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record of the proceedings to which the communication or statement pertains.

(4) *Service on parties.* The Secretary shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if other circumstances satisfy the Secretary that service of the communication or statement would be unduly burdensome, he/she, in lieu of service, may notify all parties in writing that the communication or statement has been made and filed and that it is available for inspection and copying.

(5) *Service on maker.* The Secretary shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A person subject to these Rules who make, a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

AUTHORITY: Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. 504 and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

SOURCE: 47 FR 25513, June 14, 1982, unless otherwise noted.

§ 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the EAJA" in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adju-

dicative proceedings before the Commission. An eligible party may receive an award when it prevails over Commission complaint counsel, unless complaint counsel's position in the proceeding was substantially justified or special circumstances make an award unjust. This subpart describes the parties eligible for awards and the proceedings covered. The rules also explain how to apply for awards and the procedures and standards that the Commission will use to make them.

(b) *When the EAJA applies.* The EAJA applies to any adversary adjudicative proceeding pending before the Commission at any time between October 1, 1981 and September 30, 1984. This includes proceedings commenced before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

(c) *Proceedings covered.* (1) The EAJA and this rule apply to adversary adjudicative proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any component of the Commission is represented by an attorney or other representative who enters an appearance and participates in the proceeding. The rules in this subpart govern adversary adjudicative proceedings relating to the provisions of sections 15 (c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064 (c) (d) and (f); 2066(b)), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), and section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern administrative adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)). See 16 CFR 1025.1.

(2) The Commission may designate a proceeding not listed in paragraph (c)(1) of this section as an adversary adjudicative proceeding for purposes of the EAJA by so stating in an order initiating the proceeding or designating

the matter for hearing. The Commission's failure to designate a proceeding as an adversary adjudicative proceeding shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA. Whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(3) If a proceeding includes both matters covered by the EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the EAJA, 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) and 16 CFR 1025.3(f). The applicant must show that it meets all conditions of eligibility set out in this paragraph and in §1025.71.

(2) The types of eligible applicants are:

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

(ii) Sole owners of unincorporated businesses who have a net worth of not more than \$5 million including both personal and business interests, and not more than 500 employees;

(iii) Charitable or other tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) which have not more than 500 employees;

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

(3) 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.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than as 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.

(5) The number of employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the appli-

cant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. For this purpose, *affiliate* means (i) An 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 (ii) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest. However, the presiding officer may determine that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the presiding 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.

(7) 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.

(8) An applicant that represents himself/herself regardless of whether he is licensed to practice law may be awarded all such expenses and fees available to other prevailing eligible parties. See 16 CFR 1025.61 and 1025.65 of the Commission's rules.

(e) *Standards for awards.* (1) An eligible prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of Commission complaint counsel over which the applicant has prevailed was substantially justified. Complaint counsel bear the burden of proof that an award should not be made to an eligible prevailing applicant. Complaint counsel may avoid the granting of an award by showing that its position was reasonable in law and fact.

(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.

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(f) *Allowable fees and expenses.* (1) 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.

(2) No award for the fee of an attorney or agent under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission is authorized to pay 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.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the presiding officer shall consider the following:

(i) 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;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) 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.

(5) Fees may be awarded to eligible applicants only for service performed after the issuance of a complaint and the commencement of the adjudicative proceeding in accordance with 16 CFR 1025.11(a).

(g) *Rulemaking on maximum rates for attorney fees.* (1) If warranted by an increase in the cost of living or by special circumstances, the Commission

may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this subpart. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 533.

(2) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(e). The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. The petition should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within a reasonable time after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

(h) *Presiding officer.* The presiding officer in a proceeding covered by this regulation is a person as defined in the Commission's Rules, 16 CFR 1025.3(i), who conducts an adversary adjudicative proceeding.

§ 1025.71 Information required from applicant.

(a) *Contents of application.* (1) An application for an award of fees and expenses under the EAJA 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 complaint counsel in the adjudicative 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.

(2) The application shall also include a verified statement that the applicant's net worth does 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 it attaches