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OPEN BOOK ON EQUAL ACCESS TO JUSTICE ACT

NOVEMBER 30, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3279]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3279) to amend titles 5 and 28, United States Code, to require annual reports to Congress on, and the maintenance of databases on, awards of fees and other expenses to prevailing parties in certain administrative proceedings and court cases to which the United States is a party, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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59–006

Purpose and Summary

H.R. 3279, the "Open Book on Equal Access to Justice Act," reinstates tracking and reporting requirements of payments made by the Federal Government under the Equal Access to Justice Act (EAJA). The bill requires every Federal agency to track EAJA payments and tasks the Administrative Conference of the United States (ACUS) with compiling the data. After compiling the data, the bill requires ACUS to submit annual reports to Congress and to establish an online searchable database to allow the public access to the data on EAJA payments. The current lack of any comprehensive reporting and record keeping regarding the actual use of EAJA in courts and administrative proceedings makes it difficult, if not impossible, for Congress to assess accurately the impact and effectiveness of EAJA.

Background and Need for the Legislation

Absent a specific statute authorizing fee-shifting, a party prevailing in litigation against the Federal Government is not entitled to recover attorneys' fees from the United States. This is because, under the American rule, parties to litigation must bear their own legal fees.[1] Although there are limited common law exceptions to the American rule, the doctrine of sovereign immunity prevents these exceptions from applying to the Federal Government without express statutory authorization. Several Acts of Congress contain fee-shifting provisions permitting litigants to recover attorneys' fees against the United States, including the Endangered Species Act and Title VII of the Civil Rights Act of 1964. Additionally, EAJA serves as a general fee-shifting statute in cases and adversarial administrative proceedings in which the United States is a party.

A. The Equal Access to Justice Act

In October 1980, Congress passed, and the President signed into law, EAJA[2] as part of a broader small business assistance bill "in response to widespread sentiment that administrative agencies were burdening small businesses with excessive regulation."[3] As the Supreme Court has noted, EAJA was adopted with the "specific purpose" of "eliminat[ing] for the average person the financial disincentive to challenge unreasonable governmental actions."[4] EAJA was re-enacted and made permanent in 1985.[5]

Civil litigation can become a war of attrition as parties strategically try to deplete one another's resources to force a settlement. Fundamentally, EAJA recognizes the enormous "disparity of resources between individuals, small businesses, and other organizations with limited resources and the Federal Government."[6] This

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[1] *See, e.g.,* Alyeska Pipelines Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant typically is not entitled to collect a reasonable attorney's fee from the loser.").

[2] Pub. L. No. 96–481, 94 Stat. 2321 (1980) (EAJA was originally titled the "Small Business Equal Access to Justice Act").

[3] John W. Finley III, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade Associations,* 53 WASH. U. J. URB. & CONTEMP. L. 243, 247 (Winter 1998).

[4] Comm'r v. Jean, 496 U.S. 154, 163 (1990).

[5] Pub. L. No. 99–80, 99 Stat. 183 (1985).

[6] Christopher R. Kelley, *Attorney's Fee Awards for Unreasonable Government Conduct: Notes on the Equal Access to Justice Act,* 2004 Ark. L. Notes 65, 66 (2004) (quoting H.R. Rep. No. 99–120, at 4 (1985)).

imbalance could discourage a citizen from hiring counsel to challenge an abusive government policy or could induce a citizen to settle a capricious civil or administrative enforcement action on unfavorable terms. EAJA "is meant to discourage the Federal Government from using its superior litigating resources unreasonably—it is in this respect an 'anti-bully' law." [7] Consequently, EAJA "probably is the most important" and also "among the most litigated" of the Federal fee-shifting statutes.[8]

EAJA is a one-way fee-shifting statute that permits the recovery of attorneys' fees and costs from the United States in certain circumstances. First, EAJA makes the United States liable for attorneys' fees to the same extent as any other party under a common law or statutory exception to the American rule.[9] Thus, for example, pursuant to EAJA, if the United States litigates a case in bad faith, the common law bad faith exception to the American rule could be used to require the United States to pay the prevailing party's attorneys' fees and costs. If a party prevails in litigation against the United States and is awarded attorneys' fees under a court order or settlement under this provision in EAJA, the amounts generally are paid from the Treasury Department's Judgment Fund.[10]

Second, EAJA allows certain parties who prevail against the United States in any civil litigation (other than cases sounding in tort) or in an administrative adjudication to recover attorneys' fees unless the position of the United States was "substantially justified or that special circumstances make an award unjust." [11] EAJA puts the burden on the government to show that its position was substantially justified, and the Supreme Court has interpreted EAJA's "substantially justified" standard as equivalent to reasonableness.[12] If attorneys' fees are awarded under this provision in EAJA, the funds are to be paid "from any funds made available to the agency by appropriation or otherwise." [13]

EAJA awards are not available to all prevailing parties in litigation and administrative proceedings against the United States. Only individuals with a net worth of less than $2 million, organizations worth less than $7 million with fewer than 500 employees, and tax-exempt 501(c)(3) organizations and cooperative associations under the Agricultural Marketing Act can collect attorneys' fees from the Federal Government under EAJA.[14] Furthermore, attorneys' fees are capped at $125 per hour, unless "a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." [15]

