

109TH CONGRESS
1ST SESSION

H. R. 435

To amend the provisions of titles 5 and 28, United States Code, relating to equal access to justice, award of reasonable costs and fees, and administrative settlement offers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2005

Mr. MANZULLO (for himself and Mr. BLUMENAUER) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the provisions of titles 5 and 28, United States Code, relating to equal access to justice, award of reasonable costs and fees, and administrative settlement offers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Equal Access to Jus-
5 tice Reform Act of 2005”.

6 **SEC. 2. FINDINGS AND STATEMENT OF PURPOSE.**

7 (a) FINDINGS.—The Congress finds that—

1 (1) the Equal Access to Justice Act (Public
2 Law 96–481; 94 Stat. 2325 et seq.) (in this section
3 referred to as “EAJA”) was intended to make the
4 justice system more accessible to individuals of mod-
5 est means, small businesses, and nonprofit organiza-
6 tions (in this section collectively referred to as
7 “small parties”) through limited recovery of their at-
8 torneys fees when they prevail in disputes with the
9 Federal Government;

10 (2) although EAJA has succeeded, at modest
11 cost, in improving access to the justice system for
12 small parties, EAJA retains formidable barriers to
13 attorneys’ fees recovery (even for small parties that
14 completely prevail against the Government), as well
15 as inefficient and costly mechanisms for determining
16 the fees recovery;

17 (3) among the barriers retained by EAJA are—

18 (A) EAJA’s “substantial justification de-
19 fense”, whereby the Government can deny at-
20 torneys’ fees recovery to prevailing small parties
21 if the Government can show that its position,
22 although proven illegal, was not abusive or en-
23 tirely unreasonable;

24 (B) EAJA’s hourly rate cap on attorneys’
25 fees of \$125, which is well below the market

1 rate for competent legal services in many legal
2 markets (especially for complex and high-risk
3 litigation against the Federal Government) and
4 thus prevents fair reimbursement of attorneys'
5 fees for small parties and discourages com-
6 petent counsel from undertaking meritorious
7 cases on a contingency or reduced-fee basis; and

8 (C) EAJA's outdated small business eligi-
9 bility requirements, which have not increased or
10 indexed for inflation the net worth threshold of
11 \$7,000,000 established in 1985;

12 (4) among the inefficiencies retained by EAJA
13 are—

14 (A) EAJA's substantial justification de-
15 fense, which initiates collateral litigation over
16 attorneys' fees recovery that both consumes sig-
17 nificant Federal resources and prolongs the
18 time, expense, and risk of pursuing fees recov-
19 ery to the prevailing small party;

20 (B) EAJA's omission of any mechanism
21 (such as the offer in compromise feature of
22 Federal Rule of Civil Procedure 68) that would
23 apply after a small party has prevailed on the
24 merits of its claim to encourage both sides to

1 reach a prompt and reasonable settlement of at-
2 torneys' fees;

3 (C) EAJA's failure to create an edu-
4 cational and technical assistance function with-
5 in an appropriate agency to facilitate more effi-
6 cient use, settlement, and payment of claims
7 under EAJA; and

8 (D) EAJA's failure to reassign congres-
9 sional reporting obligations to an appropriate,
10 existing agency (EAJA lodges annual congres-
11 sional reporting with the Administrative Con-
12 ference of the United States, an agency which
13 ceased to exist in 1995);

14 (5) none of these barriers or inefficiencies exists
15 in the primary Federal fee-shifting statute applicable
16 to State and local governments, Revised Statutes
17 section 722 (42 U.S.C. 1988(b)), resulting in—

18 (A) an unequal level of accountability to
19 Federal law among governments in the United
20 States (shielding the Federal Government to a
21 greater degree than State and local govern-
22 ments from the consequences of violating Fed-
23 eral law);

24 (B) an uneven playing field for small party
25 victims of Federal law violations (discouraging

1 resistance to illegal action by the Federal Gov-
2 ernment); and

3 (C) an inefficient use of Federal agency re-
4 sources (burdening the Federal budget);

5 (6) a further barrier and inefficiency is the
6 practice of Federal agencies of paying their EAJA
7 liabilities from the General Treasury rather than
8 their own agency budgets, relieving those agencies of
9 the financial consequences of their misconduct (i.e.,
10 EAJA liability) and burdening the Federal budget
11 unnecessarily;

12 (7) it is in the national interest to remove these
13 barriers and inefficiencies for small parties, particu-
14 larly small business owners, involved in disputes with
15 the Federal Government in order to develop sound
16 policies relative to the national economy in which
17 small businesses play a significant and strategic role;
18 and

