial evidence to support Board's award of 15% attorney fees. [Allen v NTSB \(1998, CA8\) 160 F3d 431.](#)

### 51. --Hourly rate and statutory cap

Court erred in directing National Transportation Safety Board to award attorney fees "at reasonable market rate"; plain statutory text and Supreme Court case law of [5 USCS § 504](#) requires that fees be limited to statutory cap in force at time of award. [Mendenhall v NTSB \(2000, CA9\) 213 F3d 464, 2000 CDOS 3993, 2000 Daily Journal DAR 5371, amd \(2000, CA9\) 2000 CDOS 5606, 2000 Daily Journal DAR 7462](#) and (ovrld in part on other grounds by [Gonzalez v Ariz. \(2012, CA9 Ariz\) 677 F3d 383.](#)

When award of fees is maximum amount allowed under regulations, no adjustment in hourly fee limitation for increase in cost of living is appropriate, under [5 USCS § 504\(b\)\(1\)\(A\)\(ii\)](#), except in informal rulemaking proceeding to raise regulatory ceiling, pursuant to petition that identifies (1) higher rate, (2) types of proceedings in which rate should be used, and (3) why higher rate is warranted; thus, claimants' request for increase in award is denied, where it does not identify itself as petition to adjust fees, nor state (1) rate that claimants believe should be established, (2) proceedings in which different rate should be used, and (3) reasons for different rates. [Lekas \(1986, DOC App\) 4 ORW 477.](#)

Authority would grant petitioners' request to promulgate regulation raising maximum EAJA per hour rate to \$ 125; it would likewise grant petitions insofar as they requested Authority to engage in rulemaking to consider establishing appropriate criteria for adjustments to maximum EAJA per hour rate based on cost of living and other special factors. [Nedra Bradley and AFGE \(1999\) 55 FLRA No. 72.](#)

In connection with defense of action brought by FAA Administrator and withdrawn before hearing, individual is entitled to expert consultant fees at rate of \$ 34.38 per hour, rather than requested rate of \$ 95.00 per hour, since such is highest rate FAA currently pays its witnesses. Application of George Sandy (1992) NTSB EA-3543.

Aside from COLA increases, only authority in [5 USCS § 504](#) to award fees above statutory cap is reference to "special factor," which does not include government's bad faith. [Mendenhall v Garvey \(1998\) NTSB 150RM-EAJA-SE-12564.](#)

### 52. Miscellaneous

A prevailing party that satisfies Equal Access to Justice Act's (EAJA's) other requirements is not limited in its recovery of paralegal fees to its attorney's cost for such services, but may recover its paralegal fees from government at prevailing market rates. [Richlin Sec. Serv. Co. v Chertoff \(2008\) 553 US 571, 128 S Ct 2007, 170 L Ed 2d 960, 21 FLW Fed S 279.](#)



Equal Access To Justice Act does not allow reimbursement of fees for non-lawyer employees and principals of prevailing party. [Fanning, Phillips & Molnar v West \(1998, CA FC\) 160 F3d 717, 42 CCF P 77401.](#)

Award of attorney fees under [5 USCS § 504](#) for attorney's expenses for photocopy charges was proper. Rooney v Engen (1985) NTSB EA-2250.

### Unpublished Opinions

Unpublished: Supreme Court's interpretation of "fees and other expenses" for administrative agency fee awards made under [5 USCS § 504\(b\)\(1\)\(A\)](#) as including fees for paralegal services equally extends to interpretation of "fees and other expenses" for fee awards under Equal Access to Justice Act, 28 USCS § 2412(d). [Lozano-Alvarado v Peake \(2008, US\) 2008 US App Vet Claims LEXIS 907.](#)

## VI. AGENCIES AND ADVERSARY ADJUDICATIONS

### A. In General

#### 53. Generally

Equal Access to Justice Act ([5 USCS § 504](#)) awards fees at agency level only for "adversary adjudication", defined as determinations on record after opportunity for agency hearing in which position of United States is represented by counsel; attorney fees are not awardable in agency proceedings in which United States is not represented by counsel. [Cornella v Schweiker \(1984, CA8 SD\) 728 F2d 978](#) (superseded by statute on other grounds as stated in [Peterson v United States R. Retirement Bd. \(1986, CA8\) 785 F2d 245](#)) and (criticized in [Turner v Astrue \(2010, ED Ky\) 764 F Supp 2d 864, 157 Soc Sec Rep Serv 8](#)).

