

**Subpart C—Procedures for Considering Applications**

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APPENDIX A TO PART 13

AUTHORITY: 5 U.S.C. 504(c)(1).

SOURCE: 48 FR 45252, Oct. 4, 1983, unless otherwise noted.

**Subpart A—General Provisions**

**§ 13.1 Purpose of these rules.**

These rules implement section 203 of the Equal Access to Justice Act, 5 U.S.C. 504 and 504 note, for the Department of Health and Human Services. They describe the circumstances under which the Department may award attorney fees and certain other expenses to eligible individuals and entities who prevail over the Department in certain administrative proceedings (called “adversary adjudications”). The Department may reimburse parties for expenses incurred in adversary adjudications if the party prevails in the proceeding and if the Department’s position in the proceeding was not substantially justified or if the action is one to enforce compliance with a statutory or regulatory requirement and the Department’s demand is substantially in excess of the ultimate decision and is unreasonable when compared with that decision. They also describe what proceedings constitute adversary adjudications covered by the Act, what types of persons and entities may be eligible for an award, and what procedures and standards the Department will use to make a determination as to whether a party may receive an award.

[48 FR 45252, Oct. 4, 1983, as amended at 69 FR 2845, Jan. 21, 2004]

**§ 13.2 When these rules apply.**

These rules apply to adversary adjudications before the Department.

[69 FR 2845, Jan. 21, 2004]

**§ 13.3 Proceedings covered.**

(a) These rules apply only to adversary adjudications. For the purpose of these rules, only an adjudication required to be under 5 U.S.C. 554, in which the position of the Department or one of its components is represented by an attorney or other representative (“the agency’s litigating party”) who enters an appearance and participates in the proceeding, constitutes an adversary adjudication. These rules do not apply to proceedings for the purpose of establishing or fixing a rate or for the purpose of granting, denying, or renewing a license.

(b) If the agency’s litigating party enters an appearance, Department proceedings listed in Appendix A to this part are covered by these rules. Also covered are any other proceedings under statutes that incorporate by reference the procedures of sections 1128(f), 1128A(c)(2), or 1842(j)(2) of the Social Security Act, 42 U.S.C. 1320a-7(f), 1320a-7a(c)(2), or 1395u(j)(2). If a proceeding is not covered under either of the two previous sentences, a party may file a fee application as otherwise required by this part and may argue that the Act covers the proceeding. Any coverage issue shall be determined by the adjudicative officer and, if necessary, by the appellate authority on review.

(c) If a proceeding is covered by these rules, but also involves issues excluded under paragraph (a) of this section from the coverage of these rules, reimbursement is available only for fees and expenses resulting from covered issues.

[45 FR 45252, Oct. 4, 1983, as amended at 69 FR 2845, Jan. 21, 2004]

**§ 13.4 Eligibility of applicants.**

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

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

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

(2) Cooperative associations as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(3) Individuals with a net worth of not more than \$2 million;

(4) Sole owners of unincorporated businesses if the owner has a net worth of not more than \$7 million, including both personal and business interests, and if the business has not more than 500 employees;

(5) All other partnerships, corporations, associations, local governmental units, and public and private organizations with a net worth of not more than \$7 million and with not more than 500 employees; and

(6) Where an award is sought on the basis stated in §13.5(c) of this part, small entities as defined in 5 U.S.C. 601.

(c) For the purpose of determining eligibility, the net worth and number of employees of an applicant is calculated as of the date the proceeding was initiated. The net worth of an applicant is determined by generally accepted accounting principles.

(d) Whether an applicant who owns an unincorporated business will be considered as an "individual" or a "sole owner of an unincorporated business" will be determined by whether the applicant's participation in the proceeding is related primarily to individual interests or to business interests.

(e) The employees of an applicant include all those persons regularly providing 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 other entity of which the applicant directly or indirectly owns or controls

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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 special circumstances that would make an award unjust.

(g) An applicant is not eligible if it appears from the facts and circumstances that it has participated in the proceedings only or primarily on behalf of other persons or entities that are ineligible.

[48 FR 45252, Oct. 4, 1983, as amended at 69 FR 2846, Jan. 21, 2004]

### § 13.5 Standards for awards.

(a) An award of fees and expenses may be made either on the basis that the Department's position in the proceeding was not substantially justified or on the basis that, in a proceeding to enforce compliance with a statutory or regulatory requirement, the Department's demand substantially exceeded the ultimate decision and was unreasonable when compared with that decision. These two bases are explained in greater detail in paragraphs (b) and (c) of this section.

(b) *Awards where the Department's position was not substantially justified.* (1) Awards will be made on this basis only where the Department's position in the proceeding was not substantially justified. The Department's position includes, in addition to the position taken by the agency in the proceeding, the agency action or failure to act that was the basis for the proceeding. Whether the Department's position was substantially justified is to be determined on the basis of the administrative record as a whole. The fact that a party has prevailed in a proceeding does not create a presumption that the Department's position was not substantially justified. The burden of proof as to substantial justification is on the agency's litigating party, which may avoid an award by showing that