Collection: Roberts, John G.: Files
Folder Title: JGR/Legal Fees Reform Act (3 of 3)
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WITHDRAWAL SHEET
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Fred F. Fielding to Branden Blum, re DOJ draft bill	4/24/85	~~P5~~ 1003 12/14/00

COLLECTION: ROBERTS, JOHN G.: Files	dlb
FILE FOLDER: Legal Fees Reform [3 of 3] OA ~~12663~~ 12660	3/1/96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA.
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(B)(6) of the FOIA]
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE

WASHINGTON

April 24, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Bill, "The Legal Fees Equity Act"

Counsel's Office has reviewed the proposed "Legal Fees Equity Act." I am not convinced of the wisdom of the two new provisions added to the version of the Act previously cleared and submitted. The present proposal would extend the $75 fee cap to awards under the Independent Counsel statute and to fees paid by Federal agencies for retained private counsel. Both situations are quite different from the typical fee-shifting provision involved in so-called public interest cases, and there is no logical reason to extend the $75 fee cap imposed on plaintiffs bringing suit against the Government to fees awarded to targets of an unfounded Independent Counsel inquiry or to fees paid by agencies for retained counsel. With respect to the latter situation, I see no reason to restrict agency action by law. Agencies can negotiate fee levels with retained counsel, and a $75 fee cap set by law may prevent Federal agencies from securing qualified counsel.

FFF:JGR:aea 4/24/85
cc: FFFielding
JGRoberts
Subj
Chron

FG

ID # 311472 CU

JL007

J.R.

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James C. Miller

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: DOJ draft bill, "The Legal Fees Equity Act"

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/04/19			/ /
Referral Note:					
CUAT18	D	85/04/22		S	85/04/26
Referral Note:					
		/ /			/ /
Referral Note:					
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Referral Note:					
		/ /			/ /
Referral Note:					

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
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5/81

311472 CU

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

April 18, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO:

SEE DISTRIBUTION

SUBJECT: Department of Justice draft bill, "The Legal Fees Equity Act"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than April 26, 1985.
(Note: This bill is similar to an earlier Justice proposal circulated for agency review on 12/9/83, subsequently cleared, and introduced in the 98th Congress as S. 2802 and H.R. 5757.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: F. Fielding, R. Greene, P. Szervo, K. Wilson, R. Irby, R. Veeder, J. Donahue

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: James C. Murr

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Department of Justice draft statement on S. 1580, the Legal Fees Equity Act.

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/10/04			/ /
	Referral Note:				
CUAT18	R	85/10/04		S	85/10/07
	Referral Note:				11:00 a.m.
					/ /
					/ /
					/ /

NO NEED FOR RESPONSES

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

311173

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 17 1985

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

I am enclosing for your review and clearance a bill entitled the "Legal Fees Equity Act," together with a section analysis and transmittal letters to the Speaker of the House of Representatives and the President of the Senate. This bill, which was prepared by the Department of Justice, is essentially the same as the bill proposed last year and introduced in the Senate as S. 2802 and in the House as H.R. 5757. The three significant changes on account of developments since then are:

1) Because Congress enacted last fall the provisions of § 5(d) of the bill -- relating to increased fees for cases under the Criminal Justice Act, 18 U.S.C. § 3006A -- as part of the Comprehensive Crime Control Act of 1984, those provisions have been deleted from this bill.

2) To clarify the scope of the bill once it is enacted, a new § 5(d) has been added to the bill specifically to impose the $75 per hour limit upon attorneys' fees awarded to subjects of investigations under the Independent Counsel statute, 28 U.S.C. § 593(g).

3) In order to provide greater equity and to promote economy and efficiency in the federal government's use of attorneys, the bill would place a limit of $75 per hour on the payment of outside private counsel for litigation by any federal agency from appropriated funds and would authorize the Attorney General to promulgate regulations governing the circumstances in which federal agencies could retain outside private counsel for litigation. The Department of Justice presently has such regulations and enforces a $75 per hour limitation for litigation under its control, but this bill would extend the Attorney General's authority to cover any federal agency that retains a private attorney for litigation who is paid from appropriated funds.

Because the provisions of the bill except for these changes are essentially identical to the version approved last year, I hope that this bill can be cleared expeditiously so that it can be introduced early in the 99th Congress.

Sincerely,

(Signed) Phillip D. Brady

PHILLIP D. BRADY
Acting Assistant Attorney General

DRAFT

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal "To provide for comprehensive reforms in compensation of attorneys pursuant to federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings involving state and local governments."

The proposal, known as the "Legal Fees Equity Act," would establish standards and procedures for awards of attorneys' fees in civil judicial and administrative proceedings against the United States, states, and local governments in cases where federal statutes allow such awards, and eliminates excessive awards in such cases. This bill specifically includes fee awards to subjects of investigations under the Independent Counsel statute, 28 U.S.C. § 593(g), and also expands the authority of the Attorney General over the hiring of outside counsel by federal agencies for litigation.

Numerous federal statutes provide that parties to civil suits and administrative proceedings against the United States, states, or local governments may, in appropriate circumstances, recover "reasonable attorneys' fees" from government defendants. These fee-shifting statutes, for the most part, provide little or no guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes, and in some cases have made awards of attorneys' fees that greatly exceed the relief obtained by the parties in the proceeding. Multipliers and bonuses have been used to double, even triple, normal commercial hourly rates. Attorneys' fee awards at rates in excess of $100 per hour are becoming increasingly common, with some attorneys' fee requests exceeding $400 per hour through the use of multipliers.

Federal, state, and local taxpayers are the ones who must bear the cost of these excessive attorneys' fee awards that confer windfalls upon a select group of attorneys. These developments have fueled litigation over attorneys' fee awards that frequently overshadows the case on the merits, and have created a burgeoning area of practice for legal practitioners and publishers who hold themselves out as experts on how to obtain large awards of attorneys' fees against government defendants.

The need for legislation is, if anything, even more acute with respect to the award of attorneys' fees against state and local governments than against the federal government. As the liability of states and localities for damages and awards of attorneys' fees has greatly expanded under new federal statutes and recent decisions of the Supreme Court, the obligation of Congress to define more clearly the circumstances and extent to which these entities should be liable for attorneys' fees under federal statutes has also grown. The sound functioning of our federal system demands that the national government should not impose upon the state governments an obligation to pay attorneys' fees in circumstances and amounts not limited by Congress.

We are pleased that Congress was able last year to pass part of this proposal doubling the rates for cases under the Criminal Justice Act, 18 U.S.C. § 3006A, but we think that only strengthens the case for enacting the balance of this comprehensive reform of attorneys' fee statutes. We can see no justification for allowing the award of attorneys' fees at the rate of several hundred dollars per hour in civil actions when attorneys representing defendants in criminal proceedings or habeas corpus actions are paid at the revised rates of \$40 or \$60 per hour. The current state of the law still reflects a serious misallocation of resources, at the expense of the public treasury. This bill will provide greater equity by preventing the excessive attorneys' fee awards under civil fee-shifting statutes.

Accordingly, we again urge the enactment of this legislation establishing a number of important guidelines for awards of attorneys' fees in civil judicial and administrative proceedings against federal, state, and local government defendants. The intent is to achieve a more equitable balance in compensation among the various attorneys litigating for or against the government -- attorneys for the government, defense attorneys paid under the Criminal Justice Act, and private attorneys receiving fees under fee-shifting statutes. The salient features of the proposal are summarized below.

