

DEPARTMENT OF THE TREASURY
EXECUTIVE OFFICE FOR ASSET FORFEITURE

DIRECTIVE NO. 36

DATE: January 22, 2013

SUBJECT: Payment of Attorney's Fees

1. **PURPOSE.** This Department of the Treasury Executive Office for Asset Forfeiture (TEOAF) Directive No. 36 provides guidance on TEOAF's and the agency's responsibilities for the payment of attorney's fees under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Public Law 106-185, 114 Stat. 202 and other authorities. This Directive does not create any private right or cause of action.

2. **SCOPE.** This Directive applies to all seizure and forfeiture cases conducted by agencies participating in the Treasury Forfeiture Fund (TFF).

3. **POLICY.** Generally, attorney's fees are not payable from the TFF. However, the TFF may pay an award of attorney's fees under the Equal Access to Justice Act (EAJA) in an ancillary proceeding to a criminal forfeiture. In a civil forfeiture case, however, attorney's fees awarded by the court under CAFRA are to be paid from the Judgment Fund, not the TFF. In an administrative forfeiture case, there is no authority to pay an award of attorney's fees from the TFF.

4. **GUIDANCE.**

A. **Payment of Attorney's Fees in Civil Forfeiture Cases**

CAFRA amended 28 U.S.C. § 2465(b) to provide for an award of attorney's fees and other litigation costs to any claimant in a civil forfeiture case who "substantially prevails." Such awards will be paid out of the Judgment Fund. The courts have generally held that a claimant "substantially prevails" if he obtains a dismissal with prejudice, summary judgment, or judgment on the merits after trial. The following are generally not considered to be substantially prevailing: declination, settlement, or dismissal without prejudice. The United States is not required to make any payments to the claimant not specifically authorized by law. See 28 U.S.C. § 2465(b)(2)(A).

This amendment to 28 U.S.C. § 2465 merely provides parties with a right to make a claim for attorney's fees. The party must pursue the claim with the court and obtain a judgment that the United States is liable for attorney's fees under 28 U.S.C. § 2465. A judgment for attorney's fees against the United States under this statute should be submitted to the Financial Management Service (FMS), U.S. Department of the Treasury, for payment pursuant to the provisions of 31 U.S.C. § 1304 just as any other judgment against the United States, (commonly referred to as the Judgment Fund).¹

TEOAF is not authorized to pay attorney's fees awarded under 28 U.S.C. § 2465 from the TFF. See 31 U.S.C. § 9703.

¹ The legislative history of CAFRA specifies that Congress intended that awards under section 2465 be paid not from the forfeiture funds, but from the Judgment Fund. Congressional Budget Office Cost Estimate: H.R. 1658 – The Civil Asset Forfeiture Reform Act of 2000, reprinted in 146 Cong. Rec. H2040, H2047-2049 (daily ed. Apr. 11, 2000).

(1) Persons who may pursue attorney's fees

In order to pursue attorney's fees under the law a party must be a claimant that has substantially prevailed in a civil forfeiture proceeding with the United States. The claimant must demonstrate to the court the following:

- (a) Claimant substantially prevailed in a proceeding contested by the United States;
- (b) Attorney's fees and costs being sought are reasonable;
- (c) Claimant has not been convicted of a crime for which the property interest was subject to forfeiture under a Federal criminal forfeiture law; and
- (d) Claimant is not one of multiple claimants to property under the circumstances where the United States is not liable for costs and attorney's fees, as described in section 4.A.2, below.

(2) Circumstances where the United States is not liable

(a) Convicted claimant with a forfeitable property interest

The United States is not liable for costs and attorney's fees if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law. See 28 U.S.C. § 2465 (b)(2)(B). The claimant's property interest need not have actually been forfeited in the criminal case; the property interest need only be subject to forfeiture as a result of the conviction.

