

109TH CONGRESS
1ST SESSION

S. 2017

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 SENATE OF THE UNITED STATES

NOVEMBER 16, 2005

Mr. FEINGOLD (for himself and Ms. SNOWE) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

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; and

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

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

22 (2) discourage marginal Federal enforcement
23 actions directed at small parties;

24 (3) reduce the practice of paying EAJA liabil-
25 ities from the General Treasury, to ensure that Fed-

1 eral agencies properly consider the financial con-
2 sequences of their actions and subsequent impact on
3 the Federal budget;

4 (4) refine and improve Federal policies through
5 adjudication;

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

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

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

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

19 (2) encourage settlement of justified enforce-
20 ment actions directed at small parties covered by
21 EAJA; and

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

1 **SEC. 3. REPORTING AND TECHNICAL ASSISTANCE BY OF-**
 2 **FICE OF ADVOCACY.**

3 (a) FUNCTIONS OF OFFICE OF ADVOCACY.—Section
 4 202 of Public Law 94–305 (15 U.S.C. 634b) is amend-
 5 ed—

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

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

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

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

20 (1) in paragraph (2), by inserting before the
 21 semicolon at the end the following: “, including the
 22 resolution of disputes with the Federal Government
 23 and the role of procedures established by the Equal
 24 Access to Justice Act (Public Law 96–481; 94 Stat.
 25 2325) in such disputes”; and

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

(c) REPORTS TO CONGRESS.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General, in cooperation with the Chief Counsel for Advocacy of the Small Business Administration, shall transmit to the congressional committees specified in paragraph (2) a report containing—

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

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

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

(iii) the extent and quality of rules and regulations adopted by each Federal

1 agency for processing, resolving, and pay-
2 ing attorneys' fees claims under EAJA;

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

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

9 (vi) an analysis of the costs and bene-
10 fits of EAJA generally;

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

21 (C) recommendations for congressional
22 oversight or legislative changes with respect to
23 EAJA, including any recommendations for pro-
24 mulgation or amendment of regulations issued
25 under EAJA by specific Federal agencies.

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

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

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

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

14 (A) in subsection (a), by striking para-
15 graph (5) and inserting the following:

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

23 (B) in subsection (b)—

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

1 (ii) by adding at the end the fol-
2 lowing:

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

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

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

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

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

23 “(E) any other relevant information that the
24 President determines may aid Congress in evalu-

1 ating the impact on small business concerns of such
2 sections.

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

6 (C) in subsection (d)—

7 (i) by striking “(d)” and inserting
8 “(d)(1)”; and

9 (ii) by adding at the end the fol-
10 lowing:

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

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

20 “(B) The Committee on the Judiciary and the
21 Committee on Small Business and Entrepreneurship
22 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.—

4 (A) IN GENERAL.—Section
5 504(b)(1)(B)(ii) of title 5, United States Code,
6 is amended by striking “\$7,000,000” and in-
7 serting “\$10,000,000”.

8 (B) ADJUSTMENT IN NET WORTH LIMITA-
9 TION.—Section 504(b) of title 5, United States
10 Code, is amended by adding at the end the fol-
11 lowing:

12 “(3) Beginning on January 1 of the 5th year
13 following the date of enactment of this paragraph,
14 and on January 1 every 5 years thereafter, the dol-
15 lar amount under paragraph (1)(B)(ii) shall be ad-
16 justed by the Producer Price Index as determined by
17 the Secretary of the Treasury, in collaboration with
18 the Bureau of Labor Statistics.”.

19 (2) JUDICIAL PROCEEDINGS.—

20 (A) IN GENERAL.—Section
21 2412(d)(2)(B)(ii) of title 28, United States
22 Code, is amended by striking “\$7,000,000” and
23 inserting “\$10,000,000”.

24 (B) ADJUSTMENT IN NET WORTH LIMITA-
25 TION.—Section 2412(d) of title 28, United

1 States Code, is amended by adding at the end
 2 the following:

3 “(5) Beginning on January 1 of the 5th year
 4 following the date of enactment of this paragraph,
 5 and on January 1 every 5 years thereafter, the dol-
 6 lar amount under paragraph (2)(B)(ii) shall be ad-
 7 justed by the Producer Price Index as determined by
 8 the Secretary of the Treasury, in collaboration with
 9 the Bureau of Labor Statistics.”.

10 (c) ELIMINATION OF RATE CAP.—

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

14 (A) by striking “(i)”; and

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

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

21 (A) by striking “(i)”; and

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

25 (d) OFFERS OF SETTLEMENT.—

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

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

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

22 (2) JUDICIAL PROCEEDINGS.—Section
23 2412(d)(1) of title 28, United States Code, as
24 amended by this section, is further amended by add-
25 ing at the end the following:

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

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

18 (e) DECLARATION OF INTENT TO SEEK FEE
 19 AWARD.—

20 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 21 504(a)(2) of title 5, United States Code, as amended
 22 by this section, is further amended by inserting be-
 23 fore the first sentence the following: “At any time
 24 after the commencement of an adversary adjudica-
 25 tion, the adjudicative officer may (and if requested

1 by a party shall) require a party to declare whether
 2 such party intends to seek an award of fees and ex-
 3 penses against the agency should such party pre-
 4 vail.”.