1. <u>Level of the Fee Cap</u>. The bill would set the maximum rate for attorney compensation in civil judicial and administrative proceedings under all federal fee-shifting statutes at \$75 per hour, which is the same rate established in the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 (which is still in effect for cases filed before October 1, 1984). The bill would, in all cases under federal fee-shifting statutes, eliminate bonuses and multipliers that courts have used excessively to escalate awards of attorneys' fees.

Because private attorneys in cases under federal fee-shifting statutes are, in one sense, doing "government legal work," it is inappropriate for the compensation that taxpayers pay to "private attorneys general" who sue the government to exceed significantly the compensation paid to the "public attorneys general" who defend the government. The proposed legislation would compensate private attorneys at a level commensurate with (but still significantly higher than) that of their government counterparts, and would provide for a reasonable incentive sufficient to attract competent counsel in fee-shifting cases.

2. <u>Awards to Prevailing Parties</u>. The bill would allow recovery of attorneys' fees only when a party has prevailed on the merits of its complaint, or, in accordance with existing case law, where the suit is concluded by settlement agreement. In addition, the bill would allow recovery of attorneys' fees only for work performed on issues in the case on which the party prevailed, and only to the extent the work performed was not excessive, redundant, or otherwise unnecessary.

3. <u>Reduction of Fee Awards</u>. The bill would specify several bases for reducing or denying fee awards that otherwise would be allowed under federal fee-shifting statutes. Reduction of the award would be appropriate, for example, in cases where a party has unreasonably protracted the litigation; where no bona fide attorney-client relationship is found to exist; where the award is excessive in comparison to the monetary results achieved in the litigation; or where the services provided were excessive with regard to the nature of the controversy. The bill would also provide for reduction of the fee award when it unreasonably exceeds the hourly salary of a salaried attorney. As a guideline, the proposal would require special scrutiny of awards at rates exceeding an amount double an attorney's hourly salary. Allowing twice the hourly salary should cover normal overhead expenses and provide for a reasonable allowance in most cases. The provision would not require courts to limit awards to an amount twice the attorneys' hourly salary, but is designed to ensure that courts carefully review awards to salaried attorneys so as to avoid conferring windfalls at the expense of taxpayers.

The bill would also provide that, in any case where a party recovers a money judgment against a federal, state, or local government, up to 25% of the judgment shall be applied to the party's legal fees. This provision would not apply to suits under certain provisions of the Equal Access to Justice Act that allow attorneys' fees only when the government's position is not found to be substantially justified. This provision also would not apply to suits for recovery of disputed taxes under 26 U.S.C. § 7430, or in cases of undue hardship.

4. <u>Procedural Guidelines</u>. The bill would establish certain procedural requirements for processing of attorneys'

fee applications under federal fee-shifting statutes, and would require courts and agencies to develop additional guidelines.

5. Independent Counsel Investigations. To avoid any ambiguity in the coverage of the legislation, the bill would specifically amend the Independent Counsel statute, 28 U.S.C. § 593(g), to impose the same $75 per hour limitation upon any fee award to a subject of an investigation under that statute.

6. Limitation on Outside Counsel Retained by Federal Agencies. To further the comprehensive nature of the bill, and to promote efficiency and economy in the federal government's use of outside counsel, the bill would impose a $75 per hour limit upon the amounts payable to outside private counsel retained by any federal agency for litigation where the taxpayers must foot the bill. It would also authorize the Attorney General to promulgate regulations governing the circumstances in which any federal agency could retain outside counsel for litigation. Although the Department of Justice presently has such regulations and enforces a $75 per hour limit for outside counsel in litigation subject to its litigation control, legislation such as this is necessary in order to extend the Attorney General's authority over the outside counsel practices of agencies with independent litigation authority. This amendment only relates to the hiring of outside counsel from appropriated funds for purposes of litigation, and does not affect an agency's use of its own attorneys for litigation.

Conclusion

The Department of Justice urges prompt and favorable consideration of the proposed legislation, which would establish much-needed guidelines for awards of attorneys' fees in civil cases against federal, state, and local government defendants. Enactment of this legislation would promote a more equitable system of compensation for attorneys paid by the government in civil cases, and should substantially reduce the present burdens of litigation over attorneys' fee awards, which one Supreme Court Justice has labeled "one of the least socially productive types of litigation imaginable." Hensley v. Eckerhart, 103 S. Ct. 1933, 1944 (1983) (Brennan, J., dissenting).

The Office of Management and Budget has advised this Department that the enactment of this proposed legislation would be in accord with the President's program.

Sincerely,

PHILLIP D. BRADY
Acting Assistant Attorney General

DRAFT

A BILL

To provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings involving state and local governments.

<u>Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled</u>, That this Act may be cited as "The Legal Fees Equity Act."

SEC. 2. <u>Findings and Purposes</u>

(a) Congress hereby finds and declares that--

(1) Many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against the United States, or against state or local governments, in judicial and administrative proceedings;

(2) The failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) It is inappropriate for the federal government to impose on state and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) The limitation of $75 per hour prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against state or local governments, in judicial or administrative proceedings;

(5) It is inappropriate for awards of attorneys' fees to be made to parties who have not prevailed on the merits of their complaint against the United States, or against state or local governments, in judicial or administrative proceedings;

(6) It is appropriate that parties in judicial or administrative proceedings against the United States, or against state or local governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) Statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against state or local governments, in judicial or administrative proceedings; and

(8) Statutory amendments are also appropriate to limit the circumstances in which federal agencies hire outside private counsel from litigation and the amounts at which such outside counsel can be paid.

(b) It is the purpose of this Act--

(1) To establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against

the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies;

(2) To require that awards of attorneys' fees against the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings;

(3) To prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies; and

(4) To require the Attorney General to promulgate regulations governing the circumstances in which federal agencies can retain outside private counsel for litigation and to impose a uniform limit on the rates such counsel can be paid from appropriated funds.

SEC. 3. Definitions

For the purpose of this Act--

(1) "Attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, plus overhead expenses, as defined in this Act, but does not include related expenses;

(2) "Fee-shifting statute" means any federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a state or local government;

(3) "Overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "Related expenses" means those expenses that may be awarded pursuant to a federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 of title 28, United States Code;

(5) "Party" means, for purposes of judicial proceedings, a party as defined by Rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of Title 5, United States Code, which is an individual, partnership, corporation, association, unincorporated business, estate or public or private organization other than an agency. The term "party" does not include the United States, or any state or local government, except when a state or local

government opposes the United States in a judicial or administrative proceeding;

(6) "Judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may under federal statute be awarded attorneys' fees or related expenses;

(7) "Administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may by statute be awarded attorneys' fees or related expenses;

(8) "Administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "Prevailed on the merits" means having succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "Decision on the merits" means a final judgment by the court, within the meaning of Rules 54-58 of the Federal Rules of Civil Procedure, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceeding, and includes a dismissal with prejudice or a dismissal pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any state government, or any agency of the state government, or any official of the state government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "Local government" means any county, city, town, municipality, municipal corporation, school board, or other political subdivision created by a state, or any agency of such entity, or any official of such entity acting in his or her official capacity.