Adversary adjudication under [5 USCS § 504](#) is one required by statute to be determined on record after opportunity for agency hearing and, unless agency hearing is statutorily mandated, [5 USCS § 504](#) does not provide for award of attorney fees. [Smedberg Machine & Tool, Inc. v Donovan \(1984, CA7 Ill\) 730 F2d 1089.](#)

With respect to determining whether adjudication is adversarial, hearing is "under § 554" if it meets that section's definition of adjudication required by statute to be determined on record after opportunity for agency hearing. [Haire v United States \(1989, CA9 Cal\) 869 F2d 531.](#)

Definition of "adversary adjudication" does not turn on whether there was in fact subsequent trial de novo or whether administrative proceeding was of sort which was subject to subsequent de novo judicial inquiry; no fee award can be made if adjudication in question involves selection or tenure of government employee since such matters are excluded from scope of 5 USCS § 554, and therefore from [5 USCS § 504](#). [D'Angelo v Department of Navy \(1984, ED Pa\) 593 F Supp 1307, 35 BNA FEP Cas 1658, 36 CCH EPD P 35195.](#)

Legislative history of exclusion of license applications and renewals from scope of EAJA ([5 USCS § 504\(b\)\(1\)\(C\)\(i\)](#)) indicates that Congress intended that exclusion be somewhat narrowly interpreted. [William J. Thoman \(2002\) 157 IBLA 95.](#)

Administrative appeal not required by statute to be adjudicated according to provisions of 5 USCS § 554 (1976) is not covered by attorney's fees provisions of Equal Access to Justice Act ([5 USCS § 504](#)). [Attorney's Fees Request of Madelon Blum \(1982\) 89 ID 241.](#)

#### 54. Activities preceding adjudication

District Court abused its discretion in awarding attorney fees for time spent in Forest Service's administrative appeal process, where administrative proceedings preceded civil action rather than being on post-litigation remand; administrative proceedings were not crucial to vindication of rights. [Friends of Boundary Waters Wilderness v Thomas \(1995, CA8 Minn\) 53 F3d 881, 26 ELR 20253.](#)

Judicial officer did not abuse his discretion by disallowing attorney fees that accrued before date agency formally denied delinquent loan servicing applications because agency's notification that it was seeking legal advice on whether brothers had acted in bad faith, while adversarial, did not transform agency's review of loan servicing application into adjudicative proceeding. [Lane v USDA \(2002, CA8 ND\) 294 F3d 1001.](#)

Administrative process that precedes agency decision, which is basis for adversary adjudication, is not part of adversary adjudication for purposes of [EAJA. In re Dwight L. Lane and Darvin R. Lane \(2000\) 59 Agric Dec 148.](#)

Although claimant properly submitted required itemized statement showing actual time expended and rate at which attorney fees and other expenses were computed, she was not entitled to recover fees and costs incurred at administrative level under Equal Access to Justice Act, 28 USCS § 2412(d)(1)(A); administrative proceedings did not meet definition of adversary proceeding under [5 USCS § 504\(b\)\(1\)\(C\).](#) [Hillensbeck v United States \(2006\) 74 Fed Cl 477.](#)

## B. Particular Cases

### 55. Boards of contract appeals

A prevailing party that satisfies Equal Access to Justice Act's (EAJA's) other requirements is not limited in its recovery of paralegal fees to its attorney's cost for such services, but may recover its paralegal fees from government at prevailing market rates. [Richlin Sec. Serv. Co. v Chertoff \(2008\) 553 US 571, 128 S Ct 2007, 170 L Ed 2d 960, 21 FLW Fed S 279.](#)

Contractor's contention that application for legal fees under Equal Access to Justice Act ([5 USCS § 504](#)) (EAJA) was new claim under Contract Disputes Act ([41 USCS §§ 601](#) et seq.) (CDA) made after effective date of CDA, and therefore within coverage of EAJA failed as claim could not be "new claim" under CDA because it was not claim in writing submitted to contracting officer upon which contracting officer had made final decision in writing, it did not meet any of criteria for CDA claim, EAJA had entirely different statutorily prescribed procedure to follow in making application for attorney's fees and other costs, and "adversary adjudication" for which fees and other expenses may be awarded under EAJA is administrative proceeding in which applicant sought relief from government's denial of original claims. [Richard P. Murray Co. \(1986, AGBCA\) 86-3 BCA P 19174.](#)

Contractor's reliance on 28 USCS § 2412 in seeking attorney's fees following agency proceedings was misplaced as that section pertains only to court proceedings; agency proceedings, including those before agency Boards of Contract Appeals, are covered by [5 USCS § 504.](#) [Maitland Bros. Co. \(1986, ASBCA\) 86-2 BCA P 18796.](#)

