

Office of Government Ethics

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represented, the representative or representatives as designated by that agency.

(e) *Office* means the United States Office of Government Ethics, or the organizational unit within the Office responsible for conducting an adversary adjudication subject to this part.

(f) *Proceeding* means an adversary adjudication as defined above.

(g) *Director* means the Director of the United States Office of Government Ethics.

§ 2610.102 Purpose.

The Act provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (“adversary adjudications”) before the Office of Government Ethics. An eligible party may receive an award when it prevails over the Office, unless the Office’s position in the proceeding was substantially justified or special circumstances make an award unjust. An eligible party may also receive an award when the demand of the Office is substantially in excess of the decision in the adversary adjudication and is unreasonable when compared with such decision, under the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Office will use to make them.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

§ 2610.103 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before the Office of Government Ethics on or after October 1, 1989, which is the date the Office became a separate executive agency. Prior to October 1, 1989, the Office was part of the Office of Personnel Management. Any adversary adjudication pending or commenced before October 1, 1989, and not finally disposed of by that date, is governed by the rules and policies implementing

the Equal Access to Justice Act as adopted by the Office of Personnel Management.

§ 2610.104 Proceedings covered.

(a) This part applies to adversary administrative adjudications conducted by the Office of Government Ethics. When all other conditions in the Act and in these rules are met, the types of proceedings to which this part applies are adversary administrative adjudications conducted by the Office under:

(1) The Debt Collection Act of 1982, 5 U.S.C. 5514;

(2) The Contract Disputes Act of 1978, 41 U.S.C. 605, 607;

(3) The Ethics in Government Act of 1978, section 402(f)(2), 5 U.S.C. app., and subpart E of part 2638 of this chapter.

(b) The Office’s failure to identify 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 the 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 matters.

§ 2610.105 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 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 and in subpart B of this part.

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

(1) An individual with a net worth of not more than \$2,000,000;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7,000,000, 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;

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(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. 1141j(a), with not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7,000,000 and not more than 500 employees; and

(6) For purposes of § 2610.106(b), a small entity as defined in 5 U.S.C. 601.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the underlying proceeding was initiated. For appeals of decisions of contracting officers made pursuant to section 6 of the Contracts Disputes Act of 1978, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(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. An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other 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 part, unless the adjudicative officer 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 adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute

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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.

[57 FR 33268, July 28, 1992, as amended at 63 FR 13116, Mar. 18, 1998]

§ 2610.106 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 was substantially justified. The position of the Office includes, in addition to the position taken by the Office in the adversary adjudication, the action or failure to act by the Office upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the Office's position was substantially justified is on the Office. No presumption arises that the Office's position was not substantially justified simply because the Office did not prevail.

(b) If, in a proceeding arising from an Office action to enforce an applicant's compliance with a statutory or regulatory requirement, the demand of the Office is substantially in excess of the decision in the proceeding and is unreasonable when compared with that decision under the facts and circumstances of the case, the applicant shall be awarded the fees and other expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof that the demand of the Office is substantially in excess of the decision and is unreasonable when compared with such decision is on the applicant. As used in this paragraph, "demand" means the express demand of the Office which led to the adversary adjudication, but it does not include a recitation by the Office of the maximum statutory penalty in the administrative complaint, or elsewhere when accompanied by an express demand for a lesser amount. Fees and expenses