SEC. 4. Scope and Application; Relationship to Other Laws

(a) The provisions of this Act --

(1) apply to the award of attorneys' fees and related expenses authorized, pursuant to any federal fee-shifting statute, to be made against the United States, or against state or local governments, in any judicial or administrative proceeding, and

(2) establish minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against state or local governments, in any judicial or administrative proceeding, except as expressly authorized by federal statute (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c) The provisions of any applicable federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act. Where an award of attorneys' fees is authorized both under a federal fee-shifting statute and under the common law, such award shall be made in accordance with the provisions of the applicable federal fee-shifting statute and with the provisions of this Act.

(d) Nothing in this Act shall be interpreted--

(1) to create any right to an award of attorneys' fees or related expenses against the United States, or against state or local governments, in any judicial or administrative proceeding, or

(2) to provide authority for any court or administrative officer to make such an award of attorneys' fees or related expenses in such proceeding.

(e) Awards of attorneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(4), (b)(5), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act shall not apply to compensation of attorneys in federal criminal proceedings or in civil habeas proceedings under the Criminal Justice Act, section 3006A of title 18, United States Code.

SEC. 5. Allowance of Attorneys' Fees

A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that --

(1) The party has prevailed on the merits against the United States, or against a state or local government;

(2) The attorneys' fees and related expenses for which the award is sought--

(A) resulted from work performed in connection with issues upon which the party prevailed, and

(B) such work was necessary to resolve the controversy;

(3) The application for attorneys' fees and related expenses is made in accordance with Section 7 of this Act;

(4) The attorneys' fees sought are not in excess of the amount permitted under section 6(a) of this Act; and

(5) The attorneys' fees sought are for services that are not excessive, redundant, or otherwise unnecessary.

SEC. 6. Amount of Attorneys' Fees

(a)(1) No award of attorneys' fees against the United States, or against a state or local government, to which this Act applies shall exceed $75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b) The court or administrative officer of an agency may reduce or deny the amount of attorneys' fees and related expenses otherwise allowable, based on a finding that--

(1) the prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted the final resolution of the controversy;

(2) there is no bona fide attorney-client relationship with an identified client;

(3) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the attorney representing the party;

(4) the time and legal services provided were excessive with regard to the nature of the controversy;

(5) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding; or

(6) a reduction or denial of the amount of attorneys' fees would otherwise be appropriate under the applicable fee-shifting statute.

Courts and administrative officers shall exercise their discretion in determining the amount of any reduction of an award under this subsection.

(c) The monetary judgment awarded in any judicial or administrative proceeding shall be reduced (but not by more than 25% thereof) by the amount of attorneys' fees otherwise authorized to be made against the United States, or against state or local governments, unless the court or administrative officer determines that undue hardship would result. This subsection shall not apply to awards of attorneys' fees pursuant to section 7430 of the Internal Revenue Code.

(d) Section 593(g) of title 28, United States Code, relating to independent counsel investigations, is amended by adding at the end thereof the following new sentence: "Such award shall not exceed $75 per hour.".

SEC. 7. Timely Applications and Procedures

(a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and related expenses only within thirty days after either a decision on the merits by the court or the entry by an administrative officer of an agency of a final decision in an administrative proceeding. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or administrative officer of the agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a decision on the merits by the court or entry by an administrative officer of a final decision of an administrative proceeding.

SEC. 8. Mootness and Settlement Defenses

No award of attorneys' fees and related expenses subject to the provisions of this Act may be made--

(1) where the government demonstrates that--

(A) the claims have become moot due to a change in government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that--

(A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and

(B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred.

SEC. 9. Comptroller General Report

The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against state or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

SEC. 10. Limitation on Employment and Compensation of Outside, Private Counsel

Section 3106 of title 5, United States Code, is amended to read as follows:

"§ 3106. Employment of attorneys; restrictions

"(a) Except as otherwise authorized by law, the head of an Executive department, military department, or other agency, including an independent agency, board, or commission, may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

"(b) Notwithstanding any other provision of law --

(1) an Executive department, military department, or other agency, including an independent agency, board, or commission, shall not retain outside, private counsel for the conduct of judicial or administrative litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, except upon a certification of need by the Attorney General and in accordance with regulations promulgated by the Attorney General; and

(2) no payment from appropriated funds to such outside, private counsel retained pursuant to subsection (b)(1) shall exceed $75 per hour.

"(c) The Attorney General, after consultation with the Office of Management and Budget, the Office of Personnel Management, and other interested agencies, and upon public notice and comment pursuant to section 553 of this title, shall promulgate regulations implementing this section, including --

(1) the circumstances, terms, and conditions under which Executive departments, military departments and other agencies, including independent agencies, boards, and commissions, are authorized to employ outside, private counsel to be paid from appropriated funds;

(2) procedures for the receipt and prompt resolution of applications from any agency for a certification of need by the Attorney General, in a particular case or class of cases, authorizing the retention of outside, private counsel for litigation in circumstances not otherwise permitted under this section; and

(3) the coordination of the use and availability of the expertise of attorneys within the Executive Branch of government for litigation.

The regulations authorized by this subsection and the determinations of the Attorney General pursuant to such regulations shall not be subject to judicial review.

"(d) For the purposes of this section, the term "outside, private counsel" means an attorney, firm, legal services organization, or association engaged in the practice of law other than as an employee of the United States.

"(e) This section does not apply to the employment and payment of counsel under section 1037 of title 10.".

SEC. 11. <u>Effective Date</u>

The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.

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Section by Section Analysis

Section 1 -- Short Title

Section 1 provides that the Act may be cited as the "Legal Fees Equity Act."

Section 2 -- Findings and Purposes

Numerous federal statutes provide that parties to civil suits and administrative proceedings against the United States, states, or local governments may, in appropriate circumstances, recover "reasonable attorneys' fees" from government defendants. These statutes have put a great burden on the courts because, for the most part, Congress has provided little or no guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes -- in some cases using "multipliers" and "bonuses" to double, and even triple, the normal hourly rates of the prevailing party's attorney. This has resulted in uncertainty at least the appearance of arbitrariness or unfairness to litigants. Litigation over attorneys' fee awards frequently overshadows the case on the merits, and has led to the creation of a burgeoning area of practice for attorneys' fee litigators.

The problems evident in this area are in some respects even more serious with respect to the states and localities. Recent decisions of the Supreme Court have expanded greatly the liability of states and local governments to suits under various Federal statutes, and correspondingly to awards of attorneys' fees. As the liability of the states and localities has greatly expanded in recent years, the obligation of Congress to define more clearly the circumstances and extent to which they should be held liable for attorneys' fees under Federal statutes has also grown.

The purpose of the bill is to have Congress provide greater guidance to the courts and federal agencies for the award of attorneys' fees pursuant to federal statute, and to reduce the current uncertainties and disparities reflected in the present decisions. The bill is not intended to deny fees to attorneys for prevailing parties; only to set common standards and procedures that would apply to all awards of attorneys' fees against the United States, and against state and local governments. This will increase the fairness and equity of the current maze of fee-shifting statutes, and should increase public acceptance of these statutes which compensate private attorneys from the public treasury.

With respect to civil judicial and administrative proceedings, the bill is intended to provide guidance in the calculation of fee awards, and to limit the hourly rate of compensation to $75 per hour, which is the same rate established in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1) and (d)(3) and 5 U.S.C. § 504(b). This $75 per hour rate would also apply specifically to a fee award to a subject of an independent counsel investigation pursuant to 28 U.S.C. § 593(g). The bill would eliminate the use of bonuses and multipliers.