Boards of Contract Appeals lack jurisdiction to award attorney fees and expenses under Equal Access to Justice Act ([5 USCS § 504](#)). [Warwick Constr., Inc. \(1983, GSBCA\) 83-2 BCA P 16663.](#)

HUD Board of Contract Appeals does not have jurisdiction to award attorney's fees pursuant to EAJA in cases involving limited denial of participation (LDP) since LDPs are not adversary adjudications as defined in EAJA. In Matter Of: [Rumaldita Dovalina \(1996, HUD BCA\) 2006-1 BCA P 33129.](#)

Board of Contract Appeals lacks jurisdiction under Equal Access to Justice Act ([5 USCS § 504](#)) to award attorney fees. [Central Colorado Contractors, Inc. \(1983, IBCA\) 84-1 BCA P 17096.](#)

Federal boards of contract appeals lack jurisdiction to grant awards under Equal Access to Justice Act ([5 USCS § 504](#)). [B & E Mail Transport, Inc. \(1983, PSBCA\) 83-2 BCA P 16644](#).

[5 USCS § 504](#) applies to fees and expenses incurred before Armed Services Board of Contract Appeals as result of certain actions by government, and § 504 is meant to draw line benefiting smaller entities but not those with deeper pockets. [Texas Instruments, Inc. v United States \(1993, CA\) 991 F2d 760, 38 CCF P 76505](#).

Contractor's request for award of cost of prosecuting appeal before Board of Contract Appeals is denied, since Board has no authority to award fees and costs under Contract Disputes Act ([41 USCS §§ 601](#) et seq.), and Equal Access to Justice Act ([5 USCS § 504](#), [28 USCS § 2412](#)) does not apply to proceedings before [Board. C.S. Smith Training, Inc. \(1983, DOT BCA\) 83-1 BCA P 16304](#).

Board of contract appeals does not have jurisdiction to award attorney's fees under Equal Access to Justice Act ([5 USCS § 504](#)); however, legal fees may be reimbursable under contract terms or under federal procurement regulations. [A.T. Kearney, Inc. \(1983, DOT BCA\) 83-2 BCA P 16835](#).

For purposes of [5 USCS § 504\(a\)\(1\)](#), which provides for award of attorney's fees and costs to prevailing party in adversary adjudication conducted by agency, definition of "adversary adjudication" does not extend to any proceeding that General Services Administration Board of Contract Appeals might conduct pursuant to [31 USCS § 3702\(a\)\(3\)](#), which authorizes Board to settle claims involving expenses incurred by federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty stations, and [31 USCS § 3529](#), which authorizes Board to respond to agency inquiries. Dennis Nielsen (GSBCA, 12/20/02) 15981-RELO.

## 56. Federal employees

Federal Employees Compensation Act benefit determinations are not adversary adjudications. [Owens v Brock \(1988, CA6 Tenn\) 860 F2d 1363, 96 ALR Fed 323](#).

Administrative proceedings conducted before Federal Employee Appeals Authority on plaintiff's involuntary separation from government service was not "adversary adjudication" within meaning of § 504 since Administrative Procedure Act ([5 USCS §§ 551](#) et seq.) excludes administrative proceedings relating to selection or tenure of employee and thus disqualified plaintiff from seeking award of attorneys fees and other expenses, incurred during administrative phase of proceedings antecedent to eventual court action, under Equal Access to Justice Act ([28 USCS § 2412](#)). [Oliveira v United States \(1986\) 11 Cl Ct 101](#), affd in part and revd in part on other grounds (1987, CA) [827 F2d 735](#).

Equal Access to Justice Act ([5 USCS § 504](#)) does not apply to administrative proceedings involving tenure, and plaintiff in action for unlawful removal and alleged ramifications as result thereof failed to cite applicable jurisdictional basis for claim for attorney fees, and since removal was prior to effective date of Civil Service Reform Act, he cannot rely on Back Pay Act attorney fee provisions which do not apply to pre-Civil Service Reform Act actions. [Kellus v United States \(1987\) 13 Cl Ct 538](#).

## 57. --Merit Systems Protection Board

[5 USCS § 7701](#) authorizes attorney fees in cases against administrative law judges brought under [5 USCS § 7521](#); in view of [5 USCS § 7701](#), authorizing attorney fees to employees who prevail in appeals against government action, [5 USCS § 504](#) is not applicable to proceedings of [Merit Systems Protection Board. SSA, HHS v Goodman \(1985, MSPB\) 28 MSPR 120](#), costs/fees proceeding, remanded on other grounds (1987, MSPB) [33 MSPR 325](#).

