

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1071

[Docket No.: CFPB -2012-0020]

RIN 3170-AA27

Equal Access to Justice Act Implementation Rule

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: The Equal Access to Justice Act, 5 U.S.C. 504, Public Law 96-481, 94 Stat. 2325 (1980) (EAJA or the Act), requires agencies that conduct adversary adjudications to award attorney fees and other litigation expenses to certain parties other than the United States in certain circumstances. EAJA also requires agencies that conduct adversary adjudications to establish procedures for the submission and consideration of applications for the award of fees and other expenses. The Consumer Financial Protection Bureau (Bureau) now adopts an interim final rule establishing such procedures and seeks public comments on this interim rule.

DATES: This interim final rule takes effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be assured of consideration.

ADDRESSES: You may submit comments by any of the following methods:

- *Electronic:* www.regulations.gov. Follow the instructions for submitting comments.

• Mail or Hand Delivery/Courier: Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. An appointment to inspect comments can be made by telephoning (202) 435-7275. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Submit only information that you wish to make publicly available. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information such as name and address information, email addresses, or telephone numbers.

FOR FURTHER INFORMATION CONTACT: John R. Coleman, Office of the General Counsel, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552; (202) 435-7254.

SUPPLEMENTARY INFORMATION:

I. Background

Originally enacted in 1980, EAJA provides that “[a]n 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.” 5 U.S.C. 504(a)(1). The Administrative Conference of the United States (ACUS) was charged with coordination of the procedural rules adopted by various agencies to implement EAJA. To carry out this responsibility, ACUS issued model rules implementing EAJA (46 FR 32900, June 25, 1981), after receiving public comment on draft model rules (46 FR 15895, March 10, 1981). ACUS published revised model rules in 1986 that reflected the amendments Congress made when it re-authorized the Act in 1985. 51 FR 16659 (May 6, 1986), previously codified at 1 CFR part 315 (1995); see Administrative Conference of the U.S., Federal Administrative Procedure Sourcebook at 419 (2d ed. 1992). ACUS did not publish model rules reflecting amendments to the Act made since 1985 before ACUS was temporarily defunded in 1996.

In preparing regulations implementing the Act, the Bureau has used the 1986 ACUS model rules as a point of departure, modifying them to put them in plain language, to reflect more recent amendments to the Act, and to make certain changes the Bureau believes are warranted for reasons explained in the following section-by-section analysis. Since the preamble to the draft model rules explained their formulation and the preamble to the final model rules summarized and responded to the public comments submitted concerning the draft rules, the Bureau does not repeat here the rationale of the model rules. Rather, the Bureau notes where its rule differs from the model rules and explains significant provisions, as follows:

1. The Bureau’s rule is divided into three subparts, as are the model rules, and maintains the same sequence with the following exception: The Bureau’s rule starts at §

1071.100 and omits model rule § 315.107, “Rulemaking on maximum rates for attorney fees,” and § 315.108, “Awards against other agencies.” The revised numbering causes Bureau § 1071.106 to correspond to model rule § 315.109.

2. Section 1071.100, “Purpose of this rule,” inserts a new paragraph (b), “When an eligible party will receive an award,” which reflects amendments to EAJA made by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, Title II, 110 Stat. 857 (1996). This paragraph is modeled on the EAJA rules of the Federal Trade Commission (FTC), 16 CFR 3.81(a)(1)(ii), but includes additional language to clarify the circumstances under which the Bureau’s notice of charges may constitute a demand. This clarifying language is consistent with the Congressional intent in promulgating SBREFA. Legislative history suggests that Congress intended the term “demand” as used in the SBREFA amendments to mean “an express written demand that leads directly to an adversary adjudication or civil action.” *See* 142 Cong. Rec. E571-01, E573 (1996) (statement of Rep. Hyde). The Congressional Record further clarifies that “the ‘demand’ at issue would be the government’s demand that was *pending upon commencement* of the adjudication or action.” *Id.* (emphasis added). Accordingly, the Bureau’s notice of charges would constitute the agency’s demand only where it was not preceded by an express written demand.

3. Section 1071.102, “Proceedings covered,” is modified and simplified from model rule § 315.103 and identifies the specific proceedings before the Bureau that are covered by EAJA. Incorporation of paragraphs (b) and (c) of model rule § 315.103 into the Bureau rule is not necessary because it is clear which Bureau proceedings are covered by EAJA.

4. Section 1071.103(b) inserts paragraph (6), which does not appear in the corresponding model rule § 315.104(b), in order to conform with the SBREFA amendments to EAJA.

5. Section 1071.104, “Standards for awards,” inserts paragraph (b), which does not appear in the corresponding model rule § 315.105, in order to conform with the SBREFA amendments to EAJA. The provision in paragraph (b) of model rule § 315.105 was moved to § 1071.104(a)(2). The last sentence in paragraph (a)(1) is modeled on the comparable rule of the Department of the Treasury governing the standards for awards under EAJA, 31 CFR 6.5, and clarifies that although the Bureau bears the burden of proof that its position was substantially justified, the fact that the Bureau did not prevail in the underlying proceeding does not create a presumption that the its position was not substantially justified.

6. Unlike model rule § 315.106(b), the corresponding paragraph (b) of § 1071.105 does not specify a rate for attorney fees, but instead refers back to the corresponding statutory provision in EAJA that sets forth the maximum hourly rate for attorney fees. This modification is intended to eliminate the need to promulgate a revised rule whenever the statutory maximum is increased. Most recently, the maximum amount of fees that may normally be awarded to an attorney or agent was increased from \$75 per hour to \$125 per hour pursuant to 1996 amendments to EAJA. 5 U.S.C. 504(b)(1)(A)(ii). Section 1071.105 modifies the model rule to permit recovery of expert fees at the “reasonable rate at which the Bureau pays witnesses with similar expertise” instead of the “highest rate” paid by the Bureau.

7. Model rule § 315.107, “Rulemaking on maximum rates for attorney fees,” does not appear in the Bureau rule. Since frequent rulemaking on this subject is not foreseen, a rule concerning it is not deemed necessary.

8. Section 315.108 of the model rules, “Awards against other agencies,” does not appear in the Bureau rule because it is not anticipated that another agency of the United States will participate in an adversary proceeding before the Bureau. In the event another agency did so participate, it is anticipated that the adjudicative officer would take appropriate action in the absence of an express rule.

9. Section 1071.106, “Delegation of authority,” is a simplified version of the corresponding model rule, § 315.109.

10. Section 1071.200, “Contents of application,” is modeled on the corresponding FTC rule governing the contents of an application for recovery of awards under EAJA, 16 CFR 3.82(a), which provides a more comprehensive list of requirements than the corresponding model rule, § 315.201(a).

11. The provisions in paragraph (b) of model rule § 315.202 have been moved to § 1071.201(b) to consolidate the provisions relating to the net worth exhibit into a single section. The provisions in paragraph (b) of corresponding model rule § 315.202 regarding the presumptively public nature of the net worth exhibit can be found in § 1071.201(c).

12. Section 1071.202, “Documentation of fees and expenses,” is modified from the corresponding model rule, § 315.203, to conform with the SBREFA amendments to EAJA.

13. Section 1071.203, “When an application may be filed,” is modified from the corresponding model rule, § 315.204, to conform with the SBREFA amendments to EAJA.
14. Paragraph (c) of § 1071.203 defines the date of final Bureau disposition. This is significant for paragraph (a), which makes reference to final disposition. In particular, paragraph (a) reiterates the statutory provision, set forth at 5 U.S.C. 504(a)(2), that a party may file an application for an award within thirty days of the Bureau's final disposition of the adversary adjudication as to which the award is sought.
15. Section 1071.300, “Filing and service of documents,” incorporates the provisions of §§ 1081.111, 1081.112 and 1081.113 concerning service and filing in adjudication proceedings. The section also requires the applicant to serve a copy of the application for fees and expenses on the General Counsel of the Bureau.
16. Section 1071.304, “Settlement,” revises the corresponding model rule, § 315.305, to make explicit that no application for recovery of fees and expense may be filed if the settlement of the underlying proceeding provides that each side shall bear its own expenses.
17. Section 1071.306, “Decision,” is modified from the corresponding model rule, § 315.307, to conform with the SBREFA amendments to EAJA.
18. Section 1071.307, “Bureau review,” is modified from the corresponding model rule, § 315.308, so that Bureau review of an adjudicatory officer’s decision concerning a fee application follows the same procedures as Bureau review of a hearing officer’s decision in the underlying matter.

