

**§ 308.173**

**12 CFR Ch. III (1–1–08 Edition)**

(4) The employees of an applicant include all those persons who were regularly providing services for remuneration for the applicant, under its direction and control, on the date the adversary adjudication was initiated. Part-time employees are included as though they were full-time employees.

(5) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. The aggregated net worth shall be adjusted if necessary to avoid counting the net worth of any entity twice. As used in this subpart, *affiliates* are individuals, corporations, and entities that directly or indirectly or acting through one or more entities control a majority of the voting shares of the applicant; and corporations and entities of which the applicant directly or indirectly owns or controls a majority of the voting shares. The Board of Directors may, however, on the recommendation of the administrative law judge, or otherwise, determine that such aggregation with regard to one or more of the applicant's affiliates would be unjust and contrary to the purposes of this subpart in light of the actual relationship between the affiliated entities. In such a case the net worth and employees of the relevant affiliate or affiliates will not be aggregated with those of the applicant. In addition, the Board of Directors may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(6) 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.

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

**§ 308.173 Prevailing party.**

(a) *General rule.* An eligible applicant who, following an adversary adjudication has gained victory on the merits in the proceeding is a "prevailing party". An eligible applicant may be a "prevailing party" if a settlement of the proceeding was effected on terms favorable to it or if the proceeding against it has been dismissed. In appropriate situations an applicant may also

have prevailed if the outcome of the proceeding has substantially vindicated the applicant's position on the significant substantive matters at issue, even though the applicant has not totally avoided adverse final action.

(b) *Segregation of costs.* When a proceeding has presented a number of discrete substantive issues, an applicant may have prevailed even though all the issues were not resolved in its favor. If such an applicant is deemed to have prevailed, any award shall be based on the fees and expenses incurred in connection with the discrete significant substantive issue or issues on which the applicant's position has been upheld. If such segregation of costs is not practicable, the award may be based on a fair proration of those fees and expenses incurred in the entire proceeding which would be recoverable under § 308.175 if proration were not performed, whether separate or prorated treatment is appropriate, and the appropriate proration percentage, shall be determined on the facts of the particular case. Attention shall be given to the significance and nature of the respective issues and their separability and interrelationship.

**§ 308.174 Standards for awards.**

(a) For applications filed pursuant to 5 U.S.C. 504(a)(1), a prevailing applicant may receive an award for fees and expenses unless the position of the FDIC during the proceeding was substantially justified or special circumstances make the award unjust. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings. Awards for fees and expenses incurred before the date on which the adversary adjudication was initiated are allowable if their incurrence was necessary to prepare for the proceeding.

(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]