Neither attorneys' fees nor expenses could be awarded under Equal Access to Justice Act ([5 USCS § 504](#)) to government employee as prevailing party challenging disability retirement, in proceedings before Merit Systems Protection Board since § 504 authorizes award of fees and expenses incurred in adversary adjudication and cases involving tenure of employee were excluded from that definition. [Gavette v Office of Personnel Management \(1986, CA\) 808 F2d 1456](#), costs/fees proceeding, judgment entered (1986, CA) [788 F2d 753](#) and (criticized in [EEOC v Great Steaks, Inc. \(2012, CA4 NC\) 667 F3d 510, 114 BNA FEP Cas 289](#)).

### 58. Government Accountability Office

GAO proceedings are not adversary adjudications as comprehended by [5 USCS § 504](#) and are generally not comprehensible under Equal Access to Justice Act unless intimately tied to resolution of judicial action. [Maritime Mgmt, Inc. v United States \(2001, CA11 Fla\) 242 F3d 1326, 14 FLW Fed C 447](#) (criticized in [N. Star Alaska Hous. Corp. v United States \(2009\) 85 Fed Cl 241](#)).

Bid protest proceedings conducted before GAO do not involve adversary adjudication under Equal Access to Justice Act ([5 USCS § 504](#)); there is no authority to allow recovery of attorney's fees and costs incurred in pursuing bid protest before [General Accounting Office. \(1982\) 62 Comp Gen 86](#).

### 59. Immigration and aliens

INS adjudicatory proceeding is not governed by [5 USCS § 504](#) and cannot be considered adversary adjudication for purpose of awarding attorney fees to successful plaintiff, even where government is represented by counsel. [Pollgreen v Morris \(1990, CA11 Fla\) 911 F2d 527](#) (criticized in Dixon v Comm'r (2006) [TC Memo 2006-97, 91 CCH TCM 1138](#)) and (criticized in [Former Empl. of BMC Software, Inc. v United States Sec'y. of Labor \(2007\) 31 CIT 1600, 519 F Supp 2d 1291, 29 BNA Intl Trade Rep 2550](#)).

### 60. --Deportation

Equal Access to Justice Act does not authorize award of attorney fees for administrative deportation proceedings before [INS. Ardestani v INS \(1991\) 502 US 129, 116 L Ed 2d 496, 112 S Ct 515, 91 Daily Journal DAR 15063](#).

Deportation proceedings were adversary adjudication for purposes of Equal Access to Justice Act ([5 USCS § 504](#)) in that position of United States was represented by counsel and were proceedings determined, by statute, on record and after opportunity for agency hearing, particularly since both sides present evidence, interrogate, examine, and cross-examine witnesses, and thus in absence of any indication by Congress to exclude Immigration and Naturalization Service proceedings from benefits from EAJA, deportation hearings are included. [Escobar Ruiz v Immigration & Naturalization Service \(1987, CA9 Cal\) 813 F2d 283](#), affd, on reh, en banc (1988, CA9) [838 F2d 1020](#).

"An adjudication under § 554" means "an adjudication as defined by § 554" and there is no question that deportation proceedings meet such definition. [Escobar Ruiz v INS \(1988, CA9\) 838 F2d 1020](#).

Determinations regarding attorney fees can be administratively appealed; therefore, ALJ's conclusion that his fee award to employer against INS cannot be appealed will be reversed, and decision of Chief Administrative Officer of Office of Immigration Review reversing ALJ's decision will be upheld where it was shown that INS had reasonable basis for allegations against employer. [Mester Mfg. Co. v U.S. INS \(1990, CA9\) 900 F2d 201](#).

Petitioner who prevails in deportation proceedings is not entitled to attorney fees under [5 USCS § 504](#). [Clarke v INS \(1990, CA3\) 904 F2d 172](#).

Equal Access to Justice Act does not apply to deportation hearings and prevailing alien will not be awarded attorney fees. [Ardestani v United States Dep't of Justice, INS \(1990, CA11\) 904 F2d 1505](#), reh den, en banc (1990, CA11) 915 F2d 698 and affd [\(1991\) 502 US 129, 116 L Ed 2d 496, 112 S Ct 515, 91](#) Daily Journal DAR 15063.

[5 USCS § 504](#) does not apply to deportation proceedings before Immigration and Naturalization Service, and petition for attorney fees will therefore be denied. [Hodge v United States Dep't of Justice \(1991, CA5\) 929 F2d 153](#), cert den (1992) 502 US 1029, 116 L Ed 2d 772, 112 S Ct 866.

Prevailing party in deportation proceeding is not entitled to attorney fees under [5 USCS § 504](#); deportation proceedings are not adversary adjudications under § 554. [Escobar v U.S. INS \(1991, CA4\) 935 F2d 650](#).

