



## **Revised Model Rules for Implementation of the Equal Access to Justice Act**

### **Ad Hoc Committee**

#### **Proposed Recommendation | June 13, 2019**

1           The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of  
2 attorney fees and other expenses to certain individuals, small businesses, and other entities who  
3 prevail against the federal government in judicial proceedings and certain adversarial agency  
4 adjudicative proceedings, when the position of the government is not substantially justified.<sup>1</sup> The  
5 stated purpose of EAJA is to, among other things, “diminish the deterrent effect of seeking  
6 review of, or defending against, governmental action by providing” the award of certain costs  
7 and fees against the United States.<sup>2</sup>

8           In the case of agency adjudications, agencies must establish “uniform procedures for the  
9 submission and consideration of applications for an award of fees and other expenses” “[a]fter  
10 consultation with the Chairman of the Administrative Conference of the United States.”<sup>3</sup> To  
11 carry out this statutory charge, the Conference’s Chairman issued model rules in 1981 to help  
12 agencies establish uniform procedures for the submission and consideration of EAJA  
13 applications.<sup>4</sup> Adoption of these model rules was intended to satisfy an agency’s obligation under  
14 section 504 of Title V of the United States Code to consult with the Chairman.<sup>5</sup> In 1986, the

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<sup>1</sup> 5 U.S.C. § 504.

<sup>2</sup> Equal Access to Justice Act, Pub. L. No. 96-481, § 202(b)(1), 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412).

<sup>3</sup> 5 U.S.C. § 504(c)(1).

<sup>4</sup> Admin Conf. of U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

<sup>5</sup> Cf. Admin Conf. of U.S., Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986).



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15 Chairman revised the 1981 model rules following the amendment and reauthorization of EAJA.<sup>6</sup>  
16 Numerous agencies adopted the 1981 and 1986 model rules, including the Federal Trade  
17 Commission, the Consumer Financial Protection Bureau, the Securities and Exchange  
18 Commission, and the National Labor Relations Board.<sup>7</sup>

19 In light of the amendments to EAJA made since 1986,<sup>8</sup> as well evolving adjudicative  
20 practices since that time, the Conference's Chairman decided to review and, as necessary, revise  
21 the 1986 model rules, just as it recently did in the case of the *Model Adjudication Rules*, which  
22 govern agency adjudication procedures generally.<sup>9</sup> Rather than simply revise the rules itself the  
23 Chairman decided to put the rules before the membership of the Conference—first through an ad  
24 hoc committee of all interested members—for review so as to assure consideration of as broad a  
25 range of views as possible. The Conference considered, among other things, EAJA rules that  
26 agencies have issued since the promulgation of the 1986 model rules. Where appropriate, the  
27 Conference updated the model rules to reflect evolving practice and the latest EAJA amendments  
28 and made additional revisions to promote greater consistency and clarity. The Conference's  
29 revised model rules appear in the appendix to this Recommendation.

30 Substantial changes have been made to the 1986 model rules. They include, most notably,  
31 the elimination of most of what was Subpart A. Subpart A of the 1986 model rules consisted of  
32 general provisions addressing, among other things, when EAJA applies, eligibility of applicants,

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<sup>6</sup> *Id.*

<sup>7</sup> Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 C.F.R. pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm'n Dec. 27, 1989) (codified as amended at 17 C.F.R. pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat'l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29 C.F.R. pt. 102); Procedural Rules Amendments, 51 Fed. Reg. 17,732 (Nat'l Labor Relations Bd. May 15, 1986); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm'n Dec. 31, 1985) (codified as amended at 16 C.F.R. pt. 0-5); Equal Access to Justice Rules, 47 Fed. Reg. 609 (Sec. Exch. Comm'n Jan. 6, 1982); Rules Governing Recovery of Awards Under Equal Access to Justice Act, 46 Fed. Reg. 48,910 (Fed. Trade Comm'n Oct. 5, 1981).

<sup>8</sup> Act of Jan. 4, 2011, Pub. L. No. 111-350, § 5, 124 Stat. 3677, 3841; Small Business Regulatory Enforcement Fairness Act of 1996, 104 Pub. L. No. 121, § 231, 110 Stat. 847, 862; Religious Freedom Restoration Act of 1993, 103 Pub. L. No. 141, § 4, 107 Stat. 1488, 1489; Education and Savings Act of 1988, Pub. L. No. 100-647, § 6239, 102 Stat. 3342, 3746.

<sup>9</sup> Admin. Conf. of the U.S., Model Adjudication Rules, 83 Fed. Reg. 49,530 (Oct. 2, 2018).



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33 proceedings covered, standards for awards, allowable fees and expenses, rulemaking on  
34 maximum rates for attorney fees, awards against other agencies, and delegations of authority.  
35 The Conference recommends the elimination of these provisions because they address the  
36 substantive standard for EAJA awards and other such matters beyond the Conference's statutory  
37 charge identified above. Other changes to the rules, including the addition of a definitions  
38 section, have also been made to improve their clarity and comprehensibility.

### **RECOMMENDATION**

39           The 1986 model rules should be replaced with the revised model rules for the  
40 implementation of EAJA that follow.