In the United States Court of Federal Claims

NOTICE OF ADOPTION OF AMENDMENTS TO RULES

On April 10, 2012, the court posted notice on its website advising of proposed amendments to its rules and inviting public comment on the proposed amendments by May 25, 2012. In response to this invitation, comments were submitted by the United States Department of Justice's Civil Division, the Court of Federal Claims Bar Association, and a private attorney specializing in litigation before this court. These comments were limited in scope: they addressed the proposed amendments affecting Rule 52.1, Rule 58.1, and Form 8. The court has reviewed these comments and after full consideration has decided to adopt some of the recommendations as part of the final amendments to its rules.

Rule 52.1

With respect to Rule 52.1 ("Administrative Record"), the court had initially proposed that the filing of a motion for judgment on the administrative record "relating to all claims in an action" would obviate the requirement for the filing of an answer pursuant to Rule 12(a)(1). The Rules Committee note accompanying the proposed rule further explained that "[a]n answer must nonetheless be filed if the motion does not pertain to all claims."

In commenting on this proposed rule, the Department of Justice recommended that the court strike the limiting language "relating to all claims in an action," thereby permitting the deferral of an answer to the complaint in every case in which a motion for judgment on the administrative record is filed, irrespective of the motion's scope. In support of this recommendation, the Department of Justice explained that efficiency in case administration counsels in favor of resolving the motion before proceeding to any remaining issues in the case. In particular, the Department of Justice pointed out that resolution of the motion before the filing of an answer might well obviate the need to address any of the remaining issues.

The court is persuaded by this argument and accordingly has adopted an amendment to Rule 52.1 that reads as follows:

Rule 52.1 Administrative Record
(c) Motions for Judgment on the Administrative Record.

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(3) ***Effect of a Motion.*** Unless otherwise provided by order of the court, a motion under this rule for judgment on the administrative record obviates the requirement for the filing of an answer under RCFC 12(a)(1).

The Department of Justice also recommended the addition of language to Rule 52.1 clarifying that an answer to the complaint need not be filed in those situations where the time for the filing of a motion under the rule is set by court order and that time comes after the date for the filing of an answer pursuant to Rule 12(a)(1). The court sees no need for the addition of such language to the rule; it speaks to an event that does not frequently occur and, as such, is best dealt with on a case-by-case basis.

Rule 58.1

The comments suggested a technical correction to the Rules Committee note explaining the proposed changes to Rule 58.1 ("Notice of Appeal"). The court has taken account of the need for this correction and accordingly has revised the language of the Rules Committee note to read as follows:

> RCFC 58.1(a) has been amended to eliminate the requirement for the filing of a paper copy of a notice of appeal in an electronic case and to reduce the number of paper copies required in a non-electric case from four to two.
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> In addition, RCFC 58.1(b) has been corrected to reflect that the fee for an appeal is prescribed by 28 U.S.C. §§ 1913 and 1917.

Form 8

The court received comments from the Department of Justice and the Court of Federal Claims Bar Association endorsing the court's proposed changes to Form 8 ("Protective Order in Procurement Protest Cases") and proposing additional changes to that form. In particular both the Department of Justice and the bar association suggested excluding government personnel from the limitations imposed by paragraph 2 of the protective order (restricting the use of protected information) and paragraph 20 of the protective order (requiring the disposal of protected information at the conclusion of the action), thereby limiting the application of those provisions to private parties only. In support of this position, the Department of Justice pointed out that government personnel are subject to certain information-reporting and record-retention requirements under federal statutory law and regulation that are inconsistent with the restrictions imposed by the protective order.

Although sensitive to this concern, the court finds the proposed solution—restricting the application of paragraphs 2 and 20 to private parties—to be more drastic than is necessary. A protective order, above all, should strive for even-handedness in the restrictions that it imposes on litigants' use of protected information. Accordingly, to meet fairly the government's unique needs regarding the use of otherwise protected information, the court has added language to both

paragraphs 2 and 20 that recognizes an exception to their strict application when use of protected information beyond the prescribed limits is "otherwise required by federal statutory law" (paragraph 2) or when "the retention of additional copies is required by federal law or regulation" (paragraph 20). If, in a given case, the government's need for relief from the restrictions of paragraphs 2 and 20 goes beyond what the amended text will permit, such relief may be sought by motion.

The Department of Justice additionally recommended, and the bar association agreed, that the court should revise the language of paragraph 7 ("Access to Protected Information by Court, Department of Justice, and Agency Personnel") to include among those automatically admitted to the protective order all Executive Branch personnel who are involved with or affected by the litigation. The comments explained that under the protective order as it currently reads, only Department of Justice and procuring agency personnel are granted automatic admission to the protective order. The comments go on to point out, however, that other government agencies, such as the Office of Management and Budget and the Small Business Administration, frequently have an interest in the litigation and a need to access protected information. Consequently, the comments recommended that the court enlarge the scope of the protective order to provide for the automatic admission of all Executive Branch personnel involved with or affected by the litigation and thereby eliminate the need for the government routinely to ask for the admission of other executive agency personnel to the terms of a protective order.

The court has decided against this recommended change because it believes that the interests sought to be protected are best served when the need for access to protected information on the part of those lacking any immediate stake in the litigation is demonstrated on a case-by-case basis. A blanket provision providing for the automatic admission to the terms of the protective order of all Executive Branch personnel involved with or affected by the litigation would leave the court with little control over a process that is fundamentally the court's responsibility to supervise. The admission to the terms of the protective order of other Executive Branch personnel beyond those now identified in paragraph 7 should be sought by motion.

Finally, the bar association recommended, and the Department of Justice agreed, that language be added to paragraph 20 to take into account the practical difficulties of applying the paragraph's protected information disposal requirements to electronically stored information (ESI). The proposed language, which the court adopts, essentially puts into place a reasonableness requirement as follows:

> [C]ompliance with this paragraph shall be complete when counsel takes reasonable steps to delete all such ESI from the active email system (such as, but not limited to, the "Inbox," "Sent Items," and

"Deleted Items" folders) of admitted counsel and of any personnel who received or sent emails with protected information while working under the direction and supervision of such counsel, and by deleting any protected ESI from databases under counsel's control. Compliance with this paragraph does not require counsel to search for and remove ESI from any computer network back-up tapes, disaster recovery systems, or archival systems.

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The court genuinely appreciates the comments that were submitted and extends this note of thanks to the individuals who expended time and effort in reviewing the proposed amendments and in offering their thoughts and suggestions. Your help and interest are indeed much valued.

The rules amended by this notice are available on the court's website at http://www.uscfc.uscourts.gov.

Hazel Keahey
Clerk of Court

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