[5 USCS § 504](#) is facially inapplicable to deportation actions and Congress did not intend otherwise. [Hashim v INS \(1991, CA2\) 936 F2d 711](#), cert den (1992) 502 US 1029, 116 L Ed 2d 772, 112 S Ct 866.

## 61. Interior Board of Land Appeals

[5 USCS § 504](#) governs mining claim contest involving plaintiffs' application for mining patent on government land where Board of Land Appeals reversed denial. [Collord v DOI \(1998, CA9 Idaho\) 154 F3d 933, 98 CDOS 6466, 98 Daily Journal DAR 8988, 28 ELR 21545](#).

Although Board of Land Appeals conducted trial-type hearing when it considered land patent application, it was not required to do so, and thus applicants were not entitled to recover attorneys' fees under [5 USCS § 504](#), because patent proceeding was not adversary adjudication within meaning of [5 USCS § 554](#). [Cavin v United States \(1989\) 19 Cl Ct 198](#), affd in part and vacated in part on other grounds (1991, CA) 950 F2d 731, reported in full (1991, CA FC) [1991 US App LEXIS 28017](#), reh den (1991, CA FC) [1991 US App LEXIS 29883](#) and reh, en banc, den (1992, CA FC) [1992 US App LEXIS 2478](#).

Although decision of Interior Board of Land Appeals qualifies as order under Administrative Procedure Act, and appeal to Board might qualify as adjudication within broad ambit of Administrative Procedure Act, appeals adjudicated by Board, absent existence of requirement that parties be afforded fact finding hearing with respect to specific subject matter under consideration, cannot give rise to petition for costs and expenses under EAJA regardless of outcome of appeal to Board, since consideration of such appeal would not constitute adjudication under [EAJA. Tom Cox \(2001\) 155 IBLA 273](#).

Contest of claim under Alaska Native Allotment Act (former [43 USCS §§ 270-1](#) et seq.) is adversary adjudication for purposes of [EAJA. Heirs of David F. Berry \(2002\) 156 IBLA 341](#).

Proceeding to review notice of violation issued by Office of Surface Mining and Reclamation and Enforcement under [30 USCS § 1275\(a\)](#) is adversary adjudication under Equal Access to Justice Act ([5 USCS § 504\(a\)\(1\)](#)). [Pacific Coast Coal Company v Office of Surface Mining Reclamation and Enforcement \(2005\) 165 IBLA 52](#).

Grazing permits issued under authority of Taylor Grazing Act ([43 USCS § 315b](#)) are "licenses" within meaning of EAJA ([5 USCS § 504\(b\)\(1\)\(C\)\(i\)](#)); thus, appeal involving granting or renewal of such grazing permits is excluded from award of EAJA fees and costs. [Western Watersheds Project \(2007\) 171 IBLA 304](#).

Public hearing provision at [30 USCS § 621\(b\)](#) does not require hearing on record subject to [5 USCS § 554](#), and therefore, is not adversary adjudication within meaning of [5 USCS § 504\(b\)\(1\)\(C\)](#). [Eno v United States \(2010\) 179 IBLA 227](#).

## 62. Securities and Exchange Commission

Investigation by Securities and Exchange Commission in course of which subpoenas were issued to directors of corporation but which did not result in hearing before administrative law judge is not "adversary adjudication"; allegations that investigation was conducted in an abusive and harassing manner does not convert proceeding into adversary adjudication. [Family Television, Inc. v SEC \(1985, DC Dist Col\) 608 F Supp 882, CCH Fed Secur L Rep P 91987.](#)

For purposes of award of attorney's fees and costs to prevailing party under EAJA ([5 USCS § 504](#)), investigation by SEC prior to issuance of order instituting proceedings (OIP) constituted adversary adjudication, since investigation was essential component for final disposition of case. [Re Rita Villa \(1998\) 1998 SEC LEXIS 2033.](#)