(b) Multiple claims

The United States is not liable for costs and attorney's fees associated with any claim if there are multiple claims to the same property and the United States:

- (i) Promptly recognizes such claim;
- (ii) Promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty, and there are no other claims to that portion of the property;
- (iii) Does not cause the claimant to incur additional, reasonable costs or fees; and
- (iv) Prevails in obtaining forfeiture with respect to one or more of the other claims.

See 28 U.S.C. § 2465(b)(2)(C).

(3) Procedures for requesting payment of attorney's fees, awarded under CAFRA, from the Judgment Fund

When there is a judgment awarding attorney's fees and costs in a civil forfeiture case, the United States Attorney's Office (USAO) should submit a request for payment of the award to the FMS, Department of the Treasury, which manages the Judgment Fund. FMS's website (<http://www.fms.treas.gov/judgefund>) has links to procedures for submitting a request for an award of costs and fees and the appropriate forms.

In addition to the forms and instructions, FMS's website also contains general information about the fund. The USAO will be required to complete and submit the appropriate forms to the Judgment Fund. TEOAF Counsel is available to provide assistance or guidance as needed.

B. Payment of Third Party Attorney's Fees in Criminal Forfeiture Cases

Since CAFRA strictly applies to civil forfeiture proceedings, the third party petitioner in an ancillary proceeding to a criminal forfeiture, pursuant to 21 U.S.C. § 853(n), must assert payment for attorney's fees under EAJA, 28 U.S.C. § 2412. EAJA provides for the award of attorney's fees to prevailing parties in any civil action against the United States in which the Government's position was not substantially justified.² A third party claimant's ancillary proceeding to a criminal forfeiture is considered a "civil action" under EAJA. Payment of attorney's fees awarded under EAJA may be made from the TFF. The USAO must obtain the approval of the chief of DOJ AFMLS for any settlement of an EAJA claim.

EAJA requires the court to award fees upon finding (1) the applicants were the prevailing parties, (2) the Government's position was not substantially justified, and (3) no circumstances exist that would make an award unjust.

Agencies should consult with TEOAF counsel if there is a possibility that EAJA attorney fees may be awarded in any case. Once the EAJA amount is approved by the court, the agencies should submit the settlement agreement, along with other appropriate documentation for issuing a refund, to TEOAF for payment. TEOAF counsel and financial operations staff will assist the agency in processing the payment from the TFF.

C. Administrative Forfeiture Cases

(1) Agency declinations

There is no authority to pay an award of attorney's fees under the statute governing the expenditure of the funds from the TFF. In administrative forfeiture cases where the agency decides not to pursue the forfeiture and returns property, neither TEOAF nor the agencies shall pay a demand for costs and attorney's fees. Also, as there is no judgment against the United States, such cases are inappropriate for consideration for payment under 31 U.S.C. § 1304.

(2) Settlements

Attorney's fees are likely to be a topic for consideration in the settlement or other appropriate disposition (e.g., remission or mitigation) of administrative forfeiture cases. Agencies negotiating a settlement that includes an agreement to pay attorney's fees should be mindful that as payment is not authorized under 31 U.S.C. § 9703 or 31 U.S.C. § 1304, the agency appropriation may be the only funds available to satisfy the terms of the agreement. Accordingly, agencies should not include an agreement to pay attorney's fees in any settlement of an administrative forfeiture.

5. AUTHORITY. 28 U.S.C. § 2412; 28 U.S.C. § 2465; 31 U.S.C. § 3104; 31 U.S.C. § 9703.

²"Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

6. **INFORMATION CONTACT.** Any inquiries pertaining to this Directive should be directed to TEOAF's Legal Counsel at (202) 622-9600.

7. **CANCELLATION.** TEOAF Directive No. 36, "Payment of Attorneys Fees," September 15, 2000, is hereby superseded.

8. **EFFECTIVE DATE.** January 22, 2013.

/S/
Eric Hampl
Director
TEOAF