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[7] Battles Farm Co. v. Pierce, 806 F.2d 1098, 1101 (D.C. Cir. 1986).
[8] Kelley, *supra* note 6, at 65.
[9] *See* 28 U.S.C. § 2412(b).
[10] *See* 31 U.S.C. § 1304. The Judgment Fund is a permanent, indefinite appropriation that pays judgments against Federal agencies that are not otherwise provided for by other appropriations.
[11] *See* 28 U.S.C. § 2412(d); 5 U.S.C. § 504(a).
[12] *See* Pierce v. Underwood, 487 U.S. 552, 565 (1988) ("We are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person.").
[13] 28 U.S.C. § 2412(d)(4); 5 U.S.C. § 504(d).
[14] 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. § 504(b)(1)(B).
[15] 28 U.S.C. § 2412(d)(2)(A); 5 U.S.C. § 504(b)(1)(A).

B. Repealed EAJA Reporting Requirements

From 1981 through 1995, EAJA provided for government-wide reporting on payments of attorneys' fees and costs made pursuant to EAJA in two annual reports to Congress. One of the reports, compiled by ACUS, described administratively awarded payments.[16] The second report described court-awarded payments and was issued initially by the Administrative Office of the U.S. Courts and later by the Attorney General.[17] In 1995, Congress repealed the EAJA reporting requirements, thereby eliminating the statutory mechanism to oversee EAJA expenditures.[18] Accordingly, there has been no official, government-wide accounting of EAJA payments since fiscal year 1994.

C. The Legislation

H.R. 3279 reinstates the repealed tracking and reporting requirements for EAJA awards. The bill directs ACUS to provide Congress with two annual reports on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to EAJA. One report will provide information on EAJA awards related to adversary agency adjudications and the second will report on awards made to prevailing parties in civil actions against the United States. The reports will describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

In addition to the reports, H.R. 3279 requires ACUS to create and maintain an online searchable database containing information with respect to EAJA awards. The online database will contain information including the case name and number, a description of the claims at issue, the amount of the award, and the basis for the finding that the position of the agency concerned was not substantially justified.

H.R. 3279 provides that the online database shall not include any information the disclosure of which is prohibited by law or court order. Moreover, the Committee recognizes that these requirements will apply to court cases and agency proceedings in which publicly available court or agency documents may contain

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[16] 5 U.S.C. § 504(e).

[17] The reporting requirement was transferred to the Attorney General by the Federal Courts Administration Act of 1992, Pub. L. No. 102–572, Title V, § 502 (1992).

[18] Federal Reports Elimination and Sunset Act of 1995 (FRESA), Pub. L. No. 104–66, §§ 1091, 3003, 109 Stat. 707 (1995). According to ACUS, section 3003(a)(l) of FRESA, enacted after ACUS ceased operations, provides:

> Subject to the provisions of paragraph (2) of this subsection and subsection (d), each provision of law requiring the submittal to Congress (or any committee of the Congress) of any annual, semiannual, or other regular periodic report specified on the list described under subsection (c) shall cease to be effective, with respect to that requirement, 4 years after the date of the enactment of this Act." Subsection (c) reads: "The list referred to under subsection (a) is the list prepared by the Clerk of the House of Representatives for the first session of the One Hundred Third Congress under clause 2 of rule III of the Rules of the House of Representatives (House Document No. 103–7)." That report (at page 153) expressly identifies ACUS' annual reporting requirement under 5 U.S.C. § 504(e). Thus ACUS' reporting requirement was repealed pursuant to FRESA and the related House Document No. 103–7. Section 504(e) of Title 5 was never amended by (or even mentioned in) section 3003(a)(l) of the 1995 Act. The editorial notes to § 504, though, do identify that section. The requirement that the Attorney General report annually on court awards under the Act was also repealed at the same time by section 1091 of Pub. L. 104–66.

Administrative Conference of the United States, "Report of the Chairman on Agency and Court Awards in FY 2010 Under the Equal Access to Justice Act" (2013).

details regarding the healthcare information of a party applying for fees and costs pursuant to EAJA. In preparing information for inclusion in the database to describe claims and the basis for finding that the position of the agency concerned was not substantially justified, ACUS must take appropriate measures to ensure that individual-specific healthcare information, such as an individual's diagnoses and treatments, is not contained in the database.

The reporting requirements in H.R. 3279 apply to EAJA awards made after the date of enactment of the legislation and the online database is to be established as soon as practicable after the date of enactment.

Hearings

The Committee on the Judiciary held no hearings on H.R. 3279.

Committee Consideration

On October 27, 2015, the Committee met in open session and ordered the bill H.R. 3279 favorably reported, without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 3279.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3279, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 4, 2015.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3279, the "Open Book on Equal Access to Justice Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3279—Open Book on Equal Access to Justice Act.

As ordered reported by the House Committee on the Judiciary on October 27, 2015.

