

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 51594 / April 21, 2005

INVESTMENT ADVISERS ACT OF 1940  
Release No. 2377 / April 21, 2005

INVESTMENT COMPANY ACT OF 1940  
Release No. 26837 / April 21, 2005

ADMINISTRATIVE PROCEEDING  
File No. 3-11086

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In the Matter of	)	
	)	
	)	
DOUGLAS W. POWELL,	)	ORDER DIRECTING PAYMENT OF FEES AND
CHARLES D. ELLIOTT, III, and	)	EXPENSES PURSUANT TO THE EQUAL
RUSSELL S. TARBETT,	)	ACCESS TO JUSTICE ACT AS TO CHARLES
	)	D. ELLIOTT, III
Respondents.	)	
	)	

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I.

Following a hearing and Initial Decision in these proceedings, Respondent Charles D. Elliott, III (“Respondent” or “Elliott”) filed an application for attorneys’ fees and expenses under the Equal Access to Justice Act (“EAJA”). Respondent Elliott subsequently submitted an Offer of Settlement of his claim under EAJA [5 U.S.C. § 504] and the Commission’s Regulations Pertaining to the Equal Access To Justice Act (“EAJA Regulations”) [17 C.F.R. § 201.31-.59], which Offer the Securities and Exchange Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and admitting the Commission’s findings herein, Respondent Elliott consents to the entry of this Order Directing Payment of Fees and Expenses Pursuant to the Equal Access to Justice Act as to Charles D. Elliott, III, as set forth below.

II.

On the basis of this Order and the Respondent’s Offer, the Commission finds that:

1. Elliott was named as a Respondent in the administrative proceedings captioned above, which were instituted on April 11, 2003.

2. After a hearing on the merits, the administrative law judge entered an Initial Decision dismissing the proceedings against Elliott on August 17, 2004. *See, In the Matter of Douglas W. Powell, et al.*, Initial Dec. No. 255 (Aug. 17, 2004). The Initial Decision became final on September 22, 2004. *See, In the Matter of Douglas W. Powell, et al.*, Exchange Act Release No. 50,423 (Sept. 22, 2004). Elliott was a prevailing party in the administrative proceedings and filed a timely application for attorney fees and expenses on October 22, 2004. *See* 5 U.S.C. § 504(a) (2); 17 C.F.R. § 201.44 (a).

3. Elliott submitted a financial affidavit with his EAJA application demonstrating that he was an individual with a net worth that did not exceed \$2 million at the time the proceedings were instituted, which qualifies him to seek attorney's fees and expenses under EAJA and the Commission's EAJA Regulations. *See* 5 U.S.C. § 504(b)(1)(B); 17 C.F.R. § 201.34(b)(1).

4. Elliott submitted invoices from his lawyers listing the legal fees and expenses that he had incurred from the beginning of the Commission's investigation through June 2004, when the final post hearing briefs were filed. Legal fees and expenses incurred prior to the institution of the administrative proceedings are not covered under EAJA. *See In the Matter of Michael Flanagan*, Initial Decision No. 240, 2003 SEC LEXIS 2795 \*32 (Nov. 24, 2003). Elliott's Offer has been adjusted to exclude any legal fees or expenses incurred prior to April 11, 2003.

5. Elliott subsequently submitted additional invoices for legal fees and expenses incurred after June 2004 when his attorneys prepared his EAJA application. Fees incurred in litigating the fee issue may be recovered in an EAJA proceeding. *In the Matter of Russo Securities, Inc.*, Exchange Act Release No. 42,121, 1999 SEC LEXI 2394 \*8 at n.14 (Nov. 10, 1999). After these administrative proceedings were instituted on April 11, 2003 and through the preparation of his EAJA application, Elliott incurred legal fees for 942.75 hours.

6. Elliott requested that his attorneys' fees be paid at rates ranging from \$175 to \$550 per hour. The Commission's EAJA Regulations provide no award of fees for an attorney may exceed \$75.00 per hour. 17 C.F.R. § 201.36 (b); see also *See In the Matter of Michael Flanagan*, Initial Decision No. 240, 2003 SEC LEXIS 2795 \*40-45 (Nov. 24, 2003). Therefore, Elliott may recover his legal fees for 942.75 hours at the rate of \$75 per hour for a total recovery of legal fees of \$70,706.25. Elliott may recover his expenses from April 11, 2003 through the preparation of his EAJA application for a total amount of \$32,263.47 in expenses.

III.

On the basis of the foregoing findings, it is

ORDERED that Charles D. Elliott, III be, and hereby is, awarded the sum of \$102,969.72 on his application under the Equal Access to Justice Act.

By the Commission.

Jonathan G. Katz  
Secretary