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of the determination. The final decision may uphold, overrule, or modify the Director's decision or take any action deemed appropriate.

(d) Judicial review is available as the law permits.

[49 FR 7986, Mar. 5, 1984, as amended at 55 FR 38983, Sept. 24, 1990]

PART 18—ATTORNEY'S FEES AND OTHER EXPENSES

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AUTHORITY: 5 U.S.C. 504(c)(1).

SOURCE: 47 FR 13510, Mar. 31, 1982, unless otherwise noted.

GENERAL PROVISIONS

§ 18.1 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 the Department of Commerce (the word Department includes its component agencies). An eligible party may receive an award when it prevails over the Department, unless the Department's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties that are eligible for awards and the Department's proceedings that are covered by the Act. They also explain how to apply for awards, and the procedures and standards that the Department will use to make them.

§ 18.2 Definitions.

As used in this part:

(a) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 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.

(b) *Adjudicative officer* means the 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.

§ 18.3 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before the Department 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 §§ 18.11 through 18.14 of this part, has been filed with the Department 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.

[53 FR 6798, Mar. 3, 1988]

§ 18.4 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Department and to appeals of decisions of contracting officers of the Department 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). Adversary adjudications conducted by the Department are 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. Pursuant to section 8(c) of the Contract Disputes Act (41 U.S.C. 607(c)), the Department has arranged for appeals from decisions by contracting officers of the Department to be decided by the General Services Administration Board of Contract Appeals. This Board, in accordance with its own procedures, shall be responsible for making determinations on applications pursuant to the Act relating to appeals to the Board from decisions of contracting officers of the Department. Such determinations are final, subject to appeal under § 18.23. Any proceeding in which the Department 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.'' The Department proceedings covered are:

(1) *Department-wide.* (i) Title VI Civil Rights hearings conducted by the Department under 42 U.S.C. 2000d–1 and 15 CFR 8.12(d).

(ii) Handicap discrimination hearings conducted by the Department under 29 U.S.C. 794(a) and 15 CFR 8.12(d).

(2) National Oceanic and Atmospheric Administration (''NOAA'')

(i) Proceedings concerning suspension, revocation, or modification of a permit or license issued by NOAA.

(ii) Proceedings to assess civil penalties under any of the statutes administered by NOAA.

(3) *International Trade Administration.* Enforcement proceedings under the AntiBoycott provisions of the Export Administration Act of 1979, 50 U.S.C. app. 2407.

(4) *Patent and Trademark Office.* Disbarment proceedings of attorneys and agents under 35 U.S.C. 32.

(b) The Department may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Department's failure to designate a 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6798, Mar. 3, 1988]

§ 18.5 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 part.

(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.

(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 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, 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 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6798, Mar. 3, 1988]

§ 18.6 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 proceedings, unless the position of the Department over which the applicant has prevailed was substantially justified. The position of the Department includes, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the Department'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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.7 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 a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under this rule may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses. 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 proceedings; 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 service does not exceed the prevailing rate for similar services, and the study or

other matter was necessary for preparation of the applicant's case.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.8 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), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than the ceiling set forth in §18.7(b) in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Department a petition for rulemaking to increase the maximum rate for attorney fees. The petition should be sent to the General Counsel, Department of Commerce, 14th Street and Constitution Avenue, Room 5870, Washington, D.C. 20230. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why higher rate is warranted. The Department 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.

§ 18.9 Awards against other agencies.

If an applicant is entitled to an award because it prevailed over another agency of the United States that participated in a proceeding before the Department and took a position that was not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

§ 18.10 Delegations of authority.

The Secretary delegates to the General Counsel the authority to take final action on matters pertaining to the Act.

INFORMATION REQUIRED FROM APPLICANTS

§ 18.11 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 the Department or other agency in the proceeding 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)) and includes a copy of its charter or articles of incorporation.

(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 the adjudicative officer 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.12 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 net worth of the applicant and any affiliates (as defined in §18.5(f) of this part) when the proceeding was initiated. Unless regulations issued by a component of the Department establish particular requirements, 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 adeversely 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 the Department's established procedures under the Freedom of Information Act (15 CFR Part 4).

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.13 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 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.