### 63. Social Security

Award of attorney's fees to Social Security claimant for representation in administrative proceedings on remand from District Court pursuant to [28 USCS § 2412\(d\)](#), which provides for attorney's fees in civil actions and adversarial adjudications, was proper, even though proceedings were not adversarial under [5 USCS § 504\(b\)\(1\)\(C\)](#), since proceedings were integral part of civil action. [Sullivan v Hudson \(1989\) 490 US 877, 109 S Ct 2248, 104 L Ed 2d 941](#), CCH Unemployment Ins Rep P 14672A (ovrld on other grounds as stated in [Lopez v Sullivan \(1991, ND Ill\) 780 F Supp 496, 36 Soc Sec Rep Serv 156, CCH Unemployment Ins Rep P 16559A](#)) and (ovrld in part on other grounds as stated in [Brown v Shalala \(1994, ED Cal\) 859 F Supp 1304, 45 Soc Sec Rep Serv 550, CCH Unemployment Ins Rep P 14507B](#)) and (criticized in [Brown v Shalala \(1995, DC Kan\) 1995 US Dist LEXIS 11034](#)) and (criticized in [Edwards v Barnhart \(2003, SD NY\) 238 F Supp 2d 645](#)) and (Abrogated as stated in [Lindstrom v Astrue \(2009, ND Iowa\) 2009 US Dist LEXIS 1827](#)) and (Abrogated in part as stated in [Casta?eda-Castillo v Holder \(2013, CA1\) 2013 US App LEXIS 14482](#)).

Administrative proceedings involving claims for Social Security benefits are not adversarial as defined in legislative history, and successful claimant may therefore not recover attorney fees for work performed at administrative level following District Court's remand order. [Cornella v Schweiker \(1984, CA8 SD\) 728 F2d 978](#) (superseded by statute on other grounds as stated in [Peterson v United States R. Retirement Bd. \(1986, CA8\) 785 F2d 245](#)) and (criticized in [Turner v Astrue \(2010, ED Ky\) 764 F Supp 2d 864, 157 Soc Sec Rep Serv 8](#)).

Social Security Administration proceedings are not adversary adjudications and are thus excluded from coverage of Equal Access to Justice Act; proceedings before Social Security Administration are not adversary adjudications since United States is not represented by counsel at agency level. [Clifton v Heckler \(1985, CA5 La\) 755 F2d 1138](#) (criticized in [N. C. Alliance for Transp. Reform, Inc. v United States DOT \(2000, MD NC\) 104 F Supp 2d 599](#)) and (ovrld in part on other grounds as stated in [Huichan v Barnhart \(2006, WD Wis\) 2006 US Dist LEXIS 74499](#)).

Fees may not be awarded under Equal Access to Justice Act ([5 USCS § 504](#)) to social security beneficiary who prevails at administrative level; administration portion of social security proceeding does not qualify as adversary adjudication because Social Security Administration does not take position which is represented through counsel; Act covers judicial review of Social Security Administrative proceedings by District Court where agency takes position in case. [Berman v Schweiker \(1982, ND Ill\) 531 F Supp 1149, 34 FR Serv 2d 296](#), affd (1983, CA7 Ill) [713 F2d 1290](#).

Administrative proceedings under Social Security are not "adversary adjudications" within meaning of [5 USCS § 504\(b\)\(1\)\(c\)](#); court refuses to create exception for award of attorney fees in cases of outrageous governmental actions at [Social Security Administration level](#). [Cole v Secretary of Health & Human Services \(1983, DC Del\) 577 F Supp 657](#).

HHS ALJ was properly denied attorney's fees under [5 USCS § 504](#), in connection with administrative proceedings conducted by 3-member panel of HHS Appeals Council to review allegations of general bias raised against ALJ by certain Social Security disability claimants, because panel's investigation of ALJ did not constitute "adversary adjudication" as required for award of attorney's fees under § 504(a)(1) since government was not represented by

counsel in neutral, factfinding inquiry. [Rowell v Sullivan \(1993, DC Dist Col\) 813 F Supp 78, 40 Soc Sec Rep Serv 248, CCH Unemployment Ins Rep P 17289A.](#)

Because only one out of seven of ALJ's conclusions was considered on remand, and because government's position had reasonable basis in fact and law, it was substantially justified; accordingly, Social Security Disability Insurance claimant was not entitled to attorneys' fees under 28 USCS § 2412(d)(1)(A). [Bryan v Astrue \(2011, MD Pa\) 788 F Supp 2d 360, 165 Soc Sec Rep Serv 253, affd \(2012, CA3 Pa\) 478 Fed Appx 747.](#)

#### 64. Tax matters

Attorney fees incurred at administrative level in suit for refund of tax are not awardable since such transactions with Internal Revenue Service cannot constitute adversary agency adjudication. [White v United States \(1984, CA11 Ala\) 740 F2d 836, 84-2 USTC P 9762, 54 AFTR 2d 5863](#) (superseded by statute on other grounds as stated in [Haitian Refugee Ctr. v Meese \(1986, CA11 Fla\) 791 F2d 1489](#)).