The bill is also intended to limit the recovery of attorneys' fees to those cases in which a party has prevailed on the merits of the complaint, and only for work performed on issues in the case on which the party prevailed. The bill also specifies several discretionary bases for reducing or denying fee awards that otherwise would be allowed under federal fee-shifting statutes -- for example, where a party's conduct unreasonably protracted the litigation; or the requested fee award unreasonably exceeds the hourly salary of a salaried attorney -- and provides, in any case where a party recovers a money judgment against a federal, state, or local government, for 25% of the judgment to be applied to the party's legal fees. 1/

Finally, the bill would amend the existing restrictions of 5 U.S.C. § 3106 to expand their coverage specifically to include the employment of outside private counsel by federal agencies.

Section 3 -- Definitions

Section 3 defines the terms used in the bill. "Attorneys' fees" are defined as fees attributable to professional legal services performed by a person, or persons, licensed to practice law, including enrolled tax practitioners who practice before the United States Tax Court. This definition is intended to limit awards to licensed practitioners, and not to allow awards to non-licensed, *pro se* claimants or law students. 2/ The definition applies to all fee-shifting statutes, and is intended

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1/ This 25% reduction would not apply to suits under certain provisions of the Equal Access to Justice Act, to suits for recovery of disputed taxes under 26 U.S.C. § 7430, or where undue hardship would result.

2/ Most courts have ruled that *pro se* litigants generally are ineligible for attorneys' fees awards. *See* *Cofield v. City of Atlanta*, 648 F.2d 986 (5th Cir. 1981); *Owens - El v. Robinson*, 498 F. Supp. 877 (W.D. Pa. 1980); *Crooker v. Department of Justice*, 632 F.2d 916, 922 (1st Cir. 1980); and *Burke v. Department of Justice*, 559 F.2d 1182 (10th Cir. 1977), *aff'g mem.* 432 F. Supp. 251 (D. Kan. 1976). The D.C. Circuit, however, has awarded attorneys' fees under the FOIA to *pro se* prisoners and to law students who received 12 hours of course credit. *See* *Crooker*
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to cover all awards of fees that in fact reflect compensation of attorneys, however denominated, including those designated as "costs" by the court or administrative agency. 3/ "Attorneys' fees" includes "overhead expenses" but does not include "related expenses."

Expenses to be included as "overhead expenses" should be considered as such except in extraordinary circumstances. The list of overhead expenses is not exhaustive, and other appropriate expenses may be included as "overhead expenses." The list is intended to preclude considering these expenses as "related expenses," except in extraordinary circumstances.

"Related expenses" are those expenses that may be awarded pursuant to federal statute, are not "overhead expenses," and are actually incurred by the attorney as a result of judicial or administrative proceedings. The term is intended to be a generic term encompassing those expenses that can properly be awarded under federal law; it does not expand the types of expenses that may be awarded. "Related expenses" does not include "attorneys' fees."

This definition is not intended to affect case law under Title VII and 42 U.S.C. § 1988 which, in some instances, has authorized awards of costs beyond those specified in 28 U.S.C. § 1920 to include such items as lodging and travel expenses. See, e.g., Northcross v. Board of Education, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). However, as noted, the definition of overhead expenses precludes

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v. Department of Treasury, 663 F.2d 140 (D.C. Cir. 1980); Jordan v. Department of Justice, No. 81-1380 (D.C. Cir. Oct. 5, 1982). The definition of "attorney," however, is not intended to affect judicial interpretations regarding whether individual statutes authorize awards of attorneys' fees to licensed attorneys appearing pro se. For example in White v. Arlen Realty & Development Corp., 614 F.2d 387 (4th Cir.) (per curiam), cert. denied, 447 U.S. 923 (1980), the Fourth Circuit denied an award of attorneys' fees to a plaintiff-attorney under the Truth-in-Lending Act.

3/ Generally, courts have followed the principle that attorneys' fees are not costs, but are separate, with attorneys' fees awards authorized by various fee-shifting statutes and costs authorized by 28 U.S.C. §§ 2412(a) and 1920. However, some statutes, such as Title VII of the Civil Rights Act and 42 U.S.C. § 1988, have been interpreted to make attorneys' fees part of costs. See Delta Air Lines v. August, 450 U.S. 346 (1981) (Title VII). If left unaddressed, parties could attempt to circumvent the $75 fee limitation and other provisions in this bill regarding attorneys' fees by seeking attorneys' fees as costs under these statutes.

considering the items enumerated there as "related expenses." The definition also excludes costs enumerated in 28 U.S.C. § 1920, and the bill is not intended to affect the allocation of costs enumerated in that section.

Courts and administrative officers may include as "related expenses" actual costs incurred for the services of paralegals and law clerks who assist attorneys in representing their clients.

The definitions of "decision on the merits" and "prevail on the merits" are discussed in connection with the provisions of section 5(1) of the bill, which requires that a party seeking an award of attorneys' fees must prevail on the merits.

Section 4 -- Scope and Application; Relationship to Other Laws

Subsection (a) provides that the provisions of this bill are intended to apply to all awards of attorneys' fees against the United States, or any state or local government, and to establish minimum criteria for such awards. In this way, this bill will provide greater uniformity and order for the scores of attorneys' fee statutes that authorize awards of attorneys' fees and related expenses against the federal, state, and local governments.

Subsection (b) provides the general rule that, notwithstanding any other provision of law, the provisions of this bill would apply to, and modify, all federal fee-shifting statutes, including the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412(b) and (d). No award of attorneys' fees and related expenses could exceed the amounts determined under the bill.

The bill only restricts the liability of governments for attorneys' fees. Nothing in this bill is intended to overturn cases such as Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978), where plaintiffs were required to pay the governmental defendant's attorneys' fees because the plaintiffs' claim was found to be "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Moreover, 28 U.S.C. § 2412(b) presently provides a statutory basis for the award of attorneys' fees against the United States under certain established common law theories.

Subsection (c) provides that the criteria for the awards of attorneys' fees and related expenses established by this bill would not supersede more restrictive criteria contained in other statutes for making such awards. The provisions of this bill establish minimum criteria to be applied for determining and awarding attorneys' fees and related expenses or costs in judicial and administrative proceedings against the United States or against state or local governments. 4/

Subsection (d) provides that nothing in the bill shall be interpreted to create any right to an award of attorneys' fees or related expenses. Any right to such an award derives solely from the provisions of other laws.

The bill does not affect the award of attorneys' fees against the government in cases such as those under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, or cases involving National Service Life Insurance or United States Government Life Insurance, under 38 U.S.C. § 784. Those statutes are not federal fee-shifting statutes, because the attorneys' fees are paid from the prevailing party's total award of damages or proceeds and are not a separate award entered against the government.

Subsection (e) provides that, although the bill generally would apply to awards under the Equal Access to Justice Act ("EAJA"), the provisions of section 6(a)(1) (establishing a limitation of $75 per hour for attorneys' fees) and section 6(c) (reduction of fee awards in money damages cases) of the bill would not apply to awards made under 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3) (as in effect for cases filed before October 1, 1984). Those provisions of the EAJA provide for awards of attorneys' fees to eligible parties who prevail in litigation with the United States unless the government proves that its position in the litigation was substantially justified. Those provisions already have a general rule limiting fee awards to no more than $75 per hour. In addition, the factors listed for reduction of fee awards in paragraphs (4) and (5) of section 6(b) of the bill would not apply under those provisions of the EAJA. 5/ The language and legislative history of those provisions of the EAJA reflect Congress's intent to award attorneys' fees to prevailing parties who meet the qualifications of that Act, unless the government's position was "substantially justified" or "special circumstances" would make an award of attorneys' fees unjust. The purpose of this subsection is to assure that the special characteristics of the EAJA in this respect will not be affected by this bill. The exceptions described in this

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4/ For example, 5 U.S.C. § 7701(g)(1) provides that attorneys' fees may be awarded if (1) the party has prevailed; and (2) the award of attorneys' fees would be "warranted in the interest of Justice. . . ." The second of these two criteria, which is not contained in the bill, would continue to apply.