19 (8) the removal of these barriers and inefficien-
20 cies is essential to—

21 (A) equalize the level of accountability to
22 Federal law among governments in the United
23 States;

1 (B) discourage marginal or abusive Fed-
2 eral enforcement actions directed at small par-
3 ties;

4 (C) stop the practice of paying EAJA li-
5 abilities from the General Treasury, which has
6 insulated agencies from the financial con-
7 sequences of their misconduct and burdened the
8 Federal budget unnecessarily;

9 (D) refine and improve Federal policies
10 through adjudication;

11 (E) promote a fair and cost-effective proc-
12 ess for prompt settlement and payment of at-
13 torneys' fees claims; and

14 (F) provide a fairer opportunity for full
15 participation by small businesses in the free en-
16 terprise system, further increasing the economic
17 vitality of the Nation.

18 (b) PURPOSE.—It is, therefore, the purpose of this
19 Act to remove existing barriers and inefficiencies in EAJA
20 in order to—

21 (1) equalize the level of accountability to Fed-
22 eral law among governments in the United States;

23 (2) discourage marginal or abusive Federal en-
24 forcement actions directed at small parties;

1 (3) stop the practice of paying EAJA liabilities
2 from the General Treasury, which has insulated
3 agencies from the financial consequences of their
4 misconduct and burdened the Federal budget unne-
5 cessarily;

6 (4) refine and improve Federal policies through
7 adjudication;

8 (5) promote a fair and cost-effective process for
9 prompt settlement and payment of attorneys' fees
10 claims; and

11 (6) provide a fairer opportunity for full partici-
12 pation by small businesses in the free enterprise sys-
13 tem, further increasing the economic vitality of the
14 Nation.

15 (c) COMPLIANCE POLICY.—In complying with the
16 statement of congressional policy expressed in this section,
17 each Federal agency, to the maximum extent practicable,
18 should—

19 (1) avoid unjustified enforcement actions di-
20 rected at small parties covered by EAJA;

21 (2) alleviate unnecessary burdens of compliance
22 with justified enforcement actions directed at small
23 parties covered by EAJA; and

1 (3) minimize impediments to prompt resolution
2 and payment of reasonable attorneys' fees to pre-
3 vailing small parties covered by EAJA.

4 **SEC. 3. REPORTING AND TECHNICAL ASSISTANCE BY OF-**
5 **FICE OF ADVOCACY.**

6 (a) FUNCTIONS OF OFFICE OF ADVOCACY.—Section
7 202 of Public Law 94–305 (15 U.S.C. 634b) is amend-
8 ed—

9 (1) in paragraph (3), by inserting before the
10 semicolon at the end the following: “and for ensur-
11 ing that the justice system remains accessible to
12 small businesses for the resolution of disputes with
13 the Federal Government;”; and

14 (2) by striking paragraph (11) and inserting
15 the following:

16 “(11) advise, cooperate with, and consult with
17 the President and Attorney General with respect to
18 section 303(b) of the Small Business Economic Pol-
19 icy Act of 1980 (15 U.S.C. 631b(b)) and section
20 504(e) of title 5, United States Code; and”.

21 (b) DUTIES OF OFFICE OF ADVOCACY.—Section 203
22 of Public Law 94–305 (15 U.S.C. 634e) is amended—

23 (1) in paragraph (2), by inserting before the
24 semicolon at the end the following: “, including the
25 resolution of disputes with the Federal Government

1 and the role of procedures established by the Equal
2 Access to Justice Act (Public Law 96–481; 94 Stat.
3 2325) in such disputes”; and

4 (2) in paragraph (3), by inserting after “the
5 Small Business Act” the following: “, including
6 those related to the Equal Access to Justice Act,”.

7 (c) REPORTS TO CONGRESS.—

8 (1) IN GENERAL.—Not later than 180 days
9 after the date of the enactment of this Act, the At-
10 torney General, in cooperation with the Chief Coun-
11 sel for Advocacy of the Small Business Administra-
12 tion, shall transmit to the congressional committees
13 specified in paragraph (2) a report containing—

14 (A) an analysis of the effectiveness of the
15 Equal Access to Justice Act (Public Law 96–
16 481; 94 Stat. 2325) (in this paragraph referred
17 to as “EAJA”) in achieving its purpose to ease
18 the burden upon small businesses and other
19 small parties covered by EAJA of engaging in
20 dispute resolution with the Federal Govern-
21 ment, including—

22 (i) the relative awareness of EAJA in
23 the small business community;

24 (ii) the relative awareness of EAJA’s
25 requirements among Federal agencies;

