

Securities and Exchange Commission

§ 201.35

(b) The fact that the Commission has not identified a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.34 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if

the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this subpart, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[47 FR 610, Jan. 6, 1982, as amended at 54 FR 53051, Dec. 27, 1989]

§ 201.35 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified. The position of the Office or Division includes, in addition to the position taken by the Office or Division in the adversary adjudication, the action or failure to act by the Office or Division upon which the adversary adjudication is based. The burden of proof that an