5/ These discretionary factors authorize a reduction of the attorneys' fee award based on findings that the time and legal services were excessive with regard to the nature of the controversy, or that the amount sought unreasonable exceeds the monetary result or injunctive relief achieved.

subsection would not apply to attorneys' fee awards under 28 U.S.C. § 2412(b).

Subsection (f) provides that the provisions of the bill shall not apply in federal criminal proceedings or civil habeas corpus proceedings in the federal courts under the Criminal Justice Act, 18 U.S.C. § 3006A.

Section 5 -- Allowance of Attorneys' Fees

Section 5 of the bill establishes the prerequisites to an award of attorneys' fees and related expenses against the United States, or against state or local governments, in any civil judicial or administrative proceeding to which a federal fee-shifting statute applies. The party seeking such awards must establish, and the court or administrative officer must determine, (1) that the party prevailed on the merits of its complaint in the proceeding; (2) that the work for which the award is sought was performed in connection with issues on which the party prevailed and was necessary to resolve the controversy; (3) that the application is submitted in compliance with the procedural requirements of Section 7; (4) that the attorneys' fees sought do not exceed amounts authorized under Section 6; and (5) that the services for which attorneys' fees are sought are not excessive, redundant, or otherwise unnecessary.

As set forth in section 4(c) of the bill, the requirements of this section for awards of attorneys' fees, including the requirement that a party "prevail," are not intended to supersede other additional requirements established by law, such as those under 5 U.S.C. § 7701(g)(1) (where an award to a prevailing party must be "warranted in the interest of Justice").

Nothing in this section is intended to change the burden of proof for determinations of "substantial justification" in applications for fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3) (as in effect for cases filed before October 1, 1984). The burden remains on the government to prove "substantial justification" in connection with such applications.

Prevail on the Merits. Paragraph (1) would preclude awards of attorneys' fees and related expenses against the United States and against state and local governments unless the party seeking the award prevailed on the merits of its complaint. The definition of "prevail on the merits" focuses on whether the party was successful on significant issues in the controversy and obtained significant relief in connection with these issues. This is intended to be a more flexible standard than some formulations of this term. *Cf. Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981) (a prevailing party for attorneys' fees purposes "has been successful on the central issue" in the case, and has "acquired the primary relief sought"). The relief sought need not be "central," but must be significant in terms of the result sought by the party. In this respect, the bill reflects the first part of the test enunciated by the Supreme Court in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983) ("plaintiffs may be considered prevailing parties for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit") (emphasis added).

This bill differs, however, from the second part of the Hensley formulation. The language of Hensley is subject to misreading, as the district court did in Laffey v. Northwest Airlines, Inc., No. 2111-70 (D.D.C. July 29, 1983), rev'd, No. 84-1838 (D.C. Cir. Sep. 28, 1984). There, the district court found that the plaintiffs to be prevailing parties for all purposes even though they in fact failed to achieve the results sought in important respects.

The purpose of the bill is to state more precisely that the relief obtained by the party must be significant, not merely "some of the benefit" the party sought. The relief obtained should be significant in terms of the result sought by the party in bringing the suit. Cf. Hensley v. Eckerhart, 103 S. Ct. at 1943 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole").

The requirement to show that the party has prevailed on the merits would also apply to statutes, such as the Clean Air Act, that authorize the award of attorneys' fees "when appropriate." 6/

This paragraph provides that the party must prevail in a "decision on the merits" of a court or a final disposition by an agency in an administrative proceeding. The Federal Rules of Civil Procedure generally define a final judgment as any order from which an appeal lies, including dismissals and default and summary judgments, and final judgments entered on less than all pending claims pursuant to Rule 54(b). The definition of "decision on the merits" is limited to those final judgments in which the party establishes entitlement to relief on the merits. Thus, an award of attorneys' fees would not be appropriate for a party who has prevailed only on a motion for preliminary injunction or for a temporary restraining order, where the merits of the suit have not been resolved. However, the definition would permit the award of attorneys' fees where the party defending

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6/ The Supreme Court in Ruckelshaus v. Sierra Club, 51 U.S.L.W. 5132, 5136 (U.S. July 1, 1983) (No. 82-242), held that the claimant must demonstrate that it enjoyed "some degree of success on the merits" in order to receive attorneys' fees under the Clean Air Act, which provides for such fees "when appropriate."

against a suit brought by the government obtains the dismissal of a groundless complaint. 7/

The bill would preclude so-called "interim awards" of attorneys' fees except where the text or legislative history of an applicable fee-shifting statute indicates that Congress has authorized them, but such awards should be made only "to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). In Hanrahan, the Supreme Court noted that the legislative history of 42 U.S.C. § 1988 cited, as examples of appropriate circumstances for interim fee awards, two cases 8/ in which the "party to whom the fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered." Id. at 757. The Court found that the plaintiffs had not prevailed on the merits of any of their claims and reversed the award of attorneys' fees. Id. at 758. Further, the Court ruled that attorneys' fees are not to be awarded for nondispositive rulings regarding matters of discovery, evidence, or procedure. Id. at 759. See also Smith v. University of North Carolina, 632 F.2d 316, 350-51 (4th Cir. 1980).

Paragraph (1) is not intended to modify existing case law providing that attorneys' fees may be awarded in cases where the litigation is terminated by settlement agreement, as long as the party seeking fees has prevailed on the merits of the relief sought. 9/ Nor is the provision intended to preclude discussions between the parties of attorneys' fees, or the waiver thereof,

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7/ See H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. 21-22 (1980). See also United States ex rel. Heydt v. Citizens State Bank, 668 F.2d 444, 447 (8th Cir. 1982) (organization which successfully opposed IRS summons in order to protect the confidentiality of its members was a prevailing party under the EAJA; however, no attorneys' fees were awarded because the IRS position was substantially justified).

8/ Bradley v. Richmond School Board., 416 U.S. 696 (1974) and Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), are cited in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 6 (1976).

9/ See, e.g., Ward v. Schweiker, 562 F. Supp. 1173 (W.D. Mo. 1983). As the court stressed in Parker v. Matthews, 411 F. Supp. 1059, 1054 (D.D.C. 1976), aff'd, 561 F.2d 320 (D.C. Cir. 1977), the settlement should be carefully scrutinized to determine if an award of attorneys' fees is justified:

> "[W]hether to award attorneys' fees where there has

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before the decision on the merits by a court or the final disposition by an administrative officer, or to prevent the government from discussing liability for attorneys' fees in conjunction with liability on the merits as part of a settlement agreement, or from including in a settlement agreement provisions for attorneys' fees and related expenses or costs.

