In the United States Court of Federal Claims

NOTICE OF ADOPTION OF AMENDMENTS TO RULES

On May 6, 2011, the court posted notice on its website advising of proposed amendments to its rules and inviting public comment on the proposed amendments by June 17, 2011. In response to this invitation, comments were submitted by the United States Department of Justice's Civil Division, Tax Division, and Environment and Natural Resources Division. A comment was also submitted by a private corporation. The court has carefully considered these comments and except for two minor technical changes (the details of which are explained below) has decided to adopt the rules changes as initially proposed.

In the main, the comments that were received offered few objections to the proposed rules. Indeed, some of the comments were directed to proposed future changes rather than to the changes currently under consideration. The court has set those suggested future changes aside for consideration at a later date. As to the remainder of the comments, two areas of concern were raised. First, regarding Rule 56 ("Summary Judgment"), the Civil Division urged the court to retain the provision of the existing rule that precludes a plaintiff from filing a motion for summary judgment until 60 days after commencement of the action (RCFC 56(a)(1)) rather than adopt the provision of the new rule that would allow a plaintiff to file a Rule 56 motion with its complaint before the government files an answer (RCFC 56(b)). This proposed change in timing, the comment stated, would leave the government in the position of having to routinely seek an extension of time in order to marshal the necessary facts—including awaiting the receipt of a litigation report from the affected agency—to frame a response to the motion for summary judgment. The contemplated timing change, in other words, is seen as unhelpful to the prompt resolution of a dispute.

Similarly, the Civil Division viewed as non-beneficial the elimination of the "point-counterpoint" procedure of the current rule (RCFC 56(c)(2) and (3)). The comment explained that the point-counterpoint procedure is of benefit to both counsel and the court because it compels engagement on the facts and thus helps to identify and clarify the issues.

The court is sensitive to each of the above-expressed concerns; they are not insubstantial. Nevertheless, it is the view of the court that uniformity in civil procedure among federal courts is a goal of overarching importance and as such must dictate the rules for this court to follow to the extent its jurisdiction will permit. There should not be one rule for summary judgment in this court and another for the United States district courts. To the extent the needs of a particular case may counsel

departure from the published rule, such needs may be addressed by order of the assigned judge.

The other matter of concern that was raised involved the views of the Tax Division regarding the proposed new Form 14 ("Order Implementing Fed. R. Evid. 502(d)"). The comment expressed concern that the proposed order places no restriction on the time when a party may seek to retract on the grounds of privilege or work-product protection a previously disclosed document. Additionally, the point was made that under the security of a Form 14 order, a party could gain an unfair advantage by disclosing information that is helpful to its case while at the same time invoking its protection against waiver to shield related but harmful information. The court was urged not to adopt the Form 14 order and instead to allow the parties to draft their own agreement regarding the effects of a disclosure of privileged or protected information.

The court has considered the concerns raised by the Tax Division but is not persuaded that they warrant withdrawal of the proposed Form 14 order. The proposed order is not an order that the court can unilaterally impose. Rather, as its text makes clear, it is an order that is entered "[p]ursuant to the agreement of the parties." Thus, any concern that the Tax Division may have about the appropriateness of relying on a Form 14 order in a given case may be readily addressed by proposing the use of a different order.

Additionally, it should be noted that the only purpose of the proposed Form 14 order is to allow parties to engage in discovery expeditiously "without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery." Addendum to Advisory Committee Notes, Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence. The proposed Form 14 order does not address the waiver doctrine in general; more specifically, it does not affect the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject.

As a final matter, we note two minor changes that are best described as technical rather than substantive in nature. First, with regard to proposed RCFC 4 ("Serving a Complaint on the United States"), the court decided to strike from subdivision (a) the word "mail" from the phrase "by hand delivery, mail, or sending it to an electronic address designated by the Attorney General for this purpose." Accordingly, RCFC 4(a) will read as follows:

> To serve a complaint on the United States, the clerk must deliver one copy of the complaint to the Attorney General or to an agent

designated by authority of the Attorney General by hand delivery or by sending it to an electronic address designated by the Attorney General for this purpose.

Second, based on a recommendation submitted by the Environment and Natural Resources Division, the court decided to amend RCFC 83.1(c)(3)(A) and (B) ("Entering an Appearance") to require the inclusion of an electronic mail address by the attorney of record for any party. Accordingly, RCFC 83.1(c)(3)(A) and (B) will read as follows:

> **(A)** ***By Parties Other Than the United States.*** The attorney of record for any party other than the United States must include on the initial pleading or paper the attorney's name, address, electronic mail address, telephone number, and facsimile number.
>
> **(B)** ***By the United States.*** After service of the complaint, the attorney of record for the United States must promptly file with the clerk and serve on all other parties a notice of appearance setting forth the attorney's name, address, electronic mail address, telephone number, and facsimile number.

For the sake of consistency, the court also decided to amend RCFC 5.5(f) ("Telephone and Facsimile Numbers") similarly to require the inclusion of an electronic mail address below the signature line of every filing. Accordingly, RCFC 5.5(f) will read as follows:

> **(f) Electronic Mail Address and Telephone and Facsimile Numbers.** The electronic mail address and telephone and facsimile numbers (including area code) of the attorney of record must appear directly below the signature line of every filing.

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The court is genuinely appreciative of the comments that were received and extends this note of thanks to the various 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/rules-and-forms.

Hazel Keahey
Clerk of Court

Issued: July 15, 2011