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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-40342.1 May 15, 1981

The Honorable Reuben B. Robertson, Chairman
Administrative Conference of the United States
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

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Dear Mr. Chairman:

You recently requested comments on your proposed "model rules" to implement the Equal Access to Justice Act, Pub. L. No. 96-481, effective October 1, 1981. As you know, the General Accounting Office does not conduct adversary adjudications under the Administrative Procedure Act (see our letters to your predecessors, B-146328, May 30, 1973, and B-146328, February 24, 1972) and therefore we have no special expertise to offer with respect to most of the policy issues raised in your draft rules. Also, some of the issues relating to legal authority could very well come before us as requests for decisions under 31 U.S.C. §§ 74 and 82d and would depend heavily on the circumstances involved in the particular request. Accordingly, while we might note generally that the draft rules strike us as a sincere and reasonable attempt to implement the congressional intent, we are limiting our comments at this time to certain issues concerning the payment of the awards.

The statutory provisions regarding payment present a number of issues which could raise serious administrative problems. We identified these issues and made legislative recommendations in a letter to the Speaker of the House of Representatives, B-40342, December 17, 1980, copy enclosed. We sent an identical letter to the President of the Senate and copies to the (then) Chairmen and minority leaders of the Judiciary and Appropriations committees.

Briefly, the Act contemplates that awards will be paid primarily from agency funds, with the permanent judgment appropriation established by 31 U.S.C. § 724a available as a back-up in limited situations. However, the Act does not establish a standard to determine when the permanent appropriation may properly be used and, in its present form, permits use of the permanent appropriation "only to the extent and in such amounts as are provided in advance in appropriation Acts" (Pub. L. No. 96-481, § 207). Until these problems are resolved legislatively or an appropriation is made under section 207, your draft rule (Subpart E, § 0.501) reflects essentially all that can be said on the matter.

The payment provisions (the new 5 U.S.C. § 504(d)(1) and 28 U.S.C. § 2412(d)(4)(A)) refer to payment "from any funds made available to the agency, by appropriation or otherwise, for such purpose." It may be asked whether this language requires specific appropriations for the

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payment of awards under the Act or at least specific budget requests. As a general proposition, we think agencies should budget for these payments. However, the legislative history indicates that other agency appropriations would nevertheless be available. The report of the House Judiciary Committee on language identical to that enacted states "Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g., through reprogramming)." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 16 and 18 (1980). Certainly the purpose of the Act would be frustrated by an interpretation which would permit an agency to avoid payment merely by failing to include an appropriate item in its budget justifications. Thus, while lack of budgeting will not be a bar to payment, proper planning and budgeting will minimize the need to divert funds from other activities.

We agree that the Act prohibits payment by the agency if judicial review will be sought. In this situation, the award may be made only by the court. 5 U.S.C. § 504(c)(1). This does not affect the ultimate source of funds but only the timing of the payment. The conference report supports this view. See H.R. Rep. No. 96-1434, 96th Cong., 2d Sess. 23 (1980). Since for the most part it cannot be known at intermediate stages of the administrative proceeding whether judicial review will eventually be sought, we think the same provision of the Act must be construed as prohibiting interim fee payments as suggested on page 13 of the explanatory statement. Certainly to the extent an award under the Act may ultimately become payable from the permanent judgment appropriation, payment would be limited to final awards.

Agencies are required by the new 5 U.S.C. § 504(e) to provide you with the information necessary to prepare the annual reports to Congress. Agencies should be instructed to keep careful records of not only awards paid from agency funds but also, to whatever extent the permanent judgment appropriation may become available, awards certified for payment by GAO from the permanent appropriation. It will be much easier for each agency to keep track of its own awards regardless of the source of funds.

Confusion may arise in cases ultimately adjudicated by a court. It will be possible for a judgment to include both a money judgment and an award of fees and expenses, with the money judgment to be paid under 31 U.S.C. § 724a and the fees to be paid from agency funds. This is beyond the scope of your model rules and we have not yet determined the best way to avoid confusion here, but merely point it out for your information.

We anticipate a number of requests for decisions once the statute goes into effect and the payment problems become more clearly defined. We will keep you advised of our activities in this area.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure