

# Rules and Regulations

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## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2610

RIN 3209-AA20

#### Amendments to the Office of Government Ethics Rules Under the Equal Access to Justice Act

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Office of Government Ethics is amending its rules under the Equal Access to Justice Act on adversary administrative adjudicatory proceedings to conform with the revisions enacted as part of the Contract with America Advancement Act of 1996, which increased the ceiling on attorney and agent fees and added small entities as eligible parties to a new category of awards based on covered proceedings involving any excessive demands, and is also making a couple of minor clarifying and paperwork revisions.

**EFFECTIVE DATE:** March 18, 1998.

**ADDRESSES:** Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Ms. Grill.

**FOR FURTHER INFORMATION CONTACT:** Arielle H. Grill, Attorney-Advisor, Office of General Counsel and Legal Policy, Office of Government Ethics, telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

**SUPPLEMENTARY INFORMATION:** The Office of Government Ethics is amending its rules at 5 CFR part 2610 for covered adversary administrative proceedings under the Equal Access to Justice Act to implement changes made to that law in subtitle C of the Small Business Regulatory Enforcement Fairness Act of 1996 under the Contract with America Advancement Act of 1996, Pub. L. 104-121. One change reflects that, for

covered proceedings commenced on or after March 29, 1996, the general ceiling on attorney and agent fees was raised from \$75.00 per hour to \$125.00 per hour. The section on rulemaking on the maximum fee rate is also being revised to include agent fees along with attorney fees. In addition, an award is permitted if the demand of the Office for relief is substantially in excess of the decision in an adversary adjudication and is unreasonable when compared with such decision, under 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. Furthermore, a small entity as defined in 5 U.S.C. 601 is declared to be an eligible party for such relief. Finally, an out-of-date citation to a former provision in the Paperwork Reduction Act regulations of the Office of Management and Budget at 5 CFR part 1320 is being removed.

In this rulemaking, OGE is implementing these statutory changes as to any covered administrative proceedings before it by revising §§ 2610.102, 2610.105, 2610.106, 2610.107, 2610.108, 2610.201 and 2610.204 of OGE's equal access rules. This is not an executive branchwide regulation, as only covered OGE administrative proceedings are affected. Moreover, OGE notes that, to date, no administrative equal access claims have been filed with it.

#### Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b) and (d), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking, public comment procedures, and 30-day delay in effectiveness as to these revisions. The notice, comment, and delayed effective date are being waived because these technical amendments to the OGE equal access regulation concern matters of agency organization, procedure, and practice. Furthermore, it is in the public interest that the new, higher attorney fees provisions and other changes as to OGE administrative proceedings covered under the Equal Access to Justice Act, as revised, be implemented as soon as possible.

#### Executive Order 12866

In promulgating these technical amendments to its equal access rules,

OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These amendments have not been reviewed by the Office of Management and Budget under that Executive Order, as they are not deemed "significant" thereunder.

#### Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rulemaking will not have a significant economic impact on a substantial number of small entities because it only affects certain covered OGE administrative proceedings and OGE has not to date received any claims as to such proceedings under the Equal Access to Justice Act.

#### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this technical amendments rulemaking does not contain any information collection requirements that require the approval of the Office of Management and Budget, since the collections of information called for under this rule are expected to involve nine or fewer persons each year. Amended § 2610.201(f) of this rule contains a statement informing the public of this matter.

#### List of Subjects in 5 CFR Part 2610

Administrative practice and procedure, Claims, Conflict of interests, Equal access to justice, Government employees.

Approved: March 12, 1998.