1 (iii) the extent and quality of rules
2 and regulations adopted by each Federal
3 agency for processing, resolving, and pay-
4 ing attorneys' fees claims under EAJA;

5 (iv) the extent to which each Federal
6 agency claims any exemptions in whole or
7 in part from EAJA's coverage;

8 (v) the frequency or degree of use of
9 EAJA's procedures by prevailing small
10 businesses; and

11 (vi) an analysis of the costs and bene-
12 fits of EAJA generally;

13 (B) an analysis of the variations in the fre-
14 quency and amounts of fee awards paid by spe-
15 cific Federal agencies and within specific Fed-
16 eral circuits and districts under section 504 of
17 title 5, United States Code, and section 2412 of
18 title 28, United States Code, including the
19 number and total dollar amount of all claims
20 filed with, and all claims processed, settled, liti-
21 gated, and paid by, each agency under EAJA;
22 and

23 (C) recommendations for congressional
24 oversight or legislative changes with respect to
25 EAJA, including any recommendations for pro-

1 mulgation or amendment of regulations issued
2 under EAJA by specific Federal agencies.

3 (2) SPECIFIED COMMITTEES.—The congress-
4 sional committees referred to in paragraph (1) are
5 the following:

6 (A) The Committee on the Judiciary and
7 the Committee on Small Business of the House
8 of Representatives.

9 (B) The Committee on the Judiciary and
10 the Committee on Small Business and Entre-
11 preneurship of the Senate.

12 (3) REPORT ON SMALL BUSINESS AND COM-
13 PETITION.—Section 303 of the Small Business Eco-
14 nomic Policy Act of 1980 (15 U.S.C. 631b) is
15 amended—

16 (A) in subsection (a) by striking paragraph
17 (5) and inserting the following:

18 “(5) recommend a program for carrying out the
19 policy declared in section 302 (including a policy to
20 ensure that the justice system remains accessible to
21 small business enterprises for the resolution of dis-
22 putes with the Federal Government), together with
23 such recommendations for legislation as the Presi-
24 dent may deem necessary or desirable.”;

25 (B) in subsection (b)—

1 (i) by striking “(b)” and inserting
2 “(b)(1)”; and

3 (ii) by adding at the end the fol-
4 lowing:

5 “(2) The President, after consultation with the Chief
6 Counsel for Advocacy of the Small Business Administra-
7 tion and the Attorney General, shall transmit simulta-
8 neously as an appendix to such annual report, a report
9 that describes, by agency and department—

10 “(A) the total number of claims filed, proc-
11 essed, settled, and litigated by small business con-
12 cerns under section 504 of title 5, United States
13 Code, and section 2412 of title 28, United States
14 Code (originally enacted pursuant to the Equal Ac-
15 cess to Justice Act (Public Law 96–481; 94 Stat.
16 2325));

17 “(B) the total dollar amount of all outstanding
18 awards and settlements to small business concerns
19 under such sections;

20 “(C) the total dollar amount of all claims paid
21 to small business concerns under such sections;

22 “(D) the underlying legal claims involved in
23 each controversy with small business concerns under
24 such sections; and

1 “(E) any other relevant information that the
2 President determines may aid Congress in evalu-
3 ating the impact on small business concerns of such
4 sections.

5 “(3) Each agency shall provide the President with
6 such information as is necessary for the President to com-
7 ply with the requirements of this subsection.”; and

8 (C) in subsection (d)—

9 (i) by striking “(d)” and inserting
10 “(d)(1)”; and

11 (ii) by adding at the end the fol-
12 lowing:

13 “(2) All reports concerning the Equal Access to Jus-
14 tice Act (Public Law 96–481; 94 Stat. 2325), or the con-
15 gressional policy to ensure that the justice system remains
16 accessible to small business enterprises for the resolution
17 of disputes with the Federal Government, shall be trans-
18 mitted to the following congressional committees:

19 “(A) The Committee on the Judiciary and the
20 Committee on Small Business of the House of Rep-
21 resentatives.

22 “(B) The Committee on the Judiciary and the
23 Committee on Small Business and Entrepreneurship
24 of the Senate.”.

1 **SEC. 4. EQUAL ACCESS FOR SMALL PARTIES IN CIVIL AND**
2 **ADMINISTRATIVE PROCEEDINGS.**

3 (a) **ELIMINATION OF SUBSTANTIAL JUSTIFICATION**
4 **STANDARD.—**

5 (1) **ADMINISTRATIVE PROCEEDINGS.—**Section
6 504 of title 5, United States Code, is amended—

7 (A) in subsection (a)(1), by striking “, un-
8 less the adjudicative officer” and all that fol-
9 lows through the period at the end and insert-
10 ing a period; and

11 (B) in subsection (a)(2), by striking “The
12 party shall also allege that the position of the
13 agency was not substantially justified.”.