Necessary Work on Prevailing Issues. Under paragraph (2), a prevailing party seeking an award of attorneys' fees and related expenses against the United States, or against state or local governments, must show that the work for which fees are sought was performed in connection with issues, substantive or procedural, upon which the party prevailed, and was necessary to the resolution of the controversy. 10/ This provision is not intended to preclude awards of attorneys' fees and related expenses where a party's pleadings contain meritorious alternative grounds for relief, based on the same facts as those on which the party prevailed, on which a court or administrative officer did not rule because the party prevailed on other grounds. In such instances, awards of attorneys' fees and related expenses may include amounts attributable to time expended on such alternative pleadings, if the court or administrative officer determines that the alternative pleadings were reasonably directed to the resolution of the merits of the controversy. Awards of attorneys' fees and related expenses are not to be made in cases where the specific statutory provisions construed in the case do not provide for the award of attorneys' fees. 11/

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been a settlement of a Title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue -- discrimination."

10/ See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940 ("[W]ork on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' . . . [T]herefore no fee may be awarded for services on the unsuccessful claim.").

11/ See Smith v. Robinson, 104 S. Ct. ___ (1984) (affirming court of appeals' reversal of district court's award of attorneys' fees where case was grounded on the Education for All Handicapped Children Act, which does not provide for the award of attorneys' fees, even though the plaintiff included allegations based on section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, which the courts did not reach). As the Court explained, "Whatever Congress' intent was in authorizing fees for substantial, unaddressed claims based on § 1988 or § 505, it could not have been to allow plaintiffs to receive an award of

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Other showings. Paragraphs (3) and (4) require that the application for awards of attorneys' fees and related expenses be made in accordance with the provisions of this Act. Paragraph (5) requires the party seeking attorneys' fees to establish that the services for which fees are sought were not "excessive, redundant, or otherwise unnecessary." 12/ Because intervenors are "parties" for the purposes of this bill, they may receive awards of attorneys' fees if they meet the requirements of the applicable fee-shifting statute and this bill, including the showing required by this paragraph.

Section 6 -- Amount of Attorneys' Fees

Civil Fee-Shifting Statutes

Paragraph 6(a)(1) establishes a maximum hourly rate of \$75 for attorneys' fees awards against the United States, states, and local governments under federal fee-shifting statutes. 13/ This provision shall not apply to awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) and (d)(3), because the EAJA has its own limit of \$75 per hour, subject to specified exceptions. 14/ In calculating the amount

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attorney's fees where Congress has made clear its intent that fees not be available." Id. at ___. See also Irving Independent School District v. Tatro, 104 S. Ct. ___, ___ (1984).

12/ See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940.

13/ In determining the total award of attorneys' fees, courts and administrative officers should continue the practice of determining the number of hours reasonably expended in the proceeding, multiplied by a reasonable hourly rate not exceeding \$75. In deciding whether the hours claimed were "reasonably expended" under any fee shifting statute, the Supreme Court has admonished that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Hensley v. Eckerhart, supra, 103 S. Ct. at 1940, citing Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). In arriving at the total fee award, the factors set forth in section 6(b) and those identified by the Supreme Court in Hensley v. Eckerhart, supra, 103 S. Ct. at 1940-41, should be considered.

14/ The provisions of the Equal Access to Justice Act, unlike other fee-shifting statutes, predicate awards of attorneys' fees not only upon a finding that the party prevailed, but also that the government was not substantially justified in its position. In light of the latter requirement and the EAJA's existing fee
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of any award of fees, section 6(a)(2) provides that multipliers or bonuses shall not be used.

The $75 per hour limit in subsection (a) is intended to assure that fees paid to private counsel in fee-shifting cases are brought somewhat more in line with the salaries of attorneys who represent the government in these cases, while providing sufficient incentive to attract competent counsel. This is appropriate, because many federal fee-shifting statutes are premised on the theory that groups or individuals who sue the government for the public benefit are acting as "private attorneys general." Attorneys' fees paid by taxpayers to these "private attorneys general" should be generally commensurate with the salaries paid by taxpayers to federal "public attorneys general." 15/ Even the rate of $75 per hour set in the bill is well above the compensation of government attorneys.

It is emphasized that this subsection establishes only a maximum hourly rate of compensation, and that prevailing rates may in fact be less than the maximum allowed under the bill. Courts should give due consideration to the fees normally received by the attorney for similar work and other relevant factors. Attorneys' fees may be awarded at hourly rates less than the maximum established by this bill.

Subsection (b) provides that courts or administrative officers may reduce or deny awards of attorneys' fees and related expenses against the United States, or against state or local governments, where it is determined that (1) the prevailing party unreasonably protracted the final resolution of the controversy; (2) there is no bona fide attorney-client relationship with an identified client; (3) the attorneys' fee unreasonably exceeds the hourly salary of a salaried attorney; (4) the time and legal services provided were excessive with regard to the nature of the controversy; (5) that the attorneys' fee award otherwise allowable would unreasonably exceed the monetary result or injunctive relief achieved in the proceeding; or (6) the award would otherwise be unjust or inappropriate. The amount of any reductions pursuant to this subsection shall be at the discretion of the court or administrative officer. The fourth and fifth factors would not apply to awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) of the Equal Access to Justice Act (as in effect for cases filed before October 1, 1984). This exception

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limitation provision, it is unnecessary to apply the general fee limitation of this bill to the EAJA.

15/ Federal fee-shifting statutes "should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general." Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).

is intended to maintain the status quo in the interpretation of the "special circumstances" provision of the EAJA, and not to affect the courts' construction of that term in the context of fee awards under the EAJA.

Paragraph (1) is patterned on the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(C) and 5 U.S.C. § 504(a)(3). Paragraphs (2) and (4) are similar to provisions for determining reasonable attorneys' fees in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1619(d)(2). Paragraph (4) is derived from Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978), where the district court was directed to determine whether it was reasonably necessary to spend the number of hours claimed by the attorneys in order to perform the legal services for which compensation was sought.

Paragraph (3) provides that the court or administrative officer may consider, as a basis for reducing an otherwise allowable fee award, whether the award would unreasonably exceed the hourly salary of the party's attorney. This provision is intended to apply to all attorneys who are paid on a salaried basis, including in-house counsel and associates in a law firm. As a general guideline, an application for an award may be regarded as unreasonably excessive under paragraph (3) if it is more than twice the attorney's hourly salary. Twice the attorney's hourly salary should, in general, provide reasonable compensation and cover normal overhead expenses. The bill does not require that awards be limited to 200% of an attorney's hourly salary in all cases, but is intended to encourage courts and administrative officers carefully to review applications for awards that would exceed that level, and to reduce awards that would confer windfalls on attorneys.

Paragraph (5) is intended to address the anomalous result where attorneys receive far greater benefit from the litigation than their clients, such as in cases where $100,000 is awarded in attorneys' fees for a $30,000 judgment, or where $22,000 in attorneys' fees is awarded for only a $500 award to each of three clients. In other cases, the injunctive relief actually achieved in the case might be so limited that it does not warrant the amount of attorneys' fees otherwise allowable. Cf. Hensley v. Eckerhart, supra, 103 S. Ct. at 1941 (The award of full attorneys' fees to a party who has achieved only partial or limited success would be "an excessive amount"). In determining whether reduction of an award is appropriate, courts or administrative officers should consider both the monetary judgment achieved and any significant injunctive or other equitable relief obtained by the parties in the proceeding.

Paragraph (6) provides that the bases for reducing an award of attorneys' fees that are listed in this subsection are not meant to be exclusive, and courts and administrative officers should continue to consider other factors that are appropriate under existing law. See Hensley v. Eckerhart, supra, 103 S. Ct. at 1940-41. For example, the legislative history of the Civil Rights

Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides that "special circumstances" are to be considered by courts in awarding attorneys' fees. Nothing in this bill is intended to preclude consideration of such "special circumstances" to reduce the amount of fee awards against the government.

