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Presidential Documents

Title 3—

The President

Proclamation 5470 of April 30, 1986

Fair Housing Month, 1986

By the President of the United States of America

A Proclamation

The year 1986 marks the eighteenth anniversary of the passage of title VIII of the Civil Rights Act of 1968, commonly referred to as the "Fair Housing Act," declaring it a national policy that housing throughout the United States should be made available to all citizens on the basis of equality and fairness.

The Federal Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, sex, or national origin.

Fairness is the foundation of our way of life and reflects the best of our traditional American values. Invidious discriminatory housing practices are abhorrent to the American sense of fair play.

In this eighteenth year since the passage of the Fair Housing Act, Americans should continue to work together to uphold the Fair Housing Act and the principle of equal opportunity on which it is based.

The Congress, by Senate Joint Resolution 303, has authorized and requested the President to issue a proclamation designating the month of April 1986 as "Fair Housing Month."

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim April 1986 as Fair Housing Month.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and tenth.

Ronald Reagan

[FR Doc. 86-10294
Filed 5-5-86; 10:51 am]
Billing code 3195-01-M

Presidential Documents

Proclamation 5471 of May 1, 1986

Loyalty Day, 1986

By the President of the United States of America

A Proclamation

The freedom of thought and action we Americans enjoy today seems as natural as the air we breathe. But there is a danger we may take this freedom for granted. We must never forget it was bought for us at a great price. The brave and resourceful Americans whose sacrifices gained our Independence and preserved it for more than 200 years against formidable foes have set an example of unflinching loyalty to the ideal of liberty and justice for all.

Our great Nation is at peace, but peace demands of us a commitment to defend the system of government that has so effectively ensured our freedoms. To encourage our vigilance and so that we may rededicate ourselves to sustaining the great American ideals, the Congress, by joint resolution approved July 18, 1958 (72 Stat. 369, 36 U.S.C. 162), has designated May 1 of each year as "Loyalty Day."

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim May 1, 1986, as Loyalty Day and call upon all Americans and all patriotic, civic, fraternal, and educational organizations to observe that day with appropriate ceremonies. I also call upon government officials to display the flag of the United States on all government buildings and grounds on that day.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of May, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and tenth.

Ronald Reagan

[FR Doc. 86-10295
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Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Part 315

Model Rules for Implementation of the Equal Access to Justice Act

AGENCY: Administrative Conference of the United States.

ACTION: Issuance of Final Revised Model Rules.

SUMMARY: The Chairman, Administrative Conference of the United States, issues final revised model rules to implement the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325, as amended by Pub. L. 99–80, 99 Stat. 183. The Act provides for the award of attorney fees and other expenses to parties who prevail over the Federal government in certain administrative and court proceedings. These revised model rules, which reflect the changes in the law made by Pub. L. 99–80, are designed to assist agencies in adopting or amending their own regulations for implementation of the Equal Access to Justice Act. Where appropriate, alternative provisions suitable for use by contract appeals boards are included; they are displayed in smaller type.

FOR FURTHER INFORMATION CONTACT: Mary Candace Fowler, Staff Attorney, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, D.C. 20037; (202) 254–7065.

SUPPLEMENTARY INFORMATION: On November 6, 1985, the Chairman of the Administrative Conference of the United States published draft revised model rules for implementation of the Equal Access to Justice Act in Federal agency proceedings. [50 FR 46250 (November 6, 1985)]. The Act provides for the award of attorney fees and other expenses to certain parties who prevail over Federal government in court cases and adversary administrative proceedings. Prevailing parties may receive awards if they meet the Act's eligibility standards (which set ceilings on the net worth and number of employees of parties) and if the government's position was not substantially justified.

After considering comments received on the draft, the Chairman is now issuing final revised model rules. These rules are intended to help fulfill the Chairman's responsibility, assigned by Congress under the Equal Access to Justice Act, to consult with agencies establishing uniform procedures for handling applications for fee awards in their own proceedings. 5 U.S.C. 504(c)(1), Pub. L. 96–481, 94 Stat. 2325, as amended by Pub. L. 99–80, 99 Stat. 183. The Chairman first issued model procedural rules for agencies in 1981. 46 FR 32900 (June 25, 1981), reprinted in Administrative Conference of the U.S., *Federal Administrative Procedure Sourcebook* (Office of the Chairman, 1985), at 353–84.

Pub. L. 99–80, enacted August 5, 1985, reauthorized the Act, which had expired on September 30, 1984. It also made several amendments, including the following:

1. Net worth ceilings for eligible parties have been raised to $2,000,000 for individuals and $7,000,000 for partnerships, corporations, and other entities;

2. Units of local government that fall within the ceilings on net worth and number of employees have been made eligible for fee awards;

3. The position of the government that must be substantially justified has been specifically defined to include the underlying action or failure to act on which the proceedings is based as well as the position in litigation; and

4. Contract dispute proceedings before agency contract appeals boards have been included in the proceedings covered by the Act.

The draft revised model rules were prepared with two purposes in mind: to assist agencies in amending their Equal Access to Justice Act procedures to reflect these statutory changes, and to adapt the existing rules as necessary for use by agency contract appeals boards. The draft revised model rules noted that application of the Act to contract appeals proceedings raises some problems that may require specialized treatment. These issues are discussed in the section-by-section analysis below, and the model rules contain italicized alternative contract appeals board provisions where appropriate.

The Office of the Chairman received twelve comments on the draft rules, most from federal agencies and most concerning various issues related to implementation of the Act by contract appeals boards. We have made some changes to the draft in response to the comments; both these and our decisions not to adopt other suggestions are discussed below.

One commenter, James McQuiston, of McQuiston Associates, submitted an entirely redrafted set of rules. Significant substantive issues raised by these rules are discussed in connection with the relevant rule provisions. To the extent that the changes made by this alternative set of rules are organizational or stylistic, we will not address them individually. Agencies have worked with their existing rules, most of which are closely based on the ACUS model rules, for over three years. To propose a wholesale redrafting and reorganization at this time would be unnecessarily burdensome and confusing.

As a preliminary matter, we would like to set forth our expectations of how agencies can fulfill the statutory requirement of consultation with the ACUS Chairman. Agencies that publish proposed rules for comment may simply notify us of the publication of their proposals; the Chairman will then provide any suggestions by filing comments. Agencies that intend to publish final rules without providing a notice and comment period should send a draft to the Office of Chairman for review and comment before publication if their rules depart significantly from the model; we will expedite this review to the extent possible.

Of course, as with the original model rules, agencies will not be bound to follow either the model rules or the suggestions made by the Chairman, whose authority is consultative only. However, to promote the uniformity of agency procedure contemplated by the Equal Access to Justice Act and to conserve their own time and resources, we strongly encourage agencies to follow the model to the greatest extent possible.

Section-by-Section Analysis

Subpart A—General Provisions

The basic changes recommended in this subpart to conform the model rules to the provisions of the amended Equal Access to Justice Act (such as deletion of references to the agency's position "as a party" and revision of the net worth ceilings on eligibility) were not controversial, and we have adopted them. However, some sections of the subpart provoked extensive comment.

Applicability: Comments from the Civil Division of the Department of Justice raised substantial questions about the draft rules' discussion of applicability and retroactivity of the new provisions of the Act. We proposed that all cases in which fee applications were pending on August 5, 1985 be treated as "pending" on the date of enactment of Pub. L. 99–80, and thus covered by the amended Act rather than by the old Act (under its savings clause for cases pending on September 30, 1984). The Civil Division, however, has pointed out legislative history that casts doubt on our interpretation. During debate in the House of Representatives before passage of the Act, Representative Kastenmeier stated:

> I would like to clarify the effective date provisions of H.R. 2378 and the relationship of these provisions with the original Act. Cases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill. This bill would apply to any case pending on October 1, 1984, and finally disposed of before the date of enactment of this bill, if the time for filing an application for fees and other expenses had not expired as of such date of enactment. 131 Cong. Rec. H4762 (June 24, 1985).

Relevant language also appears in the House Report on H.R. 2378: "The changes which are made by H.R. 2378 which merely clarify existing law are retroactive, and apply to matters which were pending on, or commenced on or after October 1, 1981. However, changes which are made by H.R. 2378 and which expand or otherwise change existing law shall take effect on the date of enactment and shall apply to matters pending on or commenced after that date." H.R. Rep. 99–120, 99th Cong., 1st Sess. 11 (1985). See also *Id.* at 21. This distinction, the Civil Division comments argue, would be meaningless if all provisions of the new act applied retroactively to cases in which only the fee application remained pending on the date of enactment. *Bradley* v. *School Board* 416 U.S. 696 (1974), which stands for the proposition that a court will apply the law in effect at the time it makes its decision (and itself involved application of an attorneys' fee statute to a case in which only the fee application was pending), makes an explicit exception for situations in which legislative history indicates that Congress did not intend a retroactive application.

We are persuaded that the provisions of the new Act (and the amended rules) as a whole should not apply to cases in which only fee applications remained pending on August 5, 1985. Instead, as envisioned by the House Report, those provisions that expand or change existing law (such as the expanded eligibility ceilings) should apply to cases on which the substantive portion of the case was still pending on the date of enactment, or the time for filing a fee application has not expired on that date, and to those other classes of cases explicitly mentioned in Pub. L. 99–80. We do not believe it is necessary to revise § 315.102 of the draft model rules, which tracks the language of Pub. L. 99–80, to accommodate this change in interpretation. Most agencies had few, if any, fee applications pending on August 5; these agencies will surely find it easier to inform affected parties directly that the old rules will continue to apply than to adopt a special rule covering the cases. Even agencies with a larger application volume, such as the NLRB, may prefer to follow this course. If not, such agencies can simply retain their old rules for as long as necessary while also adopting new rules for newer cases.

We note, in this connection, that the definition of "position of the agency" to include the underlying position as well as the litigation position is explicitly described in the House Report as a clarifying amendment:

> Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. Some courts have construed the "position of the United States" which must be "substantially justified" in a narrow fashion which has helped the Federal Government escape liability for awards. H.R. 2378 clarifies both of those points. When the escape clause was originally written, it was understood that "position of the United States" was not limited to the government's litigation position but included the action—including agency action—which led to the litigation. However, courts have been divided on the meaning of "position of the United States." H.R. 2378 clarifies that the broader meaning applies.

H.R. Rep. 99–120, at 9 (footnotes omitted). In *Russell* v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985), the Fifth Circuit agreed that the definition of "position of the agency" clarified the original Act and thus should apply even to cases in which only a fee application remained pending. While we do not propose to treat this issue explicitly in the rules, we recommend that agencies with a backlog of fee applications pending on August 5, 1985, give careful consideration to the distinction between clarifying amendments and modifying amendments in disposing of these applications.

