

§ 148.5

17 CFR Ch. I (4-1-06 Edition)

this paragraph constitute special circumstances that would make an award unjust.

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

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 148.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with an adjudicatory proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Commission was substantially justified. The position of the Commission includes, in addition to the position taken by the Commission in the adversary adjudication, the action or failure to act by the Commission upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on the Commission.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adjudicatory proceeding or if special circumstances make the award sought unjust.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 148.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the maximum daily rate prescribed for GS-18 under section 5332 of title 5 of the U.S. Code. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Presiding Officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adjudicatory proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 148.7 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this part. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553.

(b) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with §13.2 of this chapter.

§ 148.8 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in an adjudicatory proceeding

Commodity Futures Trading Commission

§ 148.12

before the Commission and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

Subpart B—Information Required from Applicants

§ 148.11 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the adjudicatory proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Commission or other agency that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or

under penalty of perjury that the information provided in the application is true and correct.

[46 FR 57671, Nov. 25, 1981, as amended at 51 FR 18880, May 23, 1986]

§ 148.12 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §148.4(f) of this part) when the adjudicatory proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Presiding Officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the adjudicatory proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Presiding Officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the Commission or other agency against which the applicant seeks an award, but need not be served on any other party to the adjudicatory proceeding. If the Presiding Officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the adjudicatory proceeding. Otherwise, any request to inspect or copy