Subsection (c) provides that, whenever a monetary judgment is awarded against the United States, or against a state or local government, the judgment shall be reduced (but not more than 25%) by the amount of attorneys' fees allowed in the proceeding. The rationale for this offset is not to reduce the attorneys' compensation, but to provide that a prevailing party should pay part of its legal expenses from any monetary award recovered in a judicial or agency proceeding. This provision would not apply to attorneys' fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) & (d)(3), where fee awards are available only where the government's position was not substantially justified. _Cf._ note 14, _supra_. It also would not apply to awards in cases brought for recovery of disputed tax payments under 26 U.S.C. § 7430, in order to avoid inconsistent adjudications under the Internal Revenue Code. 16/ Finally, the provision would not apply where the reduction otherwise would result in undue hardship to the party in the circumstances of the case. This last exception is not intended to be routinely used, but in circumstances where a reduction of the judgment recovered by the party would clearly be unjust.

The 25% reduction in monetary awards to be applied toward attorneys' fees is similar to the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2678, and section 206 of the Social Security Act, 42 U.S.C. § 406, which provide for compensation of attorneys from any monetary awards recovered by the parties.

16/ Inconsistent adjudications could result because the tax laws permit taxpayers who contest many government tax claims either: (1) to pay the contested taxes and sue for a refund in a district court or in the Claims Court, or (2) to bring suit, without payment, in the Tax Court. A taxpayer who sued in the District or Claims Court and won would receive a monetary award. Presumably, 25% of this amount would otherwise be applied to reduce any attorneys' fees award. However, a taxpayer who sued in the Tax Court and won would not receive a monetary award but, instead, simply a determination that no liability existed. Thus, the 25% reduction would hinge entirely upon the taxpayer's choice of forum, an anomalous result that would otherwise channel many more cases to the already overburdened Tax Court.

Independent Counsel Investigations

As amended in 1982, the statute providing for the appointment of an Independent Counsel to investigate allegations of criminal wrongdoing by the President and other specified Executive officials now authorizes the court to award reimbursement to a subject of an independent counsel investigation for all or part of his or her attorneys' fees incurred in the course of such investigation if no indictment is brought against the subject and the attorneys' fees would not have been incurred but for the Independent Counsel investigation. 28 U.S.C. § 593(g). This statute, however, does not provide for a limitation on the amount of fees awarded.

New subsection 6(d) of the bill would impose a limit of $75 per hour on awards under the Independent Counsel provision, the same limit as for other civil fee-shifting statutes. This change is made expressly to avoid any uncertainty as to the reach of the statute. As provided in section 11 of the bill, this amendment would apply to all attorneys' fees incurred after the date of enactment of the bill.

Criminal Justice Act Fees

As introduced in the 98th Congress (S. 2802 and H.R. 5757), the bill contained provisions that would amend the Criminal Justice Act, 18 U.S.C. § 3006A(d), to double the compensation rates for defense attorneys in criminal proceedings -- from $30 per hour for time expended in court and $20 per hour for time expended out of court to $60 and $40, respectively -- and also double the maximum total compensation to $2,000 per attorney for felony cases, $800 per attorney for misdemeanor cases, and $500 per attorney for post-trial and probation revocation proceedings.

Those provisions were enacted separately in the closing days of the 98th Congress as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. Thus, the much-needed increase in the maximum hourly rates for attorneys who represent parties under the Criminal Justice Act has already been achieved. Accordingly, the bill presently focuses solely on attorneys' fee awards in the civil and administrative context. We see the enactment of this bill as just as significant step in bringing about a better balance in civil fee awards as the Criminal Justice Act amendments were in the criminal context.

Section 7 -- Timely Applications and Procedures

Subsection (a) establishes a jurisdictional requirement that a party seeking an award of attorneys' fees and related expenses submit an application for such award within 30 days of a final decision on the merits by a court or the entry of a final disposition by an administrative officer. A final decision on the merits is defined as the entry of judgment under the Federal

Rules of Civil Procedure, and includes a dismissal of the suit and a dismissal pursuant to a settlement agreement. Parties may not be awarded attorneys' fees and related expenses by a court or administrative officer if the fee award application is made after the 30 day time limit.

This requirement is consistent with the jurisdictional time for filing fee applications pursuant to the Equal Access to Justice Act, and is responsive to the Supreme Court's recent observation that courts can adopt procedural rules setting reasonable time limits for applications for attorneys' fee awards. White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982). 17/ Subsection (a) also requires the party seeking an award to submit such information as may be required by the court or administrative officer.

Subsection (b) directs courts and agencies to provide guidance to parties regarding the information required to be filed. Courts and agencies should, at the least, require submission of the following information: a statement of the basis of the claim for attorneys' fees; a statement that attorneys' fees are awardable under applicable law; a statement of the amount sought; a copy of any written fee agreement; and an itemized accounting of the hours expended and the specific tasks performed by the attorney on each issue in the proceedings. 18/ Further, courts and administrative officers should require the submission of information to assist them in making the findings under section 6(b) of this bill, with respect to the reduction of awards of attorneys' fees. Subsection (b) further requires courts and agencies to establish procedures regarding the timing of applications for attorneys' fees and supporting information, and the timing of judicial and agency rulings on these applications. 19/

17/ As noted by the Supreme Court in White, courts currently differ with respect to the time in which attorneys' fees awards must be sought. Id., 455 U.S. at 450 n.9. Before White, some courts allowed only 10 days from the time of entry of judgment for filing of fee applications under Fed. R. Civ. P. 59(e); other circuits have imposed no time constraints. The Eighth Circuit has recommended a rule for filing attorneys' fee requests within 21 days after entry of judgment. See Obin v. District 9, Int'l Ass'n of Machinists, 651 F.2d 574, 583 (8th Cir. 1981).

18/ A requirement for this type of information is consistent with the District of Columbia Circuit's ruling in National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), which required detailed documentation by a party seeking an award of attorneys' fees.

19/ For example, in some cases fee applications can be resolved immediately following a decision on the merits in the proceeding

(footnote continued on next page)

To ensure that courts are consistent in issuing requirements for submission of information for fee applications, the bill anticipates that the Judicial Conference of the United States would prescribe guidelines for courts to follow in establishing these requirements. These guidelines would not supersede any requirements for submission of information required by law in conjunction with attorneys' fees applications. The bill also anticipates that agencies, when establishing requirements for submission of information in conjunction with fee applications, will follow the guidelines established by the courts.

Section 7(b) requires that these guidelines provide that attorneys' fees may be awarded only upon final judgments. The meaning of final judgment, including dismissals and so-called "interim awards" in the circumstances outlined by the Supreme Court in Hanrahan v. Hampton, supra, are discussed in connection with section 5(1) of the bill.