Congress did not intend to change existing standards for fee awards by enacting [26 USCS § 7430](#), concerning recovery of reasonable litigation costs in tax cases. [Sharpe v United States \(1984, ED Va\) 607 F Supp 4, 84-1 USTC P 13574, 54 AFTR 2d 6480.](#)

Denial of plaintiff taxpayer's claim for refund of firearms transfer tax was not adversary proceeding governed by [5 USCS § 504\(a\)\(1\)](#). [Blakley v United States \(2008\) 85 Fed Cl 360, 102 AFTR 2d 7424](#), revd on other grounds (2010, CA FC) [593 F3d 1337, 105 AFTR 2d 751.](#)

#### 65. Miscellaneous

Labor certification review is not adjudication and government is not obligated to pay fees to prevailing party in such review. [Smedberg Machine & Tool, Inc. v Donovan \(1984, CA7 Ill\) 730 F2d 1089.](#)

Process of obtaining airman medical certificate is "adjudication" for purposes of granting or renewing license and is excluded from scope of [5 USCS § 504](#) (Equal Access to Justice Act), thus National Transportation Safety Board and Federal Aviation Administration (FAA) did not err in denying pilot, who successfully challenged FAA's refusal to issue certificate, fees and costs sought under § 504. [Bullwinkel v United States Dep't of Transp., Federal Aviation Admin. \(1986, CA7\) 787 F2d 254.](#)

Proceeding under Export Administration Act ([50 USCS §§ 2401](#) et seq.) in relation to alleged violations of Act and denial of privilege of exporting commodities or technical data against exporter who had sought to export to Czechoslovakia two upgraded wafer polishers used in manufacturing semi-conductors, in which it was determined that exporter did not knowingly violate Act, was not adversary adjudication within meaning of [Equal Access to Justice Act. Haire v United States \(1989, CA9 Cal\) 869 F2d 531.](#)

Union was not entitled to attorneys' fees incurred in successfully defending itself in proceeding brought by NLRB, since there was substantial evidence on record from which General Counsel of NLRB could infer that union clearly and unmistakably agreed to waive grievance if its members approved pension plan. [United Brotherhood of Carpenters & Joiners, Local 2848 v NLRB \(1990, CA5\) 891 F2d 1160, 133 BNA LRRM 2473, 114 CCH LC P 11843.](#)

Plaintiff conservation group, although it was prevailing party, was denied fees under Equal Access to Justice Act (EAJA) because plaintiff's commendable efforts to insure environmental compliance occurred within proceeding Congress excepted from EAJA recovery, which in instant case was grazing permit renewal proceeding before Bureau of Land Management; EAJA excluded attorneys' fees recovery when underlying proceeding was one whose

purpose was renewal, rather than modification, of license. [Western Watersheds Project v Interior Bd. of Land Appeals \(2010, CA9 Idaho\) 624 F3d 983.](#)

Mining claim owner was not entitled to attorneys' fees incurred in proceedings under Mining Claims Rights Restoration Act of 1955, [30 USCS §§ 621-625](#), because hearing was held for purpose of granting license and was therefore not adversary adjudication in which fees could be awarded. [Eno v Jewell \(2015, CA9 Cal\) 798 F3d 1245](#), amd, reh gr, in part, reh den, reh, en banc, den (2015, CA9) [805 F3d 1154](#).

Proceeding under [42 USCS § 6926](#) to withdraw state's authorization to administer its hazardous waste program is not "adversary adjudication" as defined by [5 USCS § 504](#), and environmental advocacy group is therefore not entitled to recover attorney fees incurred when intervening in EPA enforcement proceeding. [Friends of Earth v Reilly \(1992, App DC\) 296 US App DC 170, 966 F2d 690, 35 Env't Rep Cas 1171, 22 ELR 21185.](#)

Where plaintiff, Indian Tribe's gasoline distribution operator, challenged Bureau of Indian Affairs' decision terminating operator's contract with Tribe under [25 USCS § 81](#), administrative process was "adjudication" under framework and definitions of [5 USCS §§ 504\(b\)\(1\)\(C\)](#), 551(7), and 554, and [25 USCS §§ 2](#), and [9](#), for purposes of [28 USCS § 2412\(d\)\(3\)](#) in connection with operator's request for its fees and costs. [GasPlus, L.L.C. v United States DOI \(2009, DC Dist Col\) 593 F Supp 2d 80.](#)

