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[ [HomePage](#) ]

[ [Feedback](#) ]

## Interim Guidance On Recent Amendments to the EAJA

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CECC-K

30 JUN 1996

MEMORANDUM FOR: See Distribution

SUBJECT: Interim Guidance On Recent Amendments to the EAJA

1. Enclosed for your information is a copy of Sections 231, 232, and 233 of P.L.104-121, signed into law by the President on March 29, 1996.
2. We recently were made aware of the enactment of this statute, and forward the pertinent sections to you, pending a thorough review and analysis and the preparation of Permanent Guidance on these amendments to the Equal Access to Justice Act (EAJA).
3. Public Law 104-121 is the Contract With America Advancement Act of 1996. Title II of that Act is referred to as the Small Business Regulatory Enforcement Fairness Act of 1996; Subtitle A provides for Regulatory Compliance Simplification; Subtitle B provides for Regulatory Enforcement Reforms; and Subtitle C provides for Equal Access to Justice Act Amendments, as per Sections 231, 232, and 233, which are the sections pertinent to this interim guidance.
4. The EAJA Amendments can perhaps best be understood as one part of the Small Business Regulatory Enforcement Fairness Act of 1996, the goal of which is to foster a more cooperative, less threatening regulatory environment among agencies, small businesses and other small entities.
5. As a backdrop to these recent amendments, I note it is clear that the EAJA, as it has existed since August 5, 1985 (see Chief Counsel's 6 NOV 1985 guidance on the Equal Access to Justice Act Amendments, Public Law 99-80), allows for awards of attorney fees and other expenses to parties which prevail against the government in civil litigation and in proceedings before the boards of contract appeals.
6. As of March 29, 1996, Sections 231 (for administrative actions) and 232 (for civil actions) of Public Law 104-121, allow parties which do not prevail in a case involving the government to nevertheless recover a portion of their fees and costs in certain limited circumstances. The test for recovering attorney fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief, or damages) under the facts and circumstances of the case.
7. In addition, Sections 231 and 232 do the following:
  - a. raise the statutory "cap" on the rate of attorney fees from \$75 per hour to \$125 per hour; and
  - b. amend the definition of party to mean a small entity as defined in 5 USC 601 (but only for the purposes of the new provisions allowing an award of attorney fees to parties which do not prevail against the government). A small entity under 5 USC 601 shall have the same meaning as a "small business," "small organization," i.e. independent, not-for-profit enterprise; and "small governmental

jurisdiction," as defined in that section.

8. I am not aware that any eligible party has sought attorney fees under these new provisions against the Corps. However, we anticipate that this may only be a result of the recent nature of the amendments and the lack of knowledge about them in the "wetlands defense" bar. I am hopeful that the impact of these changes to EAJA on our regulatory enforcement program will be minimal. To date, our class I civil penalty program has undertaken very few civil penalty assessments, and the overwhelming number of these resulted in negotiated agreements with the violator. I do not anticipate any great change in that situation in the near future. Similarly, in the consent decree situation, the parties are agreeing on the terms of the decree. Moreover, there should be a standard recitation that each side is bearing their own attorney fees. Therefore, the amendments should have little impact. As for civil litigation, it is my impression that in most complaints, although we may recite maximum statutory penalties, we actually ask for "appropriate civil fines" as determined by the trier of fact (either judge or jury). Thus, almost by definition, we cannot be seeking a fine which will be in substantial excess of what we receive.

9. We will continue to review the amendments and monitor the situation with the Department of Justice. We will also attempt to determine what, if any, impact the amendments may have on actions before the Boards of Contract Appeals. In the interim, however, I believe it would be prudent to review any new complaints to be filed by the Department of Justice or local U. S. Attorneys, to ensure that if we are seeking specific level of civil fines against qualifying small business entities, we take the risk of exposure under the new EAJA amendments into account before the complaint is filed.

10. Your comments and questions pertaining to the application and implications of these amendments would be most helpful as we continue to review this matter, and may be sent, through Division, to this office (Attn: Russell Petit). If you have a specific question concerning the applicability of the amendments to a specific case, an e-mail to me (with copies to Mr. Russ Petit and the appropriate Division Counsel) will be the most efficient way to handle the matter.

FOR THE COMMANDER:

Enclosure

MARTIN COHEN  
Assistant Chief Counsel  
for Litigation

DISTRIBUTION ATTACHED:

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**Enclosure**

104 P.L. 121, \*231

[\*231] SEC. 231.--ADMINISTRATIVE PROCEEDINGS.

(a) Section 504(a) of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(4) If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision,

recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.".

(\*233) SEC. 233. EFFECTIVE DATE.

The amendments made by sections 331 and 332 shall apply to civil actions and adversary adjudications commenced on or after the date of the enactment of this subtitle.

Subtitle D--Regulatory Flexibility Act Amendments

[\*241] SEC. 241.--REGULATORY FLEXIBILITY ANALYSES.

(a) Initial Regulatory Flexibility Analysis.--

(1) Section 603.-- Section 603(a) of title 5, United States Code, is amended--

(A) by inserting after "proposed rule", the phrase ", or publishes a notice of proposed rulemaking for an interpretative rule involving the

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*Send comments to: Webmaster*  
*Revised: 04 March 1996*