The Agriculture Board of Contract Appeals has raised a question as to what constitutes a timely filed application dismissed for lack of jurisdiction under the special retroactive applicability clause for contract appeals. Would a general request for fees in the initial pleading, denied by the Board in its substantive order in the case, qualify? This is a difficult question. A potential applicant that stated its intent to file for fees and was explicitly informed (by denial in an agency order) that such an application would not be entertained would in all probability not have bothered to file such an application. However, Pub. L. 99–80 contemplate that an "application" within the terms of the Act must have been filed: "[The 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. . . ." Pub. L. 99–80, sec. 7(c). We suggest that the boards require that a formal application have been filed. An applicant who feels unfairly disadvantaged by this interpretation may wish to file under the new law and take the issue before the appellate court.

Proceedings Covered: The Agriculture Board of Contract Appeals has also suggested a clarifying change to § 315.103, identifying the proceedings to which the Act applies. For contract appeals, the Board suggests the rules refer to "final decisions of contracting officers" rather than simply "decisions" made under the relevant statutory provisions. We have added the words "of contracting officers," which we agree are helpful. However, we have not added the word "final," since the Contract Disputes Act refers only to "decisions." Thus the term "final" could be more confusing than clarifying.

Eligibility: Two commenters made suggestions on the eligibility provisions of § 315.104. The Armed Services Board of Contract Appeals said the definition of "party" should follow existing Board rules; however, since the EAJA explicitly defines a party and the rules follow this definition, we cannot adopt this suggestion. The Postal Service Board of Contract Appeals noted that the word "proceeding" may be ambiguous for contract appeals, and

that in these cases eligibility should be determined as of the time the appeal was filed, rather than the claim. We agree with this interpretation, which parallels that for other proceedings, in which the commencement of the formal litigation stage is the point at which eligibility is measured. We have included appropriate alternate language for contract appeals boards in the rules.

We received no comments or suggestions on how to determine the net worth of units of local government (other than an informal comment to the effect that housing authorities, mentioned in our discussion of this issue, are virtually always independent of individual local municipalities). This difficult issue will have to be resolved on a case-by-case basis, in the context of concrete fact situations. We will monitor developments in this area in order to circulate any useful information that becomes available.

Standards for Awards: Comments on § 315.105, standards for awards, concerned two points. Some Boards of Contract Appeals suggested elimination of the "burden of proof" sentence in this rule, suggesting it is unnecessary, confusing, and unwarranted by amendments to the Act. This language appeared in the original model rules, and we see no reason to eliminate it now. However, we agree that the sentence may be ambiguous without its original ending explicitly linking it to the substantial justification determination rather than other issues, and we have revised the sentence to resolve this problem. One commenter objected to the term "agency counsel"; as explained in our original model rules, we selected this term to distinguish between the agency as a party to the proceeding and the agency as a decisionmaking body. If a clearer term will be workable in the context of contract appeals, the boards are invited to use it.

A larger issue concerns our decision to delete the phrase "reasonable in law and fact" from our rules. The Civil Division of the Justice Department and the General Counsel of the Securities and Exchange Commission have expressed doubts about whether the standard to be applied in determining substantial justification must be, as the House Report on H.R. 2378 suggests, "more than reasonable." The SEC General Counsel specifically suggests that we retain the previous language.

It is true that statements on the floor of the House of Representatives question the accuracy of certain parts of the discussion of the substantial justification standard in the House Report, particularly its suggestion that administrative actions found to be arbitrary and capricious or unsupported by substantial evidence can virtually never be substantially justified. These statements, however, do not directly question the report's assertion that the correct test, as applied in several cited court cases, is "more than mere reasonableness." And the fact that the statutory language itself was not changed is not dispositive, for the House report language makes clear that it is intended to clarify the committee's preference for one of two interpretations of the existing language.

One the other hand, the floor statements inevitably raise some questions about Congress' endorsement of the substantial justification section of the report, and the case law remains unsettled. In *Russell* v. *National Mediation Board*, the fullest treatment of the issue since passage of the new law, the Fifth Circuit decided to continue applying the "reasonable in fact and law" standard in the face of what it saw as irreconcilable inconsistencies in the legislative history of Pub. L. 99-80. On the other hand, the D.C. Circuit has continued to apply its standard of "more than mere reasonableness." *Massachusetts Fair Share* v. *LEAA*, 776 F.2d 1066 (D.C. Cir. 1985). And the SEC General Counsel notes that, in any event, "reasonable in fact and law" may itself be "more than mere reasonableness."

The underlying difficulty is that all the definitions of "substantially justified" are themselves no more concrete and specific than the term itself. Inevitably, the determination of what is substantially justified must be made in the context of the individual case. We are not certain that the "reasonable in fact and law" formulation reflects Congressional intent, nor can we predict whether a consensus test will emerge from consideration of this question by additional circuits. We suggest that, in making individual determinations, agencies and their adjudicative officers should ensure that they are looking closely at the government's position, while looking to the courts (as we will) for further guidance.

In one other point related to this section, the Civil Division of the Justice Department said that fee awards should be apportioned to cover only the amount of time litigating against unjustified positions. While we agree with the spirit of this proposition, we think it must be applied on a case-by-case basis, and thus does not lend itself to an unambiguous and helpful model rule. For example, courts and agencies might reach very different conclusions about what fees are awardable and what are not when the "justified" and "unjustified" positions are related to two separate claims combined in the same case, to technical and substantive defenses, or to alternative substantive legal theories arising out of the same facts. See *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). We are not aware that agencies have had any significant problems in dealing with such cases as they arise, and we would prefer to avoid adding a rule that may create more confusion than clarity in this area.