**Stephen D. Potts,**

*Director, Office of Government Ethics.*

For the reasons set forth in the preamble, the Office of Government Ethics is amending part 2610 of chapter XVI of 5 CFR as follows:

#### PART 2610—[AMENDED]

1. The authority citation for part 2610 continues to read as follows:

**Authority:** 5 U.S.C. 504(c)(1); 5 U.S.C. App. (Ethics in Government Act of 1978).

2. Section 2610.102 is amended by revising the second sentence and adding a new third sentence to read as follows:

**§ 2610.102 Purpose.**

\* \* \* An eligible party may receive an award when it prevails over the Office, unless the Office's position in the proceeding was substantially justified or special circumstances make an award unjust. An eligible party may also receive an award when the demand of the Office is substantially in excess of the decision in the adversary adjudication and is unreasonable when compared with such decision, under 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. \* \* \*

3. Section 2610.105 is amended by removing the word "and" at the end of paragraph (b)(4), by removing the word "any" at the beginning of paragraph (b)(5) and adding in its place the word "Any," by removing the period at the end of paragraph (b)(5) and adding in its place a semicolon followed by the word "and," and by adding a new paragraph (b)(6) to read as follows:

**§ 2610.105 Eligibility of applicants.**

\* \* \* \* \*  
(b) (6) For purposes of § 2610.106(b), a small entity as defined in 5 U.S.C. 601.  
\* \* \* \* \*

4. Section 2610.106 is amended by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively, by revising newly redesignated paragraph (d), and by adding a new paragraph (b) to read as follows:

**§ 2610.106 Standards for awards.**

\* \* \* \* \*  
(b) If, in a proceeding arising from an Office action to enforce an applicant's compliance with a statutory or regulatory requirement, the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with that decision under the facts and circumstances of the case, the applicant shall be awarded the fees and other expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof that the demand of the Office is substantially in excess of the decision and is unreasonable when compared with such decision is on the applicant. As used in this paragraph, "demand" means the express demand of the Office which led to the adversary adjudication, but it does not include a recitation by the Office of the maximum statutory penalty in the administrative complaint, or elsewhere when accompanied by an

express demand for a lesser amount. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.  
\* \* \* \* \*

(d) An award under this part will be reduced or denied if the Office's position was substantially justified in law and fact, if the applicant has unduly or unreasonably protracted the proceeding, if the applicant has falsified the application (including documentation) or net worth exhibit, or if special circumstances make the award unjust.

**§ 2610.107 [Amended]**

5. Section 2610.107 is amended by removing the dollar amount "\$75.00" in the first sentence of paragraph (b) and adding in its place the dollar amount "\$125.00."

**§ 2610.108 [Amended]**

6. Section 2610.108 is amended by:  
a. Revising the heading to read "Rulemaking on maximum rate for attorney and agent fees.";  
b. Amending the first sentence of paragraph (a) by adding the words "or agents" between the words "attorneys" and "qualified" in the parentheses, adding the words "or agent" between the words "attorney" and "fees" outside the parentheses, and by removing the dollar amount "\$75.00" and adding in its place the dollar amount "\$125.00."; and  
c. Amending the first sentence of paragraph (b) by adding the words "or agent" between the words "attorney" and "fees".  
7. Section 2610.201 is amended by removing the last sentence of paragraph (f) and by revising paragraph (a) and the introductory text of paragraph (b) to read as follows:

**§ 2610.201 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. Unless the applicant is an individual, the application shall further state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:  
(1) Show that the applicant has prevailed and identify the position of the Office in the proceeding that the applicant alleges was not substantially justified; or  
(2) Show that the demand by the Office in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

(b) The application shall also include, for purposes of § 2610.106 (a) or (b), a statement that the applicant's net worth does not exceed \$2,000,000 (for individuals) or \$7,000,000 (for all other applicants, including their affiliates) or alternatively, for purposes of § 2610.106(b) only, a declaration that the applicant is a small entity as defined in 5 U.S.C. 601. However, an applicant may omit the statement concerning its net worth if:  
\* \* \* \* \*

8. Section 2610.204 is amended by revising paragraph (a) and the first sentence of paragraph (c) to read as follows:

**§ 2610.204 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. An application may also be filed when the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with such decision. In no case may an application be filed later than 30 days after the Office of Government Ethics' final disposition of the proceeding.  
\* \* \* \* \*

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed or has been subjected to a demand from the Office substantially in excess of the decision in the adversary adjudication and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. \* \* \*

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 97-SW-34-AD; Amendment 39-10411; AD 98-06-32]

RIN 2120-AA64

**Airworthiness Directives; Eurocopter France Model AS 332C, L, and L1 Helicopters**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

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