H.R. 3279 would require the Administrative Conference of the United States (ACUS) to prepare a report each year on the amount of fees and other expenses awarded by Federal courts to nonfederal entities when they prevail in a case against the United States. The bill also would require the ACUS to create an online searchable database containing information about cases in which fees and expenses were awarded by courts or Federal agencies. The ACUS is an independent agency that assists other agencies of the Federal Government in improving regulatory and other administrative procedures.

Based on information from the ACUS, CBO estimates that implementing H.R. 3279 would cost about $1 million in fiscal year 2016 and less than $500,000 each year thereafter, assuming appropriation of the necessary amounts. Those funds would cover costs for additional ACUS staff, technological upgrades, and data collection by Federal agencies.

Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply. CBO also estimates that enacting H.R. 3279 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

H.R. 3279 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 3279 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 3279 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3279, will reinstate tracking and reporting requirements of payments made by the Federal Government under the Equal Access to Justice Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3279 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the "Open Book on Equal Access to Justice Act."

Section 2. Modification of Equal Access to Justice Act Provisions.

Section 2 makes technical corrections to 5 U.S.C. § 504 and 28 U.S.C. § 2412 by striking two extraneous references to the "United States Code" in those sections and, more significantly, re-establishes and modifies the EAJA tracking and reporting requirements contained in 5 U.S.C. § 504 for EAJA awards made as part of agency adjudications and that were contained in 28 U.S.C. § 2412(d) for EAJA awards related to civil actions against the United States.

Specifically, section 2(a) provides that each year, by March 31, the Administrative Conference of the United States (ACUS) is required to submit a report to Congress on the amount of attorneys' fees and other expenses awarded during the preceding fiscal year in administrative proceedings. The report is to describe the number, nature and amount of the awards, the claims involved, and any other information that may aid Congress in evaluating the scope and impact of EAJA awards. In addition, ACUS is required to create an online searchable database with information about EAJA awards. This information includes: the case name and number of the adversary adjudication, if available; a description of the claims in the adversary adjudication; the amount of the award; and

the basis for the finding that the position of the agency concerned was not substantially justified.

Section 2(b), which applies to EAJA payments in court cases, mirrors section 2(a) and provides that ACUS is required to provide a report on EAJA payments made in litigated cases to Congress each year by March 31. The contents of the report and the information that ACUS is to provide online are the same as the information required under section 2(a) for administrative proceedings.

Additionally, both sections 2(a) and 2(b) require that the online database created by ACUS may not reveal any information the disclosure of which is prohibited by law or court order. Moreover, the heads of Federal agencies are required to provide ACUS with the information needed to comply with the bill's reporting requirements in a timely manner.

Finally, section 2(c) makes two clerical amendments to 28 U.S.C. § 2412 and section 2(d) establishes an effective date for the reporting and online database creation requirements.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER I—GENERAL PROVISIONS

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§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

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

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

(b)(1) For the purposes of this section—

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

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (a)(4), a small entity as defined in section 601;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings; and

(F) "demand" means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28**[**, United States Code**]**.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States

having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

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

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

(e)(1) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report to the Congress, not later than March 31 of each year, on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online.

(2)(A) The report required by paragraph (1) shall account for all payments of fees and other expenses awarded under this section that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to nondisclosure provisions.

(B) The disclosure of fees and other expenses required under subparagraph (A) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.

(f) The Chairman of the Administrative Conference shall create and maintain online a searchable database containing the following information with respect to each award of fees and other expenses under this section:

(1) The case name and number of the adversary adjudication, if available.

(2) The name of the agency involved in the adversary adjudication.

(3) A description of the claims in the adversary adjudication.

(4) The name of each party to whom the award was made, as such party is identified in the order or other agency document making the award.

(5) The amount of the award.

(6) The basis for the finding that the position of the agency concerned was not substantially justified.

(g) The online searchable database described in subsection (f) may not reveal any information the disclosure of which is prohibited by law or court order.

(h) The head of each agency shall provide to the Chairman of the Administrative Conference in a timely manner all information requested by the Chairman to comply with the requirements of subsections (e), (f), and (g).

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

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TITLE 28, UNITED STATES CODE

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 161—UNITED STATES AS PARTY GENERALLY

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§ 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official ca-

pacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study,

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

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in

the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, [United States Code,] or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

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

(5)(A) The Chairman of the Administrative Conference of the United States shall submit to the Congress, not later than March 31 of each year, a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in each controversy, and any other relevant information that may aid the Congress in evaluating the scope and impact of such awards. The report shall be made available to the public online.

(B)(i) The report required by subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to nondisclosure provisions.

(ii) The disclosure of fees and other expenses required under clause (i) does not affect any other information that is subject to nondisclosure provisions in the settlement agreement.

(C) The Chairman of the Administrative Conference shall include and clearly identify in the annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report—

(i) any amounts paid from section 1304 of title 31 for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) The Chairman of the Administrative Conference shall create and maintain online a searchable database containing the following information with respect to each award of fees and other expenses under this subsection:

(A) The case name and number.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made, as such party is identified in the order or other court document making the award.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) **[**of section 2412 of title 28, United States Code,**]** *of this section* of costs enumerated in section 1920 **[**of such title**]** *of this title* (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

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