Fees and Expenses: Three commenters suggested changes to § 315.106, on allowable fees and expenses, which we had not proposed to amend. The Department of Transportation Board of Contract Appeals suggests that fees should be limited to reimbursement of actual fees incurred, and should not be determined by reference to customary fees. We do not agree, as we explained in adopting our original model rules, and we believe the law is clear that fee awards are not limited to reimbursement. 5 U.S.C. 504(b)(1)(A); 28 U.S.C. 2412(d)(2)(A).

The Armed Services Board of Contract Appeals suggests addition of a sentence stating that *pro se* litigants may not recover attorney fees. However, we believe this sentence might imply, inaccurately, that such litigants may not recover expert witness fees and other expenses. Moreover, we continue to believe, as discussed in our original model rules, that the eligiblity of *pro se* litigants should be determined on a case-by-case basis; in any event, this issue has not often arisen in agency proceedings.

James McQuiston suggests listing in this rule twelve factors for evaluating attorney fee requests, first formulated in *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), and widely applied in civil rights and other fee cases. The rule would require discussion of each relevant factor by agencies making awards. The 11th Circuit requires courts determining EAJA petitions to apply these factors, even though the Act includes its own standards for determining an appropriate fee, and some other courts have referred to *Johnson* in evaluating EAJA fee requests. *Florida Suncoast Villa* v. *United States*, 776 F. 2d 974 (11th Cir. 1985); *see* also, *e.g.*, *Kennedy* v. *Heckler*, 598 F. Supp. 124 (D. Md. 1984); *Belton* v. *Commissioner of Internal Revenue*, 595 F. Supp. 494 (D.D.C. 1984). However, judicial understanding of the *Johnson* factors and of other approaches to calculating fees (such as the lodestar concept applied in the D.C. Circuit, see *Copeland* v. *Marshall*, 641 F. 2d 880 (D.C. Cir. 1980)) is continually evolving,

and incorporation of the exact formulation of *Johnson* into the model rules will fail to take these developments into account. For example, the Supreme Court has recently said that the starting point for fee determinations should be a reasonable number of hours worked times a reasonable fee, with other factors considered after this basic calculation. *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). This starting determination is very close to the standard articulated by Congress in the Act: "[t]the amount of fees . . . shall be based upon prevailing market rates for the kind and quality of the services furnished" up to the limit of $75 per hour. 5 U.S.C. 504(b)(1)(A); 28 U.S.C. 2412(d)(2)(A).

The existing model rule requires consideration of the factors clearly relevant to the determination and permits consideration when relevant of other, unspecified factors, such as those identified in *Johnson*. Agency adjudicative officers have had no apparent problems with applying existing law on the calculation of attorney fees in an informal way, considering the difficulty of the issues, the skill of the attorney, and similar factors in determining the appropriateness of the hours billed and the hourly rate requested. We believe the *Johnson* factors will continue to inform the work of the adjudicative officers (and agency reviewers), as will other developments in attorney fee case law, without the need for detailed rules that would probably require frequent amendment.

Subpart B—Information Required from Applicants

Two significant—and related—issues in this subpart provoked comment: the proper handling of bifurcated contract appeals board proceedings, in which government liability is determined first and only then (assuming there is liability) are damages assessed, and the meaning of "final disposition."

Bifurcated Proceedings: As to this issue, commenters generally favored concluding both the liability and damages portions of a case before deciding fee applications; the Civil Division of the Justice Department pointed out that the government's position cannot always be accurately evaluated when only liability has been determined. The Veterans' Administration Board of Contract Appeals, on the other hand, suggested that it would generally work better to decide applications at the end of the liability phase; however, the Board believed the decision should be made on a case-by-case basis.

We believe that the bifurcation problem does not require a special amendment to § 315.204 of the rules. We agree with most of the commenters that in the ordinary case, fee applications can be more appropriately handled after the determination of damages (whether this determination is made by settlement or litigated). But we also agree with the VA Board that the issue should be determined on a case-by-case basis. The legislative history of the original Act clearly contemplates that there may be cases in which a court or agency may entertain an application before conclusion of the entire case. H.R. Rep. 96-1434, 96th Cong., 2d Sess. 21-22 (1981). While these cases are likely to be rare (particularly in light of the new statutory provision prohibiting agencies from finally deciding applications in cases where a government court appeal of the merits is pending), we think that agencies, like the courts, should have discretion to decide such applications when they believe the circumstances warrant it, but should not bind themselves to do so (or not to do so) by a categorical rule.

Final Disposition: Two commenters—the Transportation and Armed Services Boards of Contract Appeals—said that final disposition, in the context of contract appeals, should occur when the time for appealing the decision has expired. This approach parallels the new language in the court provisions of the Act. The commenters noted that either the contractor or the government has 120 days to appeal the final decision of a board of contract appeals. This period is longer than that for appeal from most administrative agency decisions, and the situation is complicated by the fact that the government as well as the contractor may appeal. (In most administrative proceedings covered by EAJA, of course, there is no agency appeal because the agency would be appealing its own decision.)

The point is well taken. While the contractor would be free to file its application earlier in any event, realistically, the board is unlikely to take final action on a fee application when the government might still appeal the substantive decision. (Anticipating this problem, Pub. L. 99-80 added a provision to the Act prohibiting agencies from deciding fee applications in proceedings where the government has appealed.) There is no point in requiring the applicant to meet an arbitrary filing deadline of 30 days after issuance of the decision if the agency will not consider the application for an additional 90 days.

