

Proposed Amendments to Appendix on Access to Business Proprietary Information Pursuant to Rule 73.2(c)

Appendix on Access to Business Proprietary Information Pursuant to Rule 73.2(c) is amended as follows:

~~APPENDIX ON ACCESS TO
BUSINESS PROPRIETARY INFORMATION
PURSUANT TO RULE 73.2(c)~~

~~Unless amended by order of the court, the following terms shall govern access pursuant to Rule 73.2 (c) to Business Proprietary Information contained on the administrative record for a proceeding subject to review by the court under 28 U.S.C. § 1581(c).~~

~~A. Definitions.~~

- ~~1. "Action" means an action described in 28 U.S.C. § 1581(c) and any appeals of such an action.~~
- ~~2. "Access to business proprietary information" includes the retention of Business Proprietary Information received by an attorney or consultant in the course of the administrative proceeding that gave rise to an action or the receipt or use of Business Proprietary Information in an action, regardless of whether Business Proprietary Information appears in submissions to the court.~~
- ~~3. "Agency" means either the United States International Trade Commission or the United States Department of Commerce, whichever issued the particular administrative determination that gave rise to the action.~~
- ~~4. "Authorized Attorney" means an attorney described in Rule 73.2 (c)(2).~~
- ~~5. "Authorized Consultant" means a consultant described in Rule 73.2 (c)(2).~~
- ~~6. "Business Proprietary Information" means all business proprietary information as defined in 19 U.S.C. § 1677f(c) that is contained in the administrative record of the agency proceeding underlying the action, an index of which record is filed with the court.~~
- ~~7. "Commission" means the United States International Trade Commission.~~

~~8. "Department" means the United States Department of Commerce.~~

~~9. "Document" means documents in the traditional sense as well as computer diskettes and other media.~~

~~B. Applicability. These terms shall take effect with regard to an attorney or consultant upon the attorney or consultant's filing of a Business Proprietary Information Certification which shall be substantially in the form set forth in Form 17 of the Appendix of Forms or upon the entry of an order of this court granting the attorney or consultant access to Business Proprietary Information in the action.~~

~~C. Access to Information. The agency will make Business Proprietary Information available to an authorized attorney within twenty (20) days of the service of the certified list of all items described in Rule 73.2 (a)(1) and (2). The agency may make documents available either by providing the authorized attorney with a complete copy of the record or by allowing the inspection and copying, during the agency's regular business hours, of any documents containing Business Proprietary Information that were not previously made available to the authorized attorney. (The phrase "documents not previously made available" includes documents for which a party waived service during the underlying administrative proceeding.) The agency may charge a reasonable fee for copies of any materials.~~

~~—— An authorized consultant shall have access to information as provided by the authorized attorney who has assumed direction and control over the authorized consultant's handling of Business Proprietary Information.~~

~~The agency shall not be required to make available any privileged document.~~

~~D. Disclosure of Information. Unless otherwise provided in this Appendix, individuals who have access to Business Proprietary Information pursuant to Rule 73.2 (c) and this Appendix shall not disclose Business Proprietary Information to anyone (including, without limitation, any officer, shareholder, director, or employee of any of the parties in the action), other than to the court, authorized court personnel, attorneys representing the defendant, and to authorized attorneys and authorized consultants. An authorized attorney or authorized consultant may use the Business Proprietary Information only for issues relating to the agency in the action, in administrative proceedings resulting from an order of the court remanding the matter to the agency, or in an appeal of a decision rendered by the court in the action. In the event of the consolidation of actions arising from determinations of the Commission and the Department, nothing in this Appendix shall be read to require or allow the use of Business Proprietary Information from the records of one agency in argumentation related~~

to the decision of the other agency or the service upon one agency of documents containing Business Proprietary Information from the record of the other.

~~With respect to Business Proprietary Information which was originally submitted by a party to the action, nothing in Rule 73.2 (c) or this Appendix shall prevent an attorney for that party from disclosing that information or using that information in any way, so long as such disclosure or use does not result in the disclosure of another party's Business Proprietary Information to anyone not authorized under Rule 73.2 (c) and this Appendix to have access to Business Proprietary Information.~~

~~E. Office Personnel. An authorized attorney or authorized consultant may disclose Business Proprietary Information to office personnel who are actively assisting in the action and are employed by or supervised by him or her and under his or her direction and control. The authorized attorney charged with direction and control of the authorized consultant shall assume responsibility for compliance with the terms of Rule 73.2 (c) and this Appendix by all office personnel described in this paragraph. An authorized consultant shall assume responsibility for compliance with the terms of Rule 73.2 (c) and this Appendix by all of his or her own office personnel. All office personnel authorized to see the Business Proprietary Information shall comply with the terms of Rule 73.2 (c) and this Appendix, and shall, before having access to any business proprietary documents, sign a statement of recognition that he or she is bound by the terms of Rule 73.2 (c) and this Appendix, that the information is proprietary, and that such information will not be disclosed to anyone other than authorized personnel within the firm. Such statements of recognition shall be retained by an authorized attorney, but need not be filed with the court or served upon the parties.~~