5 (2) JUDICIAL PROCEEDINGS.—Section
 6 2412(d)(1)(B) of title 28, United States Code, as
 7 amended by this section, is further amended by in-
 8 serting before the first sentence the following: “At
 9 any time after the commencement of an adversary
 10 adjudication, as defined in subsection (b)(1)(C) of
 11 section 504 of title 5, United States Code, the court
 12 may (and if requested by a party shall) require a
 13 party to declare whether such party intends to seek
 14 an award of fees and expenses against the agency
 15 should such party prevail.”.

16 (f) PAYMENT OF ATTORNEYS’ FEES FROM AGENCY
 17 APPROPRIATIONS.—

18 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 19 504(d) of title 5, United States Code, is amended to
 20 read as follows:

21 “(d)(1) Fees and other expenses awarded under this
 22 section shall be paid by any agency over which the party
 23 prevails from any funds made available to the agency by
 24 appropriation or otherwise.

1 “(2) Fees and expenses awarded under this section
 2 may not be paid from the claims and judgments account
 3 of the Treasury from funds appropriated pursuant to sec-
 4 tion 1304 of title 31.

5 “(3) Paragraph (2) shall not apply to the National
 6 Labor Relations Board, the Occupational Safety and
 7 Health Administration, the Mine Safety and Health Ad-
 8 ministration, or the Equal Employment Opportunity Com-
 9 mission.”.

10 (2) JUDICIAL PROCEEDINGS.—Section
 11 2412(d)(4) of title 28, United States Code, is
 12 amended to read as follows:

13 “(4)(A) Fees and other expenses awarded under this
 14 subsection shall be paid by any agency over which the
 15 party prevails from any funds made available to the agen-
 16 cy by appropriation or otherwise.

17 “(B) Fees and expenses awarded under this section
 18 may not be paid from the claims and judgments account
 19 of the Treasury from funds appropriated pursuant to sec-
 20 tion 1304 of title 31.

21 “(C) Subparagraph (B) shall not apply to the Na-
 22 tional Labor Relations Board, the Occupational Safety
 23 and Health Administration, the Mine Safety and Health
 24 Administration, or the Equal Employment Opportunity
 25 Commission.”.

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

2 (1) ADMINISTRATIVE PROCEEDINGS.—Section
3 504 of title 5, United States Code, as amended by
4 this section, is further amended by striking sub-
5 section (f).

6 (2) JUDICIAL PROCEEDINGS.—Section 2412 of
7 title 28, United States Code, as amended by this
8 section, is further amended by striking subsection
9 (e) and redesignating subsection (f) as subsection
10 (e).

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

15 “(e)(1) The Attorney General, after consultation with
16 the Chief Counsel for Advocacy of the Small Business Ad-
17 ministration, shall report annually to the Congress on the
18 amount of fees and other expenses awarded to individuals
19 during the preceding fiscal year pursuant to this section
20 and section 2412 of title 28. The report shall describe the
21 number, nature, and amount of the awards, the claims in-
22 volved in the controversy, and any other relevant informa-
23 tion which may aid the Congress in evaluating the scope
24 and impact of such awards for individuals engaged in dis-
25 putes with Federal agencies. Each agency shall provide the

1 Attorney General with such information as is necessary
 2 for the Attorney General to comply with the requirements
 3 of this subsection.

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

9 (i) APPLICABILITY.—The provisions of this section
 10 and the amendments made by this section shall apply to
 11 any proceeding pending on, or commenced on or after, the
 12 effective date of this Act.

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

14 (a) TITLE 5.—Section 504(b)(1) of title 5, United
 15 States Code, is amended by adding at the end the fol-
 16 lowing:

17 “(G) ‘prevailing party’ includes, in addition to
 18 a party who prevails through a judicial or adminis-
 19 trative judgment or order, a party whose pursuit of
 20 a nonfrivolous claim or defense was a catalyst for a
 21 voluntary or unilateral change in position by the op-
 22 posing party that provides any significant part of
 23 the relief sought.”.

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

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

4 (2) by adding at the end the following:

5 “(g) For the purposes of this section, the term ‘pre-
6 vailing party’ includes, in addition to a party who prevails
7 through a judicial or administrative judgment or order,
8 a party whose pursuit of a nonfrivolous claim or defense
9 was a catalyst for a voluntary or unilateral change in posi-
10 tion by the opposing party that provides any significant
11 part of the relief sought.”.

12 **SEC. 6. EFFECTIVE DATE.**

13 The provisions of this Act and the amendments made
14 by this Act shall take effect 30 days after the date of the
15 enactment of this Act.

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