While the same considerations will not apply in most other agency proceedings, where the government will not appeal, we believe the best approach is to modify the definition of "final disposition" for all proceedings. This will provide consistency among agency proceedings as well as with court cases, and will avoid the confusion that sometimes arises as to whether an application must be filed with an agency to preserve rights even though some portion of a case is being appealed to the courts.

Other Issues: Commenters raised a few smaller points about this subpart. The Agriculture Board of Contract Appeals suggested that the applicant "certify" its net worth in § 315.201(b). We believe the verification requirement of § 315.201(e), which applies to every portion of the application, is adequate. The DOT Board of Contract Appeals said that applicants should be permitted to file EAJA applications with their initial contract appeals, so that relevant testimony may be taken at the trial on the merits. It would be possible for a contractor to include a generalized statement of intent to seek fees, along with a statement of net worth and an allegation that the government's underlying position is not substantially justified, in its initial contract appeal. Realistically, however, this will not save much time or effort. As to substantial justification, the testimony on the merits will be the relevant testimony. As to the appropriate amount of any award (the item which, according to the Civil Division of the Justice Department, is most likely to prompt a dispute requiring further exploration of facts), the necessary information will not be available until after the trial on the merits. So the only thing that could be accomplished would be to take testimony on the eligibility of a potential applicant who may not even prevail in the underlying proceeding.

We have revised § 315.203, concerning documentation of fees and expenses, in response to a suggestion from the General Counsel's Office of the Department of Transportation that the existing language could be read to imply that adjudicative officers may only require further substantiation of expenses and not of attorney fees. This is not the intent of the rule.

Subpart C—Procedures for Considering Applications

Comments on this subpart of the rules focussed largely on their suitability for use by contract appeals boards. One

general comment, filed by the DOT Board of Contract Appeals, noted that the boards already have general rules on filing and service of pleadings and do not need separate EAJA rules. We believe there may be some benefit in having separate rules clearly stating EAJA procedure. To the extent, however, that existing board rules clearly cover the necessary procedures, they can be incorporated by reference in lieu of separate rules.

James McQuiston proposed a complete restructuring of the procedure for handling fee applications. He believes Congress' provision that the final decision be made by the agency, coupled with its direction that the substantial justification determination be made on the existing record, describes something other than a quasi-judicial procedure. Instead, he proposes that agency adjudicative officers function more like agency contracting officers, determining fee applications based on an informal review of the file and, where appropriate, negotiating a settlement with the applicant on the agency's behalf. The adjudicative officer's decision would then be subject to approval by an agency supervisor. Under this system, there would be no need for responsive pleadings (although the agency litigators could submit comments on the application if they chose to), nor would the applicant be required to serve copies of its application on agency litigators or any other parties to the proceeding. Similarly, no agency review process, other than the approval of the supervisor mentioned above, is provided for.

Mr. McQuiston contends that the award of fees ("negotiating a fee for services" in his words) is essentially an executive act, very similar to awarding a contract, rather than a judicial one. He argues that this approach will be much faster and will avoid the unfairness of having an agency adjudicate a dispute to which it is a party.

We do not believe this to be a better approach. The role of an agency official deciding what is a reasonable price to pay for goods or services provided directly to the agency by contractors is not clearly analogous to the role of the adjudicative officer in determining the agency's potential liability for services provided by a private attorney to a third party, particularly when a concept of agency fault enters into the decision. While an adjudicative officer might possibly function in such an "executive" capacity, this would be a very unaccustomed and probably difficult role for such an officer. Moreover, Pub. L. 99-80 and its legislative history reveal no Congressional intent to eliminate pleadings and adversary proceedings as a method of focussing the issues for the adjudicative officer, though Congress was certainly aware that this is the procedure in common use.

It seems more rational to keep the process for determining fee applications in administrative proceedings as parallel as possible to the procedure in court cases, and to preserve fee proceedings as an integral part of the proceeding in which they arose, rather than to create an entirely new procedure. While we agree that the proposed approach might save time, if administered with that goal in mind, we don't think that is the most important consideration. And we don't agree that changing the decision-making process from a quasi-judicial to an administrative one will remove a taint of unfairness. If anything, it exacerbates this problem, since the adjudicative officer as contracting officer would be explicitly charged with representing and advancing the interests of the agency in a way that the adjudicative officer as quasi-neutral arbiter is not. Accordingly, we have retained the basic approach of the original model rules.

Settlements: Two commenters objected to the requirement of § 315.305 that parties who reach settlement on attorney fees before an application is filed file their application with the proposed settlement. We have two reasons for retaining this provision, which we continue to think is a good one. First, Congress has explicitly instructed ACUS to report annually on fee awards in administrative proceedings under the Act. Information about the applicant and the proceeding, as well as the amount of the settlement, are necessary to provide a complete report. Second, this filing permits at least brief consideration by the adjudicative officer of information on the eligibility of the applicant, an extra step that seems appropriate where a waiver of sovereign immunity is involved. In many administrative proceedings, the adjudicative officer and/or the agency must approve settlements in any event, so the submission of information on matters such as eligibility would be a logical part of this process. If this is not the case in contract appeals, and the boards believe the filing of an application would be too cumbersome, we would still suggest that the boards request the settling parties to file some basic information including a statement of eligibility and the amount of the settlement on fees, if for no other reasons than to keep Congress informed.

