

107<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 5179

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.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 23, 2002

Mr. MANZULLO 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

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## 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 Amendments of 2001”.

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) it is in the national interest to remove these  
6 barriers and inefficiencies for small parties, particu-  
7 larly small business owners, involved in disputes with  
8 the Federal Government in order to develop sound  
9 policies relative to the national economy in which  
10 small businesses play a significant and strategic role;  
11 and

12 (7) the removal of these barriers and inefficien-  
13 cies is essential to—

14 (A) equalize the level of accountability to  
15 Federal law among governments in the United  
16 States;

17 (B) discourage marginal or abusive Fed-  
18 eral enforcement actions directed at small par-  
19 ties;

20 (C) refine and improve Federal policies  
21 through adjudication; and

22 (D) provide a fairer opportunity for full  
23 participation by small businesses in the free en-  
24 terprise system, further increasing the economic  
25 vitality of the Nation.

1 (b) PURPOSE.—It is, therefore, the purpose of these  
2 amendments to remove existing barriers and inefficiencies  
3 in EAJA in order to—

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

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

8 (3) refine and improve Federal policies through  
9 adjudication;

10 (4) promote a fair and cost-effective process for  
11 prompt settlement and payment of attorneys' fees  
12 claims; and

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

17 (c) COMPLIANCE.—In complying with the statement  
18 of congressional policy expressed in this section, each Fed-  
19 eral agency, to the maximum extent practicable, shall—

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

22 (2) alleviate unnecessary burdens of compliance  
23 with justified enforcement actions directed at small  
24 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  
8 amended—

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  
10 Chief Counsel for Advocacy of the Small Business  
11 Administration, in cooperation with the Attorney  
12 General, shall transmit to the Committees on Small  
13 Business and the Judiciary of the Senate and House  
14 of Representatives a report containing—

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

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



- 1 (ii) the relative awareness of EAJA's  
2 requirements among Federal agencies;
- 3 (iii) the extent and quality of rules  
4 and regulations adopted by each Federal  
5 agency for processing, resolving, and pay-  
6 ing attorneys' fees claims under EAJA;
- 7 (iv) the extent to which each Federal  
8 agency claims any exemptions in whole or  
9 in part from EAJA's coverage;
- 10 (v) the frequency or degree of use of  
11 EAJA's procedures by prevailing small  
12 businesses; and
- 13 (vi) an analysis of the costs and bene-  
14 fits of EAJA generally;
- 15 (B) an analysis of the variations in the fre-  
16 quency and amounts of fee awards paid by spe-  
17 cific Federal agencies and within specific Fed-  
18 eral circuits and districts under section 504 of  
19 title 5, United States Code, and section 2412 of  
20 title 28, United States Code, including the  
21 number and total dollar amount of all claims  
22 filed with, and all claims processed, settled, liti-  
23 gated, and paid by, each agency under EAJA;  
24 and

1 (C) recommendations for congressional  
2 oversight or legislative changes with respect to  
3 EAJA, including any recommendations for pro-  
4 mulgation or amendment of regulations issued  
5 under EAJA by specific Federal agencies.

6 (2) REPORT ON SMALL BUSINESS AND COM-  
7 PETITION.—Section 303 of the Small Business Eco-  
8 nomic Policy Act of 1980 (15 U.S.C. 631b) is  
9 amended—

10 (A) in subsection (a) by striking paragraph  
11 (5) and inserting the following:

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

19 (B) in subsection (b)—

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

22 (ii) by adding at the end the fol-  
23 lowing:

24 “(2) The President, after consultation with the Chief  
25 Counsel for Advocacy of the Small Business Administra-

1 tion and the Attorney General, shall transmit simulta-  
2 neously as an appendix to such annual report, a report  
3 that describes, by agency and department—

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

11           “(B) the total dollar amount of all outstanding  
12 awards and settlements to small business concerns  
13 under such sections;

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

16           “(D) the underlying legal claims involved in  
17 each controversy with small business concerns under  
18 such sections; and

19           “(E) any other relevant information that the  
20 President determines may aid Congress in evalu-  
21 ating the impact on small business concerns of such  
22 sections.

