

Proposed Revisions to 1986 Model EAJA Rules

Commented [RB1]: This document includes both edits adopted by the Ad Hoc Committee at the last meeting and edits proposed by ACUS's Office of the Chairman. Comment bubbles identify the source of the edits; edits not accompanied by a comment bubble reflect changes adopted by the Ad Hoc Committee at its previous meeting.

Subpart A-General Provisions

§ 315.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. § 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.

§ 315.102 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before this agency on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in subpart B of these rules, has been filed with the agency within 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 315.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this agency. These are (i) adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding, and (ii) appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before agency boards of contract appeals as provided in section 8 of that Act (41 U.S.C. 607).

Any proceeding in which this agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For this agency, the types of proceedings generally covered include: [to be supplied by the agency].

Alt. 315.103(a): [for use by contract appeals boards] The Act applies to appeals of decisions of 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).

(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.

(c) 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.

§ 315.104 Eligibility of applicants.

§ 315.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an ineligible prevailing applicant because the agency's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§315.106. Allowable fees and expenses.

(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.

(b) No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A) \$75.00 per hour. No award to compensate an expert witness may exceed the reasonable 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.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(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;

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

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

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

(5) Such other factors as may bear on the value of the services provided.

(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.

§ 315.107 Rulemaking on maximum rates for attorney fees.

(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.

(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.

§ 315.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

§ 315.109 Delegations of authority.

This agency delegates to [identify appropriate agency unit or officer] authority to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. § 504, in actions arising under [list statutes or types of proceedings.] This agency may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Alt. 315.109: [Contract appeals boards may omit this section.]

Subpart AB-Information Required From Applicants

§ 315.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies that the applicant alleges was not substantially justified; or, if the applicant has not prevailed, shall show that the agency's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision under the facts and circumstances of that case, and identify the agency position(s) in the proceeding that the applicant alleges was (were) not substantially justified or the agency's demand that is alleged to be excessive and unreasonable. 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 a statement of how an applicant meets the criteria in 5 U.S.C. § 504(b)(1)(B) section 315.104(b) 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)); or

Commented [ATW2]: ACUS's Office of the Chairman proposes that subpart A of the 1986 Model Rules be stricken in full. As presently constituted, subpart A includes provisions that go beyond the statutory text of EAJA or that modify it in certain respects, without any clear justification for these changes based upon statutory or case law. In so doing, the document arguably goes beyond EAJA's statutory mandate, which directed agencies to "[c]onsult[]" with the ACUS Chairman to establish "rule[s] [setting forth] uniform procedures for the submission and consideration of applications for an award of fees and other expenses." 5 U.S.C. § 504(c)(1). Subparts B and C carry out this mandate, providing useful procedures for the submission and disposition of EAJA applications. The information contained in subpart A relating to EAJA's applicability, the proceedings covered, standards for awards, parties that qualify, and other threshold matters is fully addressed within the text of the statute itself, and the model rules run the risk of creating confusion or misleading users if they attempt to supplement or modify that language.

Commented [ATW3]: This revision accounts for the elimination of the previous Subpart A.

Commented [ATW4]: This revision is based upon the language in CFPB's rule 1071.200(b)-(c) for the implementation of EAJA and accounts for the changes to EAJA made by SBREFA.

~~(3) In the case of an application for an award related to an allegedly excessive demand by the agency, it demonstrates that it is a small entity as that term is defined by 5 U.S.C. 601(6).~~

Commented [ATW5]: This revision is based upon the language in CFPB rule 1071.201(b) and accounts for the changes to EAJA made by SBREFA.

(c) The application shall state the amount of fees and expenses for which an award is sought.

(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.

(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.

§ 315.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization, ~~or cooperative association, or, in the case of an application for an award related to an allegedly excessive demand by the agency, a small entity as that term is defined by 5 U.S.C. 601(6).~~ must provide with its application a detailed exhibit showing the net worth of the applicant ~~is as represented in the statement required by section 315.201(b) 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.

Commented [CO6]: Would the idea that you've filed a motion and filed some sort of protective order, trump some exemption under the Freedom of Information Act (FOIA)?

Commented [ATW7R6]: No. If a FOIA exemption does not apply to the information at issue, then that information could be subject to disclosure.

Commented [ATW8]: This revision accounts for the changes to EAJA made by SBREFA.

(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 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].

Commented [CO9]: The Committee should consider striking this paragraph and instead directing practitioners to the agency's generally applicable confidentiality adjudication practices and procedures. See FTC rules after 1996 update to EAJA.

Commented [CO10]: Take all of the CFPB rule here. Does this need to be updated to account for new definition of "demand?"

Commented [ATW11R10]: CFPB rule § 1071.202, adopted here; updated this provision to account for the new definition of "demand."

§ 315.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand by the agency, 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.

§ 315.204 When an application may be filed.

(a) An application may be filed ~~whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case no~~ 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.~~

(be) 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 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

Commented [ATW12]: Staff Recommendation: The Committee originally proposed striking this language (as reflected in the redline) and moving it to a new "Definitions" section. If the Committee decides to strike subpart A, which contained the "Definitions" section, it should consider whether this language should be retained.

Subpart C-Procedures for Considering Applications

§ 315.301 Filing and service of documents.

Any application for an award or ~~other~~ pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 315.202(b) for confidential financial information.

Commented [ATW13]: Staff Recommendation: The Committee should consider whether the word "other" is necessary here. Is an application for an award a pleading?

§ 315.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(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.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied upon 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.

§ 315.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under §315.306.

§ 315.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

Commented [CO14]: Where is this provision from? Is it needed? Does the Act say that this needs to be included?

§ 315.305 Settlement.

The application and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. 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.

Commented [ATW15R14]: This provision seeks to permit the participation of other parties that might offer perspectives helpful to a proceeding. It is not a requirement of EAJA. Given this, the Committee might consider striking this provision.

§ 315.306 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written 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.

(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.

§ 315.307 Decision.

The adjudicative officer shall issue a recommended decision on the application within 60 days after the time for filing a reply, or where further proceedings are held, within 60 days after completion of such proceedings.

Commented [CO16]: Adopted CFPB rule wholesale here.

~~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. (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 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.~~

(b) For a decision involving an allegedly excessive agency 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 agency'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.

~~add section from CFPB rules.~~

[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.]

Commented [ATW17]: Staff Recommendation: The Committee should consider whether to strike the alternative rules for use by contract appeals boards in this rule and in §315.308.

§ 315.308 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. ~~Whether and how a decision is reviewed is subject to an agency's rules in accordance with [cross-reference to agency's applicable rules].~~ 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.

Commented [CO18]: Agencies can consider including a cross reference to an agency's applicable rules. See model adjudication rules.

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

§ 315.309 Judicial review.

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

§ 315.310 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within 60 days.

Commented [CO19]: The Committee should consider adding language to account for the *Astrue v. Ratliff* decision. Should the definition of "applicant" be included in the definitions section?

Commented [ATW20R19]: The existing language of this rule is consistent with *Astrue*.