Further Proceedings: Several commenters made suggestions about § 315.306. The DOT Board of Contract Appeals urged that the rule preserve a full opportunity for discovery by the government as well as the availability of full open hearings on all issues rather than confinement to the written record. The General Counsels of DOT and NASA also suggested amending the rule to clarify that discovery and even evidentiary hearings are still permissible as to issues such as eligibility and the amount of fees.

We believe the statute is clear that substantial justification determinations must be made on the written record. We also feel, in the interest of avoiding delay and expense, that it is appropriate to encourage proceedings on the written record whenever possible as to other issues. Accordingly, we have not adopted the suggestion of the DOT Board of Contract Appeals. We agree, however, that the rule could be clearer on the extent to which discovery and hearings are still permissible, and we have modified the rule accordingly.

The Agriculture Board of Contract Appeals suggested an amendment to indicate that the determination of when further proceedings are necessary is a judgement within the discretion of the adjudicative officer. We are not aware of any problems that have arisen over this issue under the existing regulation, nor of any disputes over the extent of further proceedings provided; thus we have not revised the rule. We agree, however, that this is essentially a discretionary determination, and would not object if an agency feels the need to say so explicitly.

Decision: This section raises the question of who is the "adjudicative officer" in contract appeals proceedings. The two comments we received addressing this point generally agreed with our original formulation, that whatever unit of the board made the first decision on the merits should be considered the "adjudicative officer." The Postal Service Board of Contract Appeals, however, went on to suggest that the "adjudicative officer" should not be limited to the particular presiding officer or panel that made the original decision, because this would unnecessarily limit flexibility in work allocation. We believe that agencies can properly assign EAJA petitions to new board members or panels where illness, retirement or other specific circumstances would prevent assignment to the original member or panel, and we have revised the rule to reflect this. However, the statute defines the "adjudicative officer" as "the

deciding official. . . who presided at the adversary adjudication;" thus the decisionmakers should be the same for the merits and the fee application whenever possible. Similiarly, where boards have relied on hearing examiners to take evidence, but not to make decisions, in contract disputes, the boards may wish to have these examiners recommend EAJA decisions; the examiners should not, however, actually *make* the EAJA decisions, since they were not the "deciding officials" on the merits. We repeat here our earlier suggestion, endorsed by the Armed Services Board of Contract Appeals, that boards may wish to use the term "presiding officer" to distinguish between officials authorized to make procedural rulings and those who must make the ultimate decisions.

Two other contract appeals boards oppose § 315.307's provision of a time limit (to be specified by the agency) for EAJA decisions, which they regard as unnecessary and not legally required. It is the position of the Administrative Conference that agency-established time limits or guidelines can be an effective way to reduce administrative delay. ACUS Recommendation 78-3, *Time Limits on Agency Actions*, 1 CFR 305.78-3. This provision of the model rules reflects that position.

Commenters from the Civil Division of the Department of Justice anticipated problems in determining which agency should pay when two or more are involved and recommended that the model rules resolve this question. For example, a contractor might file a claim under the Contract Disputes Act because it was required to pay wages higher than the contract rate, but the contracting officer may have been bound to impose the higher rate by a ruling or regulation of the Department of Labor. This particular example seems like one where the contracting officer could demonstate substantial justification, or at least special circumstances that would make an award unjust, so the issue might never arise. In any event, it is impossitlbe to predict and resolve every possible two-agency situation in advance. We believe these problems must be dealt with on a case-by-case basis, as they arise.

Agency Review: We received extensive comment on the question of who should be the "agency" which makes the final EAJA decisions in contract appeals board proceedings. Most of the commenters (including the Boards of Contract Appeals of the Department of Transportation, Postal Service, and Veterans Administration and Attorney Robert J. Robertory) strongly urged us to maintain the independence of the boards of contract appeals, noting the importance of that independence in the statutory scheme of the Contract Disputes Act. Comments submitted by Ronald Kienlen, Deputy Chief Trial Attorney with the Department of the Army, took the contrary position. He argued that the boards exercise authority delegated by agency heads, as circumscribed by the Contract Disputes Act. Authority to award fees under EAJA must also be delegated by the head of the agency *conducting* the proceeding (the litigating agency), and this authority is not subject to the Contract Disputes Act limitations. Congress could have authorized the boards explicitly to make awards, but instead merely stated that Contract Disputes Act proceedings were covered by the Act. Finally, the comments noted that, if Board decisions are final, the agency will have no right of appeal, even though the final decision is not its own.

These comments raise serious concerns. After careful consideration of them, of the statute, and of the legislative history, however, we have decided to stay with our original approach. Pub. L. 99-80 provides that the Act applies to "any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 . . . before an agency board of contract appeals. . . ." The House Report on the legislation elaborates:

> Subsection (c) adds new language expressly making proceedings before agency boards of contract appeals covered by the Act, as are adversary adjudications. . . . The expansion of coverage in this provision is necessary to preserve the balance of alternative remedies for government contractors found in the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613. Under the CDA, the contractor may either bring his contract dispute before an agency board or file suit directly in the Claims Court. However, if eligible prevailing contractors can recover attorney fees only in the latter forum, there will be a disincentive to bring cases before the agency boards. Thus, unless a statutory modification occurs, the complete remedy for contract cases will be frustrated.
>
> In *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379 (Fed. Cir. 1983), the court held that agency boards of contract appeals are without jurisdiction to award fees against the government under the Act. The *Fidelity* court reasoned that Congress must explicitly authorize an award of fees against the United States with specific statutory language. H.R. 2378 would legislatively overrule the result in *Fidelity* by providing statutory authority for attorneys fees.

