other important national needs; however, in deciding the disposition of surplus real property, GSA will generally give priority of consideration to uses to assist the homeless. GSA may consider any competing request for the property made under section 203(k) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484(k)) that is so meritorious and compelling that it outweighs the needs of the homeless, and HHS may likewise consider any competing request made under subsection 203(k)(1) of that law.

(3) Whenever GSA or HHS decides in favor of a competing request over a request for property for homeless assistance use as provided in paragraph (b)(2) of this section, the agency making the decision will transmit to the appropriate committees of the Congress an explanatory statement which details the need satisfied by conveyance of the surplus property, and the reasons for determining that such need was so meritorious and compelling as to outweigh the needs of the homeless.

(4) Deeds. Surplus property may be conveyed to representatives of the homeless pursuant to section 203(k) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484(k)(1), and section 501(f) of the McKinney Act as amended, 42 U.S.C. 11411. Representatives of the homeless must complete the application packet pursuant to the requirements of §12a.9 of this part and in accordance with the requirements of 45 CFR part 12.

§12a.11 Unsuitable properties.

The landholding agency will defer, for 20 days after the date that notice of a property is published in the Federal Register, action to dispose of properties determined unsuitable for homeless assistance. HUD will inform landholding agencies or GSA if appeal of an unsuitability determination is filed by a representative of the homeless pursuant to §12a.4(f)(4). HUD will advise the agency that it should refrain from initiating disposal procedures until HUD has completed its reconsideration process regarding unsuitability. Thereafter, or if no appeal has been filed after 20 days, GSA or the appropriate landholding agency may proceed with disposal action in accordance with applicable law.

§12a.12 No applications approved.

(a) At the end of the 60 day holding period described in §12a.9(a), HHS will notify GSA, or the landholding agency, as appropriate, if an expression of interest has been received for a particular property. Where there is no expression of interest, GSA or the landholding agency, as appropriate, will proceed with disposal in accordance with applicable law.

(b) Upon advice from HHS that all applications have been disapproved, or if no completed applications or requests for extensions have been received by HHS within 90 days from the date of the last expression of interest, disposal may proceed in accordance with applicable law.
§ 13.1 Purpose of these rules.

These rules implement section 203 of the Equal Access to Justice Act, 5 U.S.C. 504 and 504 note, for the Department of Health and Human Services. They describe the circumstances under which the Department may award attorney fees and certain other expenses to eligible individuals and entities who prevail over the Department in certain administrative proceedings (called “adversary adjudications”). The Department may reimburse parties for expenses incurred in adversary adjudications if the party prevails in the proceeding and if the Department’s position in the proceeding was not substantially justified. These rules explain how to apply for an award. They also describe what proceedings constitute adversary adjudications covered by the Act, what types of persons and entities may be eligible for an award, and what procedures and standards the Department will use to make a determination as to whether a party may receive an award.

§ 13.2 When these rules apply.

These rules apply to adversary adjudications pending before the Department between October 1, 1981 and September 30, 1984.

§ 13.3 Proceedings covered.

(a) These rules apply only to adversary adjudications. For the purpose of these rules, only an adjudication required to be under 5 U.S.C. 554, in which the position of the Department or one of its components is represented by an attorney or other representative (“the agency’s litigating party”) who enters an appearance and participates in the proceeding, constitutes an adversary adjudication. These rules do not apply to proceedings for the purpose of establishing or fixing a rate or for the purpose of granting, denying, or renewing a license. Department proceedings covered by these rules, if the agency’s litigating party enters an appearance and participates, are listed in Appendix A.

(b) If a proceeding is covered by these rules, but also involves issues excluded under paragraph (a) of this section from the coverage of these rules, reimbursement is available only for fees and expenses resulting from covered issues.

§ 13.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under these regulations, the applicant must be a party, as defined in 5 U.S.C. 551(3), to the adversary adjudication for which it seeks an award. An applicant must show that it meets all conditions of eligibility set out in this subpart and in Subpart B.