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

1 (C) in subsection (d)—

2 (i) by striking “(d)” and inserting

3 “(d)(1)”; and

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

6 “(2) All reports concerning the Equal Access to Jus-  
7 tice Act (Public Law 96–481; 94 Stat. 2325), or the con-  
8 gressional policy to ensure that the justice system remains  
9 accessible to small business enterprises for the resolution  
10 of disputes with the Federal Government, shall be trans-  
11 mitted to the Committees on Small Business and the Judi-  
12 ciary of the Senate and House of Representatives.”.

13 **SEC. 4. EQUAL ACCESS FOR SMALL PARTIES IN CIVIL AND**  
14 **ADMINISTRATIVE PROCEEDINGS.**

15 (a) **ELIMINATION OF SUBSTANTIAL JUSTIFICATION**  
16 **STANDARD.—**

17 (1) **ADMINISTRATIVE PROCEEDINGS.—**Section  
18 504 of title 5, United States Code, is amended—

19 (A) in subsection (a)(1), by striking “, un-  
20 less the adjudicative officer” and all that fol-  
21 lows through the period at the end and insert-  
22 ing a period; and

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

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

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

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

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

13          (b) ELIGIBILITY OF SMALL BUSINESSES FOR FEE  
14 AWARD.—

15           (1) ADMINISTRATIVE PROCEEDINGS.—Section  
16 504(b)(1)(B)(ii) of title 5, United States Code, is  
17 amended by striking “\$7,000,000” and inserting  
18 “\$10,000,000”.

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

23          (c) ELIMINATION OF RATE CAP.—

1           (1) ADMINISTRATIVE PROCEEDINGS.—Section  
2           504(b)(1)(A) of title 5, United States Code, is  
3           amended—

4                   (A) by striking “(i)”; and

5                   (B) by striking “by the agency involved”  
6           and all that follows through “a higher fee” and  
7           inserting “by the agency involved”.

8           (2) JUDICIAL PROCEEDINGS.—Section  
9           2412(d)(2)(A) of title 28, United States Code, is  
10          amended—

11                   (A) by striking “(i)”; and

12                   (B) by striking “by the United States” and  
13          all that follows through “a higher fee” and in-  
14          serting “by the United States”.

15          (d) OFFERS OF SETTLEMENT.—

16           (1) ADMINISTRATIVE PROCEEDINGS.—Section  
17           504(a) of title 5, United States Code, as amended  
18           by this section, is further amended by adding at the  
19           end the following:

20           “(5)(A) At any time after an agency receives an ap-  
21          plication submitted under paragraph (2), the agency may  
22          serve upon the applicant a written offer of settlement of  
23          the claims made in the application. If within 10 days after  
24          such service the applicant serves written notice that the  
25          offer is accepted, either the agency or the applicant may

1 then file the offer and notice of acceptance together with  
2 proof of service thereof.

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

12 (2) JUDICIAL PROCEEDINGS.—Section  
13 2412(d)(1) of title 28, United States Code, as  
14 amended by this section, is further amended by add-  
15 ing at the end the following:

16 “(E)(i) At any time after an agency receives an appli-  
17 cation submitted under subparagraph (B), the agency may  
18 serve upon the applicant a written offer of settlement of  
19 the claims made in the application. If within 10 days after  
20 such service the applicant serves written notice that the  
21 offer is accepted, either the agency or the applicant may  
22 then file the offer and notice of acceptance together with  
23 proof of service thereof.

24 “(ii) An offer not accepted within the time allowed  
25 shall be deemed withdrawn. The fact that an offer is made

1 but not accepted shall not preclude a subsequent offer. If  
2 any award of fees and expenses for the merits of the pro-  
3 ceeding finally obtained by the applicant is not more favor-  
4 able than the offer, the applicant shall not be entitled to  
5 receive an award for fees or other expenses incurred (in  
6 relation to the application for fees and expenses) after the  
7 date of the offer.”.

8 (e) DECLARATION OF INTENT TO SEEK FEE  
9 AWARD.—

10 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
11 504(a)(2) of title 5, United States Code, as amended  
12 by this section, is further amended by inserting be-  
13 fore the first sentence the following: “At any time  
14 after the commencement of an adversary adjudica-  
15 tion, the adjudicative officer may (and if requested  
16 by a party shall) require a party to declare whether  
17 such party intends to seek an award of fees and ex-  
18 penses against the agency should such party pre-  
19 vail.”.