Congress' intent to authorize the contract appeals boards themselves to award fees seems clear from this language. Moreover, Congress' obvious concern with maintaining the equivalence of contract appeals board and Claims Court remedies under the Contract Disputes Act argues strongly in favor of making contract appeals board decisions on EAJA applications the final agency decisions. The contracting agency does not review other decisions by the boards or by the Claims Court. Moreover, it would be neither efficient nor logical for the decision on whether the government's position in litigation was substantially justified to be made by an official (or body) that had no authority to decide (or review the decision in) the substantive case.

It is true that only the non-governmental party may appeal agency fee determinations under the Equal Access to Justice Act to the courts. In the usual agency situation, the agency would not need appeal rights since it would effectively be appealing its own decision—an obviously illogical outcome. By contrast, the contract appeals boards' decisions are ordinarily not reviewable by the litigating agency; instead, their decisions on the merits may be appealed to the Court of Appeals for the Federal Circuit (with the concurrence of the Attorney General). But the contract appeal situation is not unprecedented. Since passage of the original Act, the National Transportation Safety Board has made awards against the Federal Aviation Administration, and the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission have made awards against the Department of Labor. These awards were also unappealable, even though the litigating agency had no power of review over the decisions (the original Act provided for appeals by "parties," defined to exclude agencies). When it passed Public Law 90-80, Congress made no effort either to create court appeal rights or to give final authority for fee awards to the litigating rather than the deciding agencies in these cases.

We recommend, therefore, that the contract appeals boards' EAJA decisions be unreviewable by agencies, and alternate § 315.308 reflects this view. We note that the government will be able to raise this issue in court if it chooses to, since it can defend against a contractor's appeal of an EAJA decision by arguing failure to exhaust administrative remedies.

Other Issues: James McQuiston recommends amendment of § 315.309, on judicial review, to provide that parties who wish to appeal fee determinations may file a notice of appeal with the

agency, which will then transmit it to the court. Under the statute (as in other agency appeals), it is the responsibility of the dissatisfied party to appeal the decision; this responsibility extends, of course, to the filing of a notice of appeal with the proper court within the statutory time limit.

The DOT Board of Contract Appeals raised questions about § 315.310, concerning payment of awards. First, the Board states, section 13(a) of the Contract Disputes Act provides for payment of damages in substantive contract proceedings through 31 U.S.C. 724a, upon certification by a contract appeals board to the Comptroller General. EAJA awards should be handled the same way. Moreover, the agency should not be required to pay within 60 days, since it has 120 days to appeal the decision.

In each of these cases, the Equal Access to Justice Act provides explicitly for different treatment than the standard procedure in contract appeals. Under 5 U.S.C. 504(d), as amended by Pub. L. 99-80, "(f)ees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." The new law specifically eliminated previous language permitting the payment of awards out of general funds for the payment of judgments against the United States. (Because of another provision of the original Act, Equal Access to Justice Act awards could not actually be paid out of these funds even before the passage of Pub. L. 99-80.) Similarly, awards made in contract appeals proceedings should be payable by the agency over which the applicant prevailed.

Likewise, the 120-day appeal provision of the Contract Disputes Act does not affect the suitability of § 315.310 for contract appeals. The Equal Access to Justice Act expressly provides that appeals from decisions on fee applications must be made within 30 days, not 120. And if a government appeal of the substantive decision is pending, under 5 U.S.C. 504(a)(2), the contract appeals board may not reach a final decision on an EAJA application in any event.

James McQuiston has suggested that the rules contain provisions directly related to the Administrative Conference's EAJA data collection effort. He would require applicants for awards to submit a partially-completed Administrative Conference report form, including data from their applications as to eligibility, fees claimed, and the proceeding involved, with their applications. He also suggests provisions identifying the agency personnel responsible for gathering EAJA data and the procedures they are to follow in collecting and submitting the data to the Conference.

We appreciate this concern for the effectiveness of our data-collection efforts. However, we are not certain whether the rules proposed would significantly aid those efforts. Requiring applicants to submit an ACUS form with their fee applications may be an efficient way of initiating the data collection process for some agencies and unnecessarily burdensome for others. (For example, it might be difficult for agencies holding hearings in many locations around the country to make the forms readily available to applicants.) Although we are not including this proposal in our model rules, we suggest that individual agencies consider it, reaching their own conclusions as to whether it would be helpful.

The other suggested rules on data collection relate to internal agency procedures rather than to matters that directly affect the public. The agencies are already bound by statute to provide the Conference with necessary data, and an agency rule will not add anything to this statutory requirement. Thus we don't see any clear purpose in detailing the procedures in regulations. However, if individual agencies believe that the adoption of a rule describing their data collection procedures will help to strengthen those procedures, they may wish to consider this suggestion further.

List of Subjects in 1 CFR Part 315

Administrative practice and procedure, Equal access to justice.

Chapter III of Title 1, CFR is amended to add Part 315 to read as follows:

PART 315—MODEL RULES FOR IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

Subpart A—General Provisions

Sec.
315.101 Purpose of these rules.
315.102 When the Act applies.
315.103 Proceedings covered.
315.104 Eligibility of applicants.
315.105 Standards for awards.
315.106 Allowable fees and expenses.
315.107 Rulemaking on maximum rates for attorney fees.
315.108 Awards against other agencies.
315.109 Delegations of authority.

Subpart B—Information Required From Applicants

315.201 Contents of application.
315.202 Net worth exhibit.
315.203 Documentation of fees and expenses.
Sec.
315.204 When the application may be filed.