§18.14 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 the Department'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, becomes 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

PROCEDURES FOR CONSIDERING APPLICATIONS

§ 18.15 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 §18.12(b) for confidential financial information.

§ 18.16 Answer to application.

(a) Within 30 calendar 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 (an extension for an additional 30 days is available as a matter of right) or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30 calendar 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 the 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 §18.20.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.17 Reply.

Within 15 calendar 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 §18.20.

§ 18.18 Comments by other parties.

Any party to a proceeding other than the applicant and the agency counsel may file comments on an application within 30 calendar days after it is served or on an answer within 15 calendar 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.19 Settlement.

The applicant 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 component 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.20 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.21 Decision.

The adjudicative officer shall issue an initial decision on the application within 30 calendar days after completion of proceedings on the application. The initial decision of the adjudicative officer 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 Department'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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.22 Agency review.

Either the applicant or agency counsel may file a petition for review of the initial decision on the fee application, or the Department may decide to review the decision on its own initiative. The petition must be filed with the General Counsel, Office of the Assistant General Counsel for Administration, Rm. 5882, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230, not later than 30 calendar days after the initial decision is issued. For purposes of this section, a document will be considered filed with the General Counsel as of the date of the postmark (or for government penalty mail, as shown by a certificate of mailing), if mailed, or if not mailed, as of the date actually delivered to the Office of General Counsel. A petition for review must be accompanied by a full written statement in support thereof, including a precise statement of why the petitioner believes the initial decision should be reversed or modified, and proof of service upon all parties. A response to the petition may be filed by another party to the proceeding and must be filed with the General Counsel at the above address not more than 30 calendar days after the date of service of the petition for review. The General Counsel may request any further submissions deemed helpful in resolving the petition for review. If neither the applicant nor agency counsel seeks review and the Department does not take review on its own initiative, the initial decision on the application shall become a final decision of the Department 30 calendar days after it is issued. Whether to review a decision is a matter within the discretion of the General Counsel. If review is taken, the General Counsel will issue the Department's final decision on the application or remand the application to the adjudicative officer for further proceedings. The standard of review exercised by the General Counsel shall be that which was required for the highest level of Departmental review which could have been exercised on the underlying covered proceeding.

[53 FR 6799, Mar. 3, 1988]

§ 18.23 Judicial review.

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

§ 18.24 Payment of award.

An applicant seeking payment of an award by the Department shall submit a copy of the final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts to the General Counsel, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 5870, Washington, D.C. 20230. The Department will pay the amount awarded to the applicant within 60 calendar days, 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.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6800, Mar. 3, 1988]

PART 19—REFERRAL OF DEBTS TO THE IRS FOR TAX REFUND OFFSET

Sec.
19.1 Purpose.
19.2 Applicability and scope.
19.3 Administrative charges.
19.4 Notice requirement before offset.
19.5 Review within the Department.
19.6 Departmental determination.
19.7 Stay of offset.

AUTHORITY: 31 U.S.C. 3720A; Public Law 98–369; 98 Stat. 1153.

SOURCE: 58 FR 39653, July 26. 1993, unless otherwise noted.

§ 19.1 Purpose.

This part establishes procedures for the Department of Commerce (DOC) to refer past-due debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to the DOC. It specifies the agency procedures and the rights of the debtor applicable to claims for payment of debts owed to the DOC.

§ 19.2 Applicability and scope.

(a) These regulations implement 31 U.S.C. 3720A which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Department against amounts payable to or on behalf of the debtor by or on behalf of the Department;

(4) With respect to which, the DOC has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or legally enforceable, the DOC has considered evidence presented by such taxpayer, and has determined that an amount of such debt is past-due and legally enforceable;

(5) Has been disclosed by the DOC to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which, the DOC has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, will be referred to the IRS for offset against any overpayment of taxes;

(7) Is at least $25.00;

(8) With respect to which, all other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations codified at 26 CFR 301.6402–6 relating to the eligibility of a debt for tax refund offset have been satisfied.

§ 19.3 Administrative charges.

In accordance with 4 CFR part 102, all administrative charges incurred in connection with the referral of a debt to the IRS shall be assessed on the debt