14 (2) **JUDICIAL PROCEEDINGS.—**Section 2412 of
15 title 28, United States Code, is amended—

16 (A) in subsection (d)(1)(A), by striking “,
17 unless the court” and all that follows through
18 the period at the end and inserting a period;

19 (B) in subsection (d)(1)(B), by striking
20 “The party shall also allege” and all that fol-
21 lows through the period at the end and insert-
22 ing a period; and

23 (C) in subsection (d)(3), by striking “, un-
24 less the court” and all that follows through the
25 period at the end and inserting a period.

1 (b) ELIGIBILITY OF SMALL BUSINESSES FOR FEE
2 AWARD.—

3 (1) ADMINISTRATIVE PROCEEDINGS.—Section
4 504(b)(1)(B)(ii) of title 5, United States Code, is
5 amended by striking “\$7,000,000” and inserting
6 “\$10,000,000”.

7 (2) JUDICIAL PROCEEDINGS.—Section
8 2412(d)(2)(B)(ii) of title 28, United States Code, is
9 amended by striking “\$7,000,000” and inserting
10 “\$10,000,000”.

11 (c) ELIMINATION OF RATE CAP.—

12 (1) ADMINISTRATIVE PROCEEDINGS.—Section
13 504(b)(1)(A) of title 5, United States Code, is
14 amended—

15 (A) by striking “(i)”; and

16 (B) by striking “by the agency involved”
17 and all that follows through “a higher fee” and
18 inserting “by the agency involved”.

19 (2) JUDICIAL PROCEEDINGS.—Section
20 2412(d)(2)(A) of title 28, United States Code, is
21 amended—

22 (A) by striking “(i)”; and

23 (B) by striking “by the United States” and
24 all that follows through “a higher fee” and in-
25 serting “by the United States”.

1 (d) OFFERS OF SETTLEMENT.—

2 (1) ADMINISTRATIVE PROCEEDINGS.—Section
3 504(a) of title 5, United States Code, as amended
4 by this section, is further amended by adding at the
5 end the following:

6 “(5)(A) At any time after an agency receives an ap-
7 plication submitted under paragraph (2), the agency may
8 serve upon the applicant a written offer of settlement of
9 the claims made in the application. If within 10 business
10 days after such service the applicant serves written notice
11 that the offer is accepted, either the agency or the appli-
12 cant may then file the offer and notice of acceptance to-
13 gether with proof of service thereof.

14 “(B) An offer not accepted within the time allowed
15 shall be deemed withdrawn. The fact that an offer is made
16 but not accepted shall not preclude a subsequent offer. If
17 any award of fees and expenses for the merits of the pro-
18 ceeding finally obtained by the applicant is not more favor-
19 able than the offer, the applicant shall not be entitled to
20 receive an award for fees or other expenses incurred (in
21 relation to the application for fees and expenses) after the
22 date of the offer.”.

23 (2) JUDICIAL PROCEEDINGS.—Section
24 2412(d)(1) of title 28, United States Code, as

1 amended by this section, is further amended by add-
2 ing at the end the following:

3 “(E)(i) At any time after an agency receives an appli-
4 cation submitted under subparagraph (B), the agency may
5 serve upon the applicant a written offer of settlement of
6 the claims made in the application. If within 10 business
7 days after such service the applicant serves written notice
8 that the offer is accepted, either the agency or the appli-
9 cant may then file the offer and notice of acceptance to-
10 gether with proof of service thereof.

11 “(ii) An offer not accepted within the time allowed
12 shall be deemed withdrawn. The fact that an offer is made
13 but not accepted shall not preclude a subsequent offer. If
14 any award of fees and expenses for the merits of the pro-
15 ceeding finally obtained by the applicant is not more favor-
16 able than the offer, the applicant shall not be entitled to
17 receive an award for fees or other expenses incurred (in
18 relation to the application for fees and expenses) after the
19 date of the offer.”.

20 (e) DECLARATION OF INTENT TO SEEK FEE
21 AWARD.—

22 (1) ADMINISTRATIVE PROCEEDINGS.—Section
23 504(a)(2) of title 5, United States Code, as amended
24 by this section, is further amended by inserting be-
25 fore the first sentence the following: “At any time

1 after the commencement of an adversary adjudica-
2 tion, the adjudicative officer may (and if requested
3 by a party shall) require a party to declare whether
4 such party intends to seek an award of fees and ex-
5 penses against the agency should such party pre-
6 vail.”.