Section 8 -- Mootness and Settlement Defenses

Under existing law, a party will be held to be a prevailing party and entitled to recover attorneys' fees and related expenses or costs even if the claim has been mooted, if it is found that the suit was a "catalyst" for the change of policy that rendered the claim moot. See, e.g., Maher v. Gagne, 448 U.S. 122, 129-30 (1980). Subsection (a) would codify the standard by which pending litigation is determined to have been such a catalyst by requiring that the litigation be a "material factor" in the policy change. This is the standard that is currently being applied by most courts. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). This provision would ensure that courts do not place undue emphasis on chronology -- that is, the fact that the plaintiff's case was pending when the government changed the policy that mooted the suit. Under this provision, governments would be encouraged to carry out planned policy reforms without fear of incurring liability for fees in pending suits, but would still be liable for attorneys' fees unless the government could

(footnote continued)
in order to permit a simultaneous appeal on the merits and of the fee award. This would prevent piecemeal appeals, and might be appropriate where no disagreement existed over the calculation of the award or where the determination required complete familiarity with the record. See White, supra, 455 U.S. at 454. In other cases, however, it might be preferable to defer attorneys' fees issues until all appeals on the merits have been completed and a final judgment has been entered. This might be appropriate in cases where the determination of attorneys' fees is difficult and likely to consume more time than the appeal on the merits.

prove that the suit actually was not a "material factor" in the policy change.

Subsection (b) would deny awards of attorneys' fees and related expenses for services performed after a written offer of settlement by the United States, or by state or local governments, if the party refuses the offer but is ultimately able to do no better when the case is resolved on the merits. This would provide an incentive to governments to make reasonable settlement offers, and encourage parties to give serious consideration to such offers. 20/ This provision would not apply, if, at the time the settlement offer was made, the party's refusal to accept the offer was reasonable. The ten-day requirement and other procedural provisions of Rule 68 of the Federal Rules of Civil Procedure should provide guidance to courts and administrative officers in determining whether the failure of the party to accept the offer was reasonable.

20/ Current federal fee-shifting statutes often provide little incentive for parties to settle cases early in the litigation. With respect to cases under 42 U.S.C. § 1988, *see* Fioretti and Convery, *Attorney's Fees Under The Civil Rights Act -- A Time for Change*, 16 J. Mar. L. Rev. 261, 277-78 (1983):

> "Aside from the 'prevailing party' issue, the present application of § 1988 results in a lack of incentive for plaintiff's attorneys to enter into pretrial settlements. The more hours the attorney spends on the case, the higher his potential fee award. The motivation then is not to settle, but to proceed to trial, where the hourly rates are even higher.
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> * * *
>
> "Nor is such a result in the plaintiff's best interests. The purpose of the Civil Rights Act as a whole is to protect those who have suffered a constitutional tort. It naturally follows that if an early settlement is possible, the plaintiff, the protected party under the Act, should be compensated swiftly. However, a plaintiff's attorney, who during the early phase of the litigation has spent relatively few hours in preparation, may lack incentive to settle until compensable hours have reached a significant level. Thus, the overriding goal of the Civil Rights Act is thwarted and litigation is encouraged. The already crowded courts are further congested, so that the taxpayer suffers as well."

Section 9 -- Comptroller General Report

Section 9 requires the Comptroller General of the United States to submit an annual report to the President and the Congress on the amount of attorneys' fees and related expenses or costs awarded against the United States or against state and local governments under federal fee-shifting statutes in judicial and administrative proceedings. To assist the Comptroller General, courts and agencies should provide whatever information is needed. In preparing this report, the Comptroller General should use the reports prepared under the Equal Access to Justice Act by the Director of the Administrative Office of the United States Courts and the Chairman of the Administrative Conference of the United States, respectively, under 28 U.S.C. § 2412(d)(5) and 5 U.S.C. § 504(e).

Section 10 -- Limitation on Employment and Compensation of Outside Private Counsel

A new provision in the bill would amend the Legal Fees Equity Act to impose upon the federal government the same fee cap -- $75 per hour -- that the bill would impose upon attorneys' fee awards to parties in litigation with the federal government, or with the states.

Section 3106 of Title 5 of the United States Code currently requires that executive agencies must refer all litigation to the Department of Justice, unless otherwise authorized by law. The Department already has regulations governing the hiring of private counsel in litigation under its authority, and it has consistently limited the payment of private counsel to $75 per hour. But the Department's regulations now do not reach agencies with independent litigation authority. Where agencies are authorized by law to employ attorneys to conduct litigation, there presently are no statutory restrictions upon the hiring of outside counsel as opposed to staff attorneys, or upon the hourly rates that may be paid. As a result, many agencies presently expend taxpayer dollars on private attorneys at a cost well in excess of the cost of staff attorneys. Other agencies, though, including those with large litigation caseloads such as the Securities and Exchange Commission and the Federal Trade Commission, rely entirely upon staff counsel and do not use outside private counsel.

As part of the overall reform effort of the Legal Fees Equity Act, the bill would make all agencies accountable to the Attorney General with respect to the hiring of outside counsel. This amendment would provide that, notwithstanding any other provision of law, no agency could retain private counsel at the expense of the taxpayers to conduct litigation except in accordance with regulations adopted by the Attorney General. The bill also sets a limit of $75 on the hourly rate of such attorneys retained by the government and paid from appropriated funds. This provision corresponds to the $75 limit on the hourly rate on all fee-shifting statutes, so that the taxpayers will pay private agency counsel a rate no higher than would be paid by those same taxpayers to a prevailing plaintiff in a fee-shifting case. (For attorneys directly employed by the federal government, of course, the effective hourly rate would be far less than $75 per hour.)

This section would amend 5 U.S.C. § 3106. The two existing sentences of § 3106 would be retained largely without change as subsections (a) and (e), respectively. The only change is that the first sentence of present § 3106, which refers to Executive departments and military departments, would be expanded to include a reference to all other agencies including independent agencies, boards, and commissions, to make subsection (a) consistent with the reach of the limitations of subsection (b). Of course, there are many independent agencies, boards and commissions that already have independent litigation authority, and they would not be affected by the change to subsection (a). They would, however, be affected by the limitations of subsection (b), which would apply to the hiring of private counsel at taxpayer expense by any agency, independent or not.

Subsection (b) states the general rule that no agency may retain private counsel at taxpayer expense to handle any litigation except as provided in regulations adopted by the Department of Justice, and that, in any event, such private counsel may not be paid more than $75 per hour from appropriated funds. This includes any funds appropriated to the agency, and the permanent, indefinite appropriation to the Judgment Fund under 31 U.S.C. § 1304.

Subsection (c) authorizes the Attorney General to promulgate regulations implementing the provisions of this section as amended. The regulations could not raise the overall limit of $75 per hour in subsection (b)(2) but, subject to that limit, they may take into account different types of litigation and the experience and skill of attorneys. The subsection also contemplates a procedure for an agency, in exceptional circumstances, to apply to the Attorney General for a certification of need to employ outside private counsel, for a particular case or a class of litigation, in circumstances that would not otherwise be permitted by the regulations. This will preserve a measure of flexibility in the hiring of outside counsel in response to unexpected demands. The regulations also provide that the Attorney General may act to coordinate the use and availability of the expertise of the some 17,000 attorneys presently employed by the federal government, in order to promote their more efficient use and to reduce the need for hiring more expensive outside counsel. The bill specifically precludes judicial review of the regulations adopted by the Attorney General under this subsection and the determinations and actions he takes pursuant to those regulations, because judicial review of the Attorney General's supervision of litigation involving the United States would be most inappropriate.

Section ~~10~~ 11 -- Effective Date

Section ~~10~~ 11 applies the provisions of the bill to any award of attorneys' fees and related expenses incurred subsequent to the enactment of the bill. Further, the provisions of the bill apply to actions commenced prior to enactment, but only for attorneys' fees and related expenses incurred after that date.

Dg

ID # 311173 CU

FI001-01

J.R.

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Subject: Legal Fees Equity act

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/04/18			/ /
Referral Note:					
CUAT 18	A	85/04/19			/ /
Referral Note:					
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.