19. Section 1071.309, “Payment of award,” sets forth a 60 day deadline in which the Bureau must pay the amount awarded to the applicant.

II. Regulatory Requirements

The rule relates solely to agency procedure and practice and, thus, is not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(b). Although the rule is exempt from these requirements, the Bureau invites comment on it.

Because no notice of proposed rulemaking is required, these regulations are not a “rule” as defined by the Regulatory Flexibility Act, 5 U.S.C. 601(2). The regulations in this part do not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 12 CFR Part 1071

Administrative practice and procedure, Banking, Banks, Consumer protection, Credit, Credit unions, Equal access to justice, Law enforcement, National banks, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau adds part 1071 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

Title 12 – Banks and Banking

CHAPTER X—BUREAU OF CONSUMER FINANCIAL PROTECTION

Part 1071 – Rule Implementing Equal Access to Justice Act

Subpart A – General Rule

Sec.

1071.100 Purpose of this rule

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- 1071.306 Decision
- 1071.307 Bureau review
- 1071.308 Judicial review
- 1071.309 Payment of award

Authority: 5 U.S.C. 504.

Subpart A – General Rules

§ 1071.100 Purpose of this rule.

(a) In General. The Equal Access to Justice Act (the Act), 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the Bureau of Consumer Financial Protection (the Bureau). An eligible party may receive an award when it prevails over the Bureau, unless the Bureau's position in the proceeding was substantially justified or special circumstances make an award unjust. This part describes the parties eligible for awards and the proceedings that are covered. This part

also explains how to apply for awards, and the procedures and standards that the Bureau will use in ruling on those applications.

(b) When an eligible party will receive an award. An eligible party will receive an award when:

(1) It prevails in the adversary adjudication, unless the Bureau's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the Bureau was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(2) The Bureau's demand is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision, under all the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

"Demand" means the express final written demand made by the Bureau prior to initiation of the adversary adjudication, but does not include a recitation by the Bureau of the statutory penalty in the notice of charges or elsewhere when accompanied by an express demand for a lesser amount. The relief requested in the Bureau's notice of charges issued pursuant to 12 CFR § 1081.200(b)(3) may constitute the Bureau's demand only where the notice of charges was not preceded by an express final written demand.

§ 1071.101 When the Act applies.

The Act applies to any adversary adjudication pending before the Bureau at any time after July 21, 2011.

§ 1071.102 Proceedings covered.

The Act applies to all adjudicative proceedings under part 1081 as defined in § 1081.103.

§ 1071.103 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.

(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; or

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(6) For purposes of receiving an award for fees and expenses for defending against an excessive Bureau demand, any small entity, as that term is defined under 5 U.S.C. 601(6).

(c) For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

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

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual or group of individuals, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate of that business for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(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.

§ 1071.104 Standards for awards.

(a) For a prevailing party:

(1) An eligible prevailing applicant may receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit, unless the position of the Bureau was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant because the Bureau's position was substantially justified is on counsel for the Bureau. However, no presumption arises that the Bureau's position was not substantially justified simply because the Bureau did not prevail.

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

(b) For a party defending against an excessive demand:

(1) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the portion of a Bureau demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(2) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

§ 1071.105 Allowable fees and other expenses.

(a) Subject to the limitations of paragraph (b), awards will be based on rates customarily charged, in the locale of the hearing, 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 a reduced rate to the applicant.

(b) No award for the fee of any attorney or agent under this rule may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the reasonable rate at which the Bureau pays witnesses with similar expertise. However an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(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 fee for similar services, or, if an employee of the applicant, the fully allocated cost 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 the applicant's case.