Subpart C—Procedures for Considering Applications

315.301 Filing and service of documents.
315.302 Answer to application.
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315.306 Further proceedings.
315.307 Decision.
315.308 Agency review.
315.309 Judicial review.
315.310 Payment of award.

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 [5 U.S.C. 504(c)(1)]; Pub. L. 99-80, 99 Stat. 183.

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.

(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.

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

(1) An individual with a net worth of not more than $2 million;

(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;

(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;

(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

(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.

(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.

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.

(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.

(e) The employees of an applicant include all persons who regularly perform services for renumeration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(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.

(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.

§ 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.

§315.105 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 $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.

(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 approriate 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 B—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. 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)).

(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 must provide with its application a detailed exhibit showing the new 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.

(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].

§ 315.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, pursuant to § 315.306 of these rules.

§ 315.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30

days after this agency's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become a final and unappealable, both within the agency and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a 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.

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.

§ 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 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.

§ 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.

§ 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.

§ 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 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.]

§ 315.308 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

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.

Dated: April 28, 1986.

Marshall J. Breger,

Chairman.

[FR Doc. 86-9789 Filed 5-5-86; 8:45 am]

BILLING CODE 6110-01-M

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

Pay Administration (General)

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is revising its regulations on offsetting debts due the United States from the current pay of a Federal employee. These revisions are necessary (1) to make the definition of "agency" reflect the full range of governmental entities authorized to use the provisions of 5 U.S.C. 5514; and (2) to establish a system through which Federal agencies can obtain an official to conduct salary offset hearings when they cannot make adequate arrangements by some other means.

EFFECTIVE DATE: June 5, 1986.

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SUPPLEMENTARY INFORMATION: These final regulations incorporate two regulations previously published separately. On October 31, 1984, OPM published interim regulations (49 FR 43619) to establish an emergency system so creditor agencies could arrange for a Federal employee to serve as a hearing official for salary offsets. On April 30, 1985, OPM published proposed regulations (50 FR 18267) revising the definition of "agency" and deleting some extraneous material inadvertently included in 5 CFR 550.1106(b)(3). Both regulations provided a 60-day comment period. A summary of the comments received and an explanation of any resulting changes to the regulatory text follows.

1. The Definition of Agency

We received three comments on our proposed regulations—two from Federal agencies and one from a labor organization.

The two agencies recommended changes to the proposed amendment of the definition. Both recommendations were incorporated. The final regulations expand the description of the judicial branch and add a new category for Government entities not directly classifiable in any of the three branches, such as the Smithsonian Institution.

The labor organization questioned whether the scope of 5 U.S.C. 5514 could be extended to include the legislative and judicial branches. The General Accounting Office (GAO) believes that it can and we agree. (See GAO decision B-217402 dated June 10, 1985). The original legislation (Pub. L. 83-497, 68 Stat. 482 (1954)) authorized administrative offset of current pay for erroneous payments made to or on behalf of civilian or military personnel of the Government. No qualifications were mentioned that would have restricted the authority to any particular branch of the Government. It does not appear that either the recodification of title 5 in 1966 (Pub. L. 89-554, 80 Stat. 477) or the subsequent amendments by the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749) made any substantive change in the scope of the original statute.

2. A System for Obtaining Hearing Officers

We received eight comments on the interim regulations—six from Federal agencies and two from labor organizations. The labor organizations did not object to the regulations.

a. *Burden on agency personnel.* Five of the six agencies commented on the potential burden on the debtor's employing agency if a significant number of employees were subjected to a salary offset at the same time. They believe the 60-day turnaround requirement may handicap agencies in performing their own missions.

We appreciate the concern expressed in these comments. We would like to stress, however, that this procedure for obtaining hearing officials applies in the event that "the creditor agency cannot provide a prompt and appropriate hearing before an administrative law judge or before a hearing official furnished pursuant to another lawful arrangement . . . ." [Emphasis added.] Agencies are free to establish a system that will meet their particular needs. These regulations establish an emergency procedure that was never intended to be the sole or primary system for obtaining hearing officials.

b. *Cost and reimbursement.* Four agencies were concerned about reimbursement for costs associated with the hearings. Some agencies believe that a requirement to provide hearing officials must be accompanied by a clear requirement for reimbursement.

Although the final salary offset regulations state that the arrangements for a salary offset hearing official are to be made by the creditor agency, the factors to be considered in determining which party bears the financial responsibility for salary offset hearings may vary from case to case. Therefore, agencies are free to arrive at any mutually satisfactory arrangements consistent with any applicable limitations on the expenditure of their appropriated funds.

c. *Competency of hearing officials and consistency of decisions.* Two agencies noted that the method of selecting hearing officials can affect consistency in the hearings and decisions. One agency believed that specific qualifications criteria provided by OPM would produce consistency in selecting individuals for hearing officials. This would in turn produce some consistency in the quality of hearings given Government-wide. Another agency believed that a plan requiring the creditor agency to obtain a hearing official from the debtor's employing agency would not permit the creditor agency to select specific hearing officers by name. The agency believed that if it could select an individual by name, repeated use of the same individual would permit him or her to become familar with the statutory basis of the debts under review, thus producing consistency in the decisions.

Both creditor and employing agencies should be aware of the importance of reliable and consistent debt collection procedures. However, the salary offset hearing is primarily a fact-finding proceeding. The primary plan established by an agency for requiring hearing officials, should be designed to ensure that each employee obtains a fair hearing and that the Government's