7 (2) JUDICIAL PROCEEDINGS.—Section
8 2412(d)(1)(B) of title 28, United States Code, as
9 amended by this section, is further amended by in-
10 sserting before the first sentence the following: “At
11 any time after the commencement of an adversary
12 adjudication, as defined in subsection (b)(1)(C) of
13 section 504 of title 5, United States Code, the court
14 may (and if requested by a party shall) require a
15 party to declare whether such party intends to seek
16 an award of fees and expenses against the agency
17 should such party prevail.”.

18 (f) PAYMENT OF ATTORNEYS’ FEES FROM AGENCY
19 APPROPRIATIONS.—

20 (1) ADMINISTRATIVE PROCEEDINGS.—Section
21 504(d) of title 5, United States Code, is amended—

22 (A) by striking “subsection” and inserting
23 “section”; and

24 (B) by adding at the end the following:

25 “Fees and expenses awarded under this section

1 may not be paid from the claims and judgments
2 account of the Treasury from funds appro-
3 priated pursuant to section 1304 of title 31.”.

4 (2) JUDICIAL PROCEEDINGS.—Section
5 2412(d)(4) of title 28, United States Code, is
6 amended by adding at the end the following: “Fees
7 and expenses awarded under this subsection may not
8 be paid from the claims and judgments account of
9 the Treasury from funds appropriated pursuant to
10 section 1304 of title 31.”.

11 (g) ELIGIBILITY OF TAXPAYERS FOR FEE AWARD.—

12 (1) ADMINISTRATIVE PROCEEDINGS.—Section
13 504 of title 5, United States Code, as amended by
14 this section, is further amended by striking sub-
15 section (f).

16 (2) JUDICIAL PROCEEDINGS.—Section 2412 of
17 title 28, United States Code, as amended by this
18 section, is further amended by striking subsection
19 (e) and redesignating subsection (f) as subsection
20 (e).

21 (h) CONFORMING AMENDMENT RELATING TO RE-
22 PORTING REQUIREMENT UNDER SMALL BUSINESS
23 ACT.—Section 504(e) of title 5, United States Code, is
24 amended to read as follows:

1 “(e)(1) The Attorney General, after consultation with
2 the Chief Counsel for Advocacy of the Small Business Ad-
3 ministration, shall report annually to the Congress on the
4 amount of fees and other expenses awarded to individuals
5 during the preceding fiscal year pursuant to this section
6 and section 2412 of title 28. The report shall describe the
7 number, nature, and amount of the awards, the claims in-
8 volved in the controversy, and any other relevant informa-
9 tion which may aid the Congress in evaluating the scope
10 and impact of such awards for individuals engaged in dis-
11 putes with Federal agencies. Each agency shall provide the
12 Attorney General with such information as is necessary
13 for the Attorney General to comply with the requirements
14 of this subsection.

15 “(2) A requirement that the President report annu-
16 ally on proceedings affecting small business concerns
17 under this section and under section 2412 of title 28 is
18 provided in section 303(b) of the Small Business Eco-
19 nomic Policy Act of 1980 (15 U.S.C. 631b(b)).”.

20 (i) APPLICABILITY.—The provisions of this section
21 and the amendments made by this section shall apply to
22 any proceeding pending on, or commenced on or after, the
23 effective date of this Act.

1 **SEC. 5. DEFINITION OF PREVAILING PARTY IN EAJA CASES.**

2 (a) TITLE 5.—Section 504(b)(1) of title 5, United
3 States Code, is amended by adding at the end the fol-
4 lowing new paragraph:

5 “(G) ‘prevailing party’ includes, in addition to
6 a party who prevails through a judicial or adminis-
7 trative judgment or order, a party whose pursuit of
8 a nonfrivolous claim or defense was a catalyst for a
9 voluntary or unilateral change in position by the op-
10 posing party that provides any significant part of
11 the relief sought.”.

12 (b) TITLE 28.—Section 2412 of title 28, United
13 States Code, is amended—

14 (1) in subsection (d)(2)(H), by inserting after
15 “means” the following: “, subject to subsection
16 (g),”; and

17 (2) by adding at the end the following new sub-
18 section:

19 “(g) For the purposes of this section, the term ‘pre-
20 vailing party’ includes, in addition to a party who prevails
21 through a judicial or administrative judgment or order,
22 a party whose pursuit of a nonfrivolous claim or defense
23 was a catalyst for a voluntary or unilateral change in posi-
24 tion by the opposing party that provides any significant
25 part of the relief sought.”.

1 **SEC. 6. EFFECTIVE DATE.**

2 The provisions of this Act and the amendments made
3 by this Act shall take effect 30 days after the date of the
4 enactment of this Act.

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