(e) An award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

§ 1071.106 Delegations of authority.

The Director may delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.

Subpart B – Information Required from Applicants

§ 1071.200 Contents of application.

An application for an award of fees and expenses under the Act shall contain the following:

(a) Identity of the applicant and the proceeding for which the award is sought;

(b) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Bureau's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision, under the facts and circumstances of that case;

(c) Identification of the Bureau position(s) in the proceeding that the applicant alleges was (were) not substantially justified; or, identification of the Bureau's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(d) A brief description of the type and purpose of the organization or business (unless the applicant is an individual).

(e) A statement of how the applicant meets the eligibility criteria of § 1071.103;

(f) The amount of fees and expenses incurred after the initiation of the adversary adjudication, or in the case of a claim for defending against an allegedly excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the allegedly excessive portion of the demand;

(g) Any other matter the applicant wishes the Bureau to consider in determining whether and in what amount an award should be made; and

(h) A written verification under oath or under penalty of perjury that the information provided is true and correct, accompanied by the signature of the applicant or an authorized officer or attorney.

§ 1071.201 Net worth exhibit.

(a) The application shall also include a detailed exhibit showing that the applicant's net worth did not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) However, an applicant may omit this exhibit 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;

(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));

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

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 522(b)(1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on Bureau counsel but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be handled in accordance with

the Bureau's established procedures under the Freedom of Information Act, 12 CFR 1070.10, et seq.

§ 1071.202 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand by the Bureau, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 1071.203 When an application may be filed.

(a) An application may be filed not later than 30 days after the final disposition of the proceeding to which the application relates.

(b) If review or reconsideration is sought or taken of a decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this subpart, final disposition means the later of –

(1) The date that the Director’s final order issued pursuant to § 1081.405 is final and unappealable, both within the agency and to the courts; or

(2) The date that the Bureau issues any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, that is not subject to a petition for reconsideration.

Subpart C – Procedures for Considering Applications

§ 1071.300 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 proceedings under part 1081.

In addition, a copy of each application for fees and expenses shall be served on the General Counsel of the Bureau.

§ 1071.301 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Bureau may file an answer to the application. Unless Bureau 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 consent to the award requested.

(b) If Bureau 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 joint request by Bureau 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 Bureau counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, Bureau counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 305 of this part.

§ 1071.302 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 § 305 of this part.

§ 1071.303 Comments by other parties.

Any party to a proceeding other than the applicant and Bureau 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.

§ 1071.304 Settlement.

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

Bureau counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

§ 1071.305 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 Bureau 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 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.

(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.

§ 1071.306 Recommended decision.

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

(a) For a decision involving a prevailing party: The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall include, if at issue, findings on whether the agency's

position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(b) For a decision involving an allegedly excessive Bureau demand: The decision on the application shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the Bureau's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

§ 1071.307 Bureau Review.

Either the applicant or Bureau counsel may seek review of the recommended decision on the fee application by filing a notice of appeal under §1081.402(a), or the Director may decide to review the decision on his or her own initiative, in accordance with §1081.402(b). If neither the applicant nor Bureau counsel seeks review and the Director does not take review on his or her own initiative, the Director will adopt the recommended decision on the application as the final decision of the Bureau within 30 days of the issuance of the recommended decision. Whether to review a decision is a matter within the discretion of the Director. If review is taken, the Director will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

§ 1071.308 Judicial review.

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

§ 1071.309 Payment of award.

An applicant seeking payment of an award shall submit to the Bureau a copy of the Bureau's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. An applicant shall be paid the amount awarded within 60 days of entry of the final decision unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

[THIS PAGE PERTAINS TO THE INTERIM FINAL RULE WITH REQUEST
FOR PUBLIC COMMENT TITLED, "EQUAL ACCESS TO JUSTICE ACT
IMPLEMENTATION RULE"]

Dated: June __, 2012.

Richard Cordray

Director, Bureau of Consumer Financial Protection.