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

(1) Individuals with a net worth of not more than $1 million;

(2) Sole owners of unincorporated businesses if the owner has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) Charitable or other tax-exempt organizations 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) Cooperative associations 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) All other partnerships, corporations, associations or public or private organizations with a net worth of not
more than $5 million and with not more than 500 employees.

(c) For the purpose of determining eligibility, the net worth and number of employees of an applicant is calculated as of the date the proceeding was initiated. The net worth of an applicant is determined by generally accepted accounting principles.

(d) Whether an applicant who owns an unincorporated business will be considered as an “individual” or a “sole owner of an unincorporated business” will be determined by whether the applicant’s participation in the proceeding is related primarily to individual interests or to business interests.

(e) The employees of an applicant include all those persons regularly providing 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 is not eligible if it appears from the facts and circumstances that it has participated in the proceedings only or primarily on behalf of other persons or entities that are ineligible.

§ 13.5 Standards for awards.

(a) Awards will not be made for fees and expenses where the Department’s position in the proceeding was substantially justified at the time the proceeding was initiated. The fact that a party has prevailed in a proceeding does not create a presumption that the Department’s position was not substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency’s litigating party, which may avoid an award by showing that its position was reasonable in law and fact.

(b) When two or more matters are joined together for one hearing, each of which could have been heard separately (without regard to laws or rules fixing a jurisdictional minimum amount for claims), and an applicant has prevailed with respect to one or several of the matters, an eligible applicant may receive an award for expenses associated only with the matters on which it prevailed if the Department’s position on those matters was not substantially justified.

(c) Awards for fees and expenses incurred before the date on which a proceeding was initiated will be made only if the applicant can demonstrate that they were reasonably incurred in preparation for the proceeding.

(d) Awards will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if other special circumstances make an award unjust.

§ 13.6 Allowable fees and expenses.

(a) Awards will be limited to the rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses. Awards will not be made for more than the applicant’s actual expenses. If a party has already received, or is eligible to receive, reimbursement for any expenses under another statutory provision or another program allowing reimbursement, its award under these rules must be reduced by the amount the prevailing party has already received, or is eligible to receive, from the Federal government.

(b) An award for the fees of an attorney or agent may not exceed $75.00 per hour, regardless of the actual rate charged by the attorney or agent. An award for the fees of an expert witness
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may not exceed the highest rate at which the Department pays expert witnesses, which is $24.09 per hour, regardless of the actual rates charged by the witness. These limits apply only to fees; an award may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges separately for such expenses.

(c) In determining the reasonableness of the fees sought for attorneys, agents or expert witnesses, the adjudicative officer must consider factors bearing on the request, which include, but are not limited to:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for like services; if the attorney, agent or witness is an employee of the applicant, the fully allocated cost of service;

(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.

§ 13.10 Contents of application.

(a) Applications for an award of fees and expenses must include:

(1) The name of the applicant and the identification of the proceeding;

(2) A declaration that the applicant believes it has prevailed, and an identification of the position of the Department that the applicant alleges was not substantially justified at the time of the initiation of the proceeding;

(3) Unless the applicant is an individual, a statement of the number of its employees on the date on which the proceeding was initiated, and a brief description of the type and purpose of its organization or business;

(4) A description of any affiliated individuals or entities, as the term “affiliate” is defined in §13.4(f), or a statement that none exist;

(5) A statement that the applicant’s net worth as of the date on which the proceeding was initiated did not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(i) 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 qualified under such section; or

(ii) 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));

(6) A statement of the amount of fees and expenses for which an award is sought;

(7) A declaration that the applicant has not received, has not applied for, and does not intend to apply for reimbursement of the cost of items listed in the Statement of Fees and Expenses under any other program or statute; or

if the applicant has received or applied for or will receive or apply for reimbursement of those expenses under another program or statute, a statement...
§ 13.12 Documentation of fees and expenses.

(a) All applicants must be accompanied by full documentation of the fees and expenses, including the cost of any study, exhibit, analysis, report, test or other similar item, for which the applicant seeks reimbursement.

(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 portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled “Confidential Financial Information,” accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, the officer will omit the material from the public record. In that case, any decision regarding disclosure of the material (whether in response to a request from an agency or person outside the Department or on the Department’s own initiative) will be made in accordance with applicable statutes and Department rules and procedures for commercial and financial records which the submitter claims are confidential or privileged. In particular, this regulation is not a basis for a promise or obligation of confidentiality.

