

## Proposed Amendments to Rule 73.2

Rule 73.2 is amended as follows:

**Rule 73.2.** Documents in an Action Described in 28 U.S.C. § 1581 (c) or (f)

(a) Actions Described in 28 U.S.C. § 1581(c). Unless the alternative procedure prescribed by subdivision (b) of this rule is followed, in an action described in 28 U.S.C. § 1581(c), within 40 days after the date of service of the complaint on the administering authority established to administer title VII of the Tariff Act of 1930 or the United States International Trade Commission, the administering authority or the Commission shall **must** file with the clerk of the court the items specified in paragraphs (1) and (2) of this subdivision (a), if they exist, and the certified list specified in paragraph (3) of this subdivision (a), as part of the official record of the civil action.

(1) A copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be maintained by section 777(a)(3) of the Tariff Act of 1930.

(2) A copy of the determination and the facts and conclusions of law ~~upon~~ **on** which such determination was based, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

(3) A certified list of all items specified in paragraphs (1) and (2) of this subdivision.

(b) Alternative Procedure in an Action Described in 28 U.S.C. § 1581(c). As an alternative to the procedures prescribed in subdivision (a) of this rule in an action

described in 28 U.S.C. § 1581(c):

(1) Within 40 days after the date of service of the complaint ~~upon~~**on** the administering authority or the International Trade Commission, the administering authority or the Commission may file with the clerk of the court a certified list of all items described in subdivisions (a)(1) and (a)(2) of this rule, along with a copy of the determination and the facts and conclusions of law ~~upon~~**on** which such determination was based. The Commission ~~shall~~**must** in addition file a copy of its staff report of information received in the investigation. If either agency uses this alternative procedure, it ~~shall~~**must** serve on the parties notice of that fact in conjunction with service of the certified list.

(2) The agency ~~shall~~**must** retain the remainder of the record. All parts of the record ~~shall~~**will** be a part of the record on review for all purposes.

(3) At any time, the court may order any part of the record retained by the agency to be filed. A motion by a party to have the agency file a retained part of the record ~~shall~~**must** set forth reasons why the submission of appendices required by Rule 56.2(c) is insufficient to fairly present the relevant portions of the record to the court.

(c) Confidential or Privileged Information in an Action Described in 28 U.S.C. § 1581(c).

(1) In an action described in 28 U.S.C. § 1581(c), any document, comment, or information that is accorded confidential or privileged status by the agency whose action is being contested and that is required to be filed with the clerk of the court, ~~shall~~**must** be filed under seal. Any such document, comment, or

information ~~shall~~**must** be accompanied by a non-confidential description of the nature of the material being transmitted. For the purposes of this rule and Rule 81(h), the term “confidential information” includes business proprietary information as defined in 19 U.S.C. § 1677f(c).

(2) An attorney or consultant may retain or otherwise have access to business proprietary information in the administrative record in an action described in 28 U.S.C. § 1581(c) if: (i) the attorney or consultant timely files with the court a Business Proprietary Information Certification which ~~shall~~**must** be substantially in the form set forth in Form 17 of the Appendix of Forms making each of the certifications therein required or (ii) the court issues an order granting the attorney or consultant access to such information. ~~Upon~~**On** meeting either of these requirements, the attorney or consultant ~~shall~~**will** retain or have access to business proprietary information pursuant to the terms of the Appendix on Access to Business Proprietary Information.

(3) A Business Proprietary Information Certification for an attorney or consultant representing or retained on behalf of a party or applicant for intervention is timely if it is filed: (i) at the time the summons or application for intervention is filed, as applicable or (ii) at any other time if the party or applicant for intervention is, at the time of filing, represented by an attorney who retains or has access to business proprietary information pursuant to this rule.

(4) When an attorney or consultant has access to business proprietary information in an action pursuant to subdivision (2) and (i) the attorney terminates the attorney’s appearance in the action, (ii) the consultant ceases to be retained

for purposes of the action, (iii) the time period for appealing a final judgment in the action has expired without the filing of a notice of appeal or (iv) all appeals of the action have concluded, the attorney or consultant ~~shall~~**must** promptly file with the court and serve ~~upon~~**on** parties a Notice of Termination of Access to Business Proprietary Information which ~~shall~~**must** be substantially in the form set forth in Form 18 of the Appendix of Forms, certifying that the attorney or consultant meets the requirements therein. ~~Such notice shall~~**The attorney or consultant must** also be mailed **mail the notice** to: Secretary, United States International Trade Commission, when a determination of that Commission is contested; and to APO Unit, United States Department of Commerce, when a determination of that Department is contested.

(5) If filed fewer than 31 days after the date of service of the complaint, any Certification under subdivision (2) or other request for access to business proprietary information, in addition to being served ~~upon~~**on** all parties to the action, ~~shall~~**must** be served on any interested party described in Rule 3(f) that has not become a party to the action as of the time of service.

(d) Documents in an Action Described in 28 U.S.C. § 1581(f). In an action described in 28 U.S.C. § 1581(f), within 15 days after the date of service of the summons and complaint on the administering authority or the International Trade Commission, the administering authority or the Commission ~~shall~~**must** file, with the clerk of the court, under seal, the confidential information involved, together with pertinent parts of the record, which ~~shall~~**must** be accompanied by a non-confidential description of the nature of the information being filed, as part of the official court record

of the action.

(e) Documents Filed-Copies. Certified copies of the original papers in the agency proceeding may be filed.

(f) Filing of the Record With the Clerk of the Court-What Constitutes. The filing of the record shall **will** be as prescