

(b) For applications filed pursuant to 5 U.S.C. 504(a)(4), an applicant may receive an award unless the demand by the FDIC was reasonable when compared with the decision of the administrative law judge, the applicant has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

[64 FR 62102, Nov. 16, 1999]

§ 308.175 Measure of awards.

(a) *General rule.* 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, provided that no award under this subpart for the fee of an attorney or agent may exceed \$125 per hour. No award to compensate an expert witness may exceed the highest rate at which the FDIC pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses. Fees and expenses awarded under 5 U.S.C. 504(a)(4) related to defending against an excessive demand shall be paid only as a consequence of appropriations paid in advance.

(b) *Determination of reasonableness of fees.* In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fee for like services, or, if he or she is 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 expert 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 proceeding; and

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

(c) *Awards for studies.* The reasonable cost of any study, analysis, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate payable for similar services, and the study or other matter was necessary for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999]

§ 308.176 Application for awards.

(a) *Contents.* An application for an award of fees and expenses under this subpart shall contain:

(1) The name of the applicant and an identification of the proceeding;

(2) For applications filed pursuant to 5 U.S.C. 504(a)(1), a showing that the applicant has prevailed, and an identification of each issue with regard to which the applicant believes that the position of the FDIC in the proceeding was not substantially justified;

(3) For applications filed pursuant to 5 U.S.C. 504(a)(4), a showing that the demand by the FDIC is substantially in excess of the decision of the administrative law judge and is unreasonable when compared with such decision under the facts and circumstances of the case;

(4) A statement of the amount of fees and expenses for which an award is sought;

(5) For applications filed pursuant to 5 U.S.C. 504(a)(4), a statement of the amount of fees and expenses which constitute appropriations paid in advance;

(6) If the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated;

(7) A description of any affiliated individuals or entities, as defined in § 308.172(c)(5), or a statement that none exist;

(8) A declaration that the applicant, together with any affiliates, had a net worth not more than the ceiling established for it by § 308.172(b) as of the date the proceeding was initiated;

(9) For applications filed pursuant to 5 U.S.C. 504(a)(1), a statement whether

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the applicant is a small entity as defined in 5 U.S.C. 601; and

(10) Any other matters that the applicant wishes the FDIC to consider in determining whether and in what amount an award should be made.

(b) *Verification.* 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 and supporting documents is true and correct.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999]

§ 308.177 Statement of net worth.

(a) *General rule.* A statement of net worth must be filed with the application for an award of fees. The statement shall reflect the net worth of the applicant and all affiliates of the applicant.

(b) *Contents.* (1) The statement of net worth may be in any form convenient to the applicant which fully discloses all the assets and liabilities of the applicant and all the assets and liabilities of its affiliates, as of the time of the initiation of the adversary adjudication. Unaudited financial statements are acceptable unless the administrative law judge or the Board of Directors otherwise requires. Financial statements or reports to a Federal or state agency, prepared before the initiation of the adversary adjudication for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board of Directors otherwise requires.

(2) In the case of applicants or affiliates that are not banks, net worth shall be considered for the purposes of this subpart to be the excess of total assets over total liabilities, as of the date the underlying proceeding was initiated, except as adjusted under §308.172(c)(2). Assets and liabilities of individuals shall include those beneficially owned within the meaning of the FDIC's rules and regulations.

(3) If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. In all cases the administrative law judge or the Board of Directors may call for additional information needed to establish the applicant's net worth as of the initiation of the proceeding. Except as adjusted by additional information that was called for under the preceding sentence, net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(c) *Statement confidential.* Unless otherwise ordered by the Board of Directors or required by law, the statement of net worth shall be for the confidential use of counsel for the FDIC, the Board of Directors, and the administrative law judge.

§ 308.178 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services performed. The administrative law judge or the Board of Directors may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.