~~F. Authorized Consultants. An authorized consultant shall have access to Business Proprietary Information in an action only under the direction and control of an authorized attorney, who shall assume responsibility for compliance with the terms of Rule 73.2 (c) and this Appendix by such authorized consultant, and subject to the terms of Rule 73.2 (c) and this Appendix. Consultants include non-attorneys such as economists, accountants and computer specialists.~~

~~As to any consultant who is subject to the agency's administrative protective order issued in the proceeding that gave rise to the action whom an authorized attorney considers necessary to preparation of the case in the action, the authorized attorney shall file with the court a Business Proprietary Information Certification which shall be substantially in the form set forth in Form 17 of the Appendix of Forms executed by the consultant.~~

~~As to any consultant not described in the preceding paragraph whom an authorized attorney considers necessary to preparation of the case in the action, the authorized attorney shall, prior to seeking consent for the filing of such a~~

~~Certification, provide counsel for the parties with the curriculum vitae of the proposed consultant. If all counsel consent, the authorized attorney shall then file such a Certification, executed by the proposed consultant, with the court. If all counsel do not consent, access to Business Proprietary Information for the consultant may be sought by motion.~~

~~G. Filing and marking of documents. Any document, including without limitation any brief or memorandum, that is filed with the court in the action that contains any Business Proprietary Information shall be conspicuously marked in accordance with Rule 81(h) and any Business Proprietary Information shall be appropriately marked by bracketing. Arrangements shall be made with the clerk of the court to retain such documents under seal, permitting access only to the court, authorized court personnel, attorneys representing the agency, and to individuals authorized by this Appendix to have access to such documents. The party filing any document referenced in this paragraph shall also file, in accordance with Rule 81(h) and serve on the parties in accordance with Rule 5(h), a version of such document from which all of the Business Proprietary Information shall have been deleted.~~

~~H. Service. Any document containing Business Proprietary Information shall be served on all parties whose counsel are authorized to have access to such document pursuant to Rule 73.2 (c) and this Appendix in a wrapper conspicuously marked on the front "Business Proprietary — to be opened only by (authorized attorney for that party)." If served by mail, the business proprietary document shall be placed within two envelopes, the inner one sealed and marked "Business Proprietary Information — to be opened only by (name of authorized attorney)," and the outer one sealed and not marked as containing Business Proprietary Information. Parties not authorized to have access to any such document pursuant to Rule 73.2 (c) and this Appendix shall be served in accordance with Rule 81(h) with a copy of the document from which all Business Proprietary Information shall have been deleted.~~

~~I. Safeguarding Business Proprietary Information. The individuals covered by Rule 73.2 (c) and this Appendix shall review the procedures for the protection of Business Proprietary Information listed in the agency administrative protective orders on the administrative record and comply with such procedures for the duration of the action.~~

~~J. Oral proceedings. Authorized attorneys shall endeavor to avoid the unnecessary use of Business Proprietary Information in any oral proceeding before the court. If an authorized attorney for any party in the action finds it necessary to refer to Business Proprietary Information in any oral proceeding before the court, such attorney shall notify the court and all other counsel of record as soon as the necessity becomes apparent and propose whatever mechanism may be available and appropriate to prevent disclosure of Business~~

~~Proprietary Information to persons other than those authorized by this Appendix.~~

~~K. Breach of the terms of this Appendix. The individuals covered by Rule 73.2 (c) and this Appendix shall promptly report any breach of the provisions of this Appendix to the court, to counsel for the Agency, and to counsel for the party whose Business Proprietary Information is involved. The individuals covered by Rule 73.2 (c) and this Appendix shall take all reasonable steps to remedy the breach and shall cooperate fully in any investigation of the breach undertaken by the court.~~

~~L. Termination of Access to Business Proprietary Information. An authorized attorney or authorized consultant shall cease to have access to Business Proprietary Information subject to this Appendix upon the filing of a Notice of Termination pursuant to Rule 73.2 (c). A former authorized attorney or authorized consultant remains bound by his or her obligation to abide by the terms of Rule 73.2 (c) and this Appendix and may not divulge Business Proprietary Information that he or she learned during the action or in the underlying administrative proceeding to any person.~~

~~M. Effect of this Appendix. This Appendix shall have the force and effect of a judicial protective order as to any person who has or has had access to Business Proprietary Information pursuant to this Appendix.~~

~~PRACTICE COMMENT: The Appendix on Access to Business Proprietary Information makes reference to Rule 71. Pursuant to the renumbering of the Rules, the former Rule 71 now will be identified as Rule 73.2.~~

(Added Jan. 25, 2000, eff. May 1, 2000; and amended Aug. 29, 2000, eff. Jan. 1, 2001; Sept. 30, 2003, eff. Jan. 1, 2004; _____, 2012, eff. _____, 2013.)

Advisory Committee Note

The Appendix on Access to Business Proprietary Information Pursuant to Rule 73.2(c) has been eliminated and its provisions incorporated, as needed, into Administrative Order No. 02-01.