[5 USCS § 504\(a\)\(4\)](#), which, in adversary adjudication arising from agency action to enforce party's compliance with statutory or regulatory requirement, allows recovery of fees and costs when demand of agency is substantially in excess of decision of adjudicative officer and is unreasonable when compared with such decision, sets forth conjunctive two-prong test (both prongs of which depend on facts and circumstances of each case) for determining whether fees and costs should be awarded; first prong is largely quantitative, focusing on whether, in context of cases under Federal Mine Safety and Health Act ([30 USCS §§ 801](#) et seq.), Secretary of Labor has proposed penalty that is substantially in excess of penalty ultimately assessed by FMSHRC pursuant to [30 USCS § 820\(i\)](#), and second prong is qualitative, presenting issue of whether Secretary has acted reasonably in proposing particular penalty. [Secretary v L & T Fabrication & Construction, Inc. \(2000\) 22 FMSHRC 509.](#)

Administrative proceedings under Davis-Bacon Act ([40 USCS §§ 276a](#) et seq.) are not subject to attorney's fees and costs provisions of Equal Access to Justice Act ([5 USCS § 504](#)), since such proceedings are not adversarial adjudications within meaning of Equal Access to Justice Act. Re Heavy Constructors Association of Greater Kansas City Area (1994) WAB Case No. 94-13.

Where complaint against respondent under Plant Quarantine Act and regulations issued thereunder for failing to present one piece of baggage in his possession at Honolulu Airport for required inspection is dismissed with prejudice, respondent may recover attorney fees and expenses under Equal Access to Justice Act where agency position is not substantially justified and there are no special circumstances that make award unjust. [In re Wiley Prentice \(1988\) 47 Agric Dec 1655.](#)

Petition filed by attorney pursuant to EAJA requesting compensation for fees and costs that he incurred to obtain judicial stay of his interim suspension from practice of law before Commission, where suspension was initiated during show cause proceeding for permanent disbarment, will be denied, since neither Commission's proceeding nor petitioner's temporary suspension comes within purview of EAJA as adversary adjudication. Re Thomas L. Root, Esq., FCC FCC91-124 (adopted 4/12/91).

Equal Access to Justice Act ([5 USCS § 504](#)) is not applicable to Debt Collection Act ([5 USCS § 5514](#)) proceedings. In re William D. Vogel, Jr. (11/30/00) PS Docket No. DCA 99-396.

While petitioner United States Postal Service licensee was entitled to attorney's fees under [28 USCS § 2412\(d\)\(1\)\(A\)](#) because respondent Postal Regulatory Commission's (PRC) position was not "substantially justified," licensee was only entitled to fees incurred in connection with court proceedings, not those before PRC, as under [39 USCS § 404\(e\)\(3\)](#), PRC proceedings did not require "hearing" and did not meet definition of "adversary



adjudication" under § 2412(d) and [5 USCS §§ 504, 554](#); that 39 USCS § 503 stated PRC was to promulgate rules and regulations and establish procedures, subject to [5 USCS chs. 5](#) and 7, was irrelevant to determining if proceedings before PRC were "adversary adjudications," because generic provisions of [5 USCS ch. 5](#) could apply even if formal adjudication procedures in § 554 did not. [LePage's 2000, Inc. v Postal Regulatory Comm'n \(2012, App DC\) 400 US App DC 79, 674 F3d 862.](#)

### Unpublished Opinions

Unpublished: Based on legislative history of Equal Access to Justice Act (EAJA), [5 USCS § 504](#), applicable case law, and relevant regulations, court concluded that phrase "or otherwise" in EAJA required that person physically appear at adjudication and advocate position on behalf of United States. Congress necessarily intended to give government power control its fate and public fisc by giving it power to choose to defend or not to defend agency action, and while caselaw showed that "or otherwise" did not require attorney to actually appear at adjudication to make it adversarial, caselaw simply did not support that no one had to appear and documents alone were insufficient under EAJA to make proceeding adversarial; therefore, based on caselaw, ALJ proceedings were not covered by EAJA and doctor was not entitled to fees because Department of Health and Human Services did not send person to represent its interests. [Handron v Sebelius \(2009, DC NJ\) 669 F Supp 2d 490](#), affd, costs/fees proceeding (2012, CA3 NJ) [677 F3d 144](#).

Unpublished: Regulations regarding Equal Access to Justice Act (EAJA), [5 USCS § 504](#) did not support doctor's position that person did not need to physically appear at adjudication to make it adversarial; since guidance of model rules also suggested that someone rather than something had to appear at adjudication, and since that did not occur in doctor's case, court was compelled to find that doctor was not entitled to fees under [EAJA. Handron v Sebelius \(2009, DC NJ\) 669 F Supp 2d 490](#), affd, costs/fees proceeding (2012, CA3 NJ) [677 F3d 144](#).

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Office of the Secretary of Commerce--Attorney's fees and other expenses, [15 CFR 18.1](#) et seq.

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## 5 USCS § 504

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