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(b) The documentation shall include an affidavit from each attorney, agent, or expert witness representing or appearing in behalf of the party, stating the actual time expended, the rate at which fees and other expenses were computed, a description of the specific services performed, 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. Where the adversary adjudication includes covered proceedings (as described in §13.3) as well as excluded proceedings, or two or more matters, each of which could have been heard separately, the fees and expenses shall be shown separately for each proceeding or matter, and the basis for allocating expenses among the proceedings or matters shall be indicated.

(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period.

(c) If the applicant seeks reimbursement of any expenses not covered by the affidavit described in paragraph (b), the documentation must also include an affidavit describing all such expenses and stating the amounts paid or payable by the applicant or by any other person or entity for the services provided.

(d) The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

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§ 13.27 Agency review.

(a) The head of the agency or office, or his or her designee, shall review any award granted under this part whether or not the parties request such review, and issue a final decision. No award shall be made under this subpart without approval of the head of the agency or office or his or her designee.

(b) If either the applicant or the agency's litigating party seeks review of the adjudicative officer's decision on the fee application, it shall file and serve exceptions within 30 days after issuance of the initial decision. The head of the agency or office or his or her designee shall issue a final decision on the application as soon as possible or remand the application to the adjudicative officer for further proceedings.

§ 13.26 Decisions.

The adjudicative officer shall issue an initial decision on the application as promptly as possible after the filing of the last document or conclusion of the hearing. The decision must include written findings and conclusions on the applicant's eligibility and status as a prevailing party, including a finding on the net worth of the applicant. Where the adjudicative officer has determined under §13.11(b) that the applicant's net worth information is exempted from disclosure under the Freedom of Information Act, the finding on net worth shall be kept confidential. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, an explanation of any difference between the amount requested and the amount awarded, and whether any special circumstances make the award unjust.

§ 13.24 Settlements.

The applicant and the agency's litigating party may agree on a proposed settlement of the award at any time prior to final action on the application. If the parties agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. All settlements must be approved by the adjudicative officer and the head of the agency or office or his or her designee before becoming final.

§ 13.25 Further proceedings.

(a) Ordinarily, a decision on an application will be made on the basis of the hearing record and pleadings related to the application. However, at the request of either the applicant or the agency's litigating party, or on his or her own initiative, the adjudicative officer may order further proceedings, including an informal conference, oral argument, 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 additional written submissions or oral testimony shall identify the information sought and shall explain why the information is necessary to decide the issues.

(c) The adjudicative officer may impose sanctions on any party for failure to comply with his or her order to file pleadings, produce documents, or present witnesses for oral examination. These sanctions may include but are not limited to granting the application partly or completely, dismissing the application, and diminishing the award granted.

§ 13.27 Agency review.

(a) The head of the agency or office, or his or her designee, shall review any award granted under this part whether or not the parties request such review, and issue a final decision. No award shall be made under this subpart without approval of the head of the agency or office or his or her designee.

(b) If either the applicant or the agency's litigating party seeks review of the adjudicative officer's decision on the fee application, it shall file and serve exceptions within 30 days after issuance of the initial decision. The head of the agency or office or his or her designee shall issue a final decision on the application as soon as possible or remand the application to the adjudicative officer for further proceedings.
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Any party that does not file and serve exceptions within the stated time limit loses the opportunity to do so.

§ 13.28 Judicial review.

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

§ 13.29 Payment of award.

The notification to an applicant of a final decision that an award will be made shall contain the name and address of the appropriate Departmental finance office that will pay the award. An applicant seeking payment of an award shall submit to that finance officer a copy of the final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The Department will pay the amount awarded to the applicant within 60 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 proceedings.

§ 13.30 Designation of adjudicative officer.

Upon the filing of an application pursuant to §13.11(a), the officer who presided over the taking of evidence in the proceeding which gave rise to the application will, if available, be automatically designated as the adjudicative officer for the handling of the application.
## APPENDIX A

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