20 (2) JUDICIAL PROCEEDINGS.—Section  
21 2412(d)(1)(B) of title 28, United States Code, as  
22 amended by this section, is further amended by in-  
23 serting before the first sentence the following: “At  
24 any time after the commencement of an adversary  
25 adjudication, as defined in subsection (b)(1)(C) of



1 section 504 of title 5, United States Code, the court  
2 may (and if requested by a party shall) require a  
3 party to declare whether such party intends to seek  
4 an award of fees and expenses against the agency  
5 should such party prevail.”.

6 (f) PAYMENT FROM AGENCY APPROPRIATIONS.—

7 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
8 504(d) of title 5, United States Code, is amended—

9 (A) by striking “subsection” and inserting  
10 “section”; and

11 (B) by adding at the end the following:  
12 “Fees and expenses awarded under this section  
13 may not be paid from the claims and judgments  
14 account of the Treasury from funds appro-  
15 priated pursuant to section 1304 of title 31.”.

16 (2) JUDICIAL PROCEEDINGS.—Section  
17 2412(d)(4) of title 28, United States Code, is  
18 amended by adding at the end the following: “Fees  
19 and expenses awarded under this subsection may not  
20 be paid from the claims and judgments account of  
21 the Treasury from funds appropriated pursuant to  
22 section 1304 of title 31.”.

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

24 (1) ADMINISTRATIVE PROCEEDINGS.—Section  
25 504 of title 5, United States Code, as amended by

1 this section, is further amended by striking sub-  
2 section (f).

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

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

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

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

6       (i) APPLICABILITY.—The provisions of this section  
7 and the amendments made by this section shall apply only  
8 to an adversary adjudication initiated, or civil action filed,  
9 on or after the effective date of this Act.

10 **SEC. 5. DEFINITION OF PREVAILING PARTY.**

11       (a) IN GENERAL.—Chapter 1 of title 1, United  
12 States Code, is amended by adding at the end the fol-  
13 lowing new section:

14 **“§ 8. Definition of ‘prevailing party’**

15       “(a) IN GENERAL.—In determining the meaning of  
16 any Act of Congress, or of any ruling, regulation, or inter-  
17 pretation of the various administrative bureaus and agen-  
18 cies of the United States, or of any judicial or administra-  
19 tive rule, which provides for the recovery of attorneys’  
20 fees, the term ‘prevailing party’ shall include, in addition  
21 to a party who prevails through a judicial or administra-  
22 tive judgment or order, a party whose pursuit of a non-  
23 frivolous claim or defense was a catalyst for a voluntary  
24 or unilateral change in position by the opposing party that  
25 provides any significant part of the relief sought.

1 “(b) RELATIONSHIP TO OTHER LAWS.—

2 “(1) SPECIAL CRITERIA FOR PREVAILING DE-  
3 FENDANTS.—If such an Act, ruling, regulation, in-  
4 terpretation, or rule requires a defendant, but not a  
5 plaintiff, to satisfy certain different or additional cri-  
6 teria to qualify for the recovery of attorneys’ fees,  
7 subsection (a) shall not affect the requirement that  
8 such defendant satisfy such criteria.

9 “(2) SPECIAL CRITERIA UNRELATED TO ‘PRE-  
10 VAILING’.—If such an Act, ruling, regulation, inter-  
11 pretation, or rule requires a party to satisfy certain  
12 criteria, unrelated to whether or not such party has  
13 ‘prevailed’, to qualify for the recovery of attorneys’  
14 fees, subsection (a) shall not affect the requirement  
15 that such party satisfy such criteria.”.

16 (b) CLERICAL AMENDMENT.—The table of sections  
17 at the beginning of such chapter is amended by adding  
18 at the end the following new item:

“8. Definition of ‘prevailing party’.”.

19 **SEC. 6. EFFECTIVE DATE.**

20 The provisions of this Act and the amendments made  
21 by this Act shall take effect 30 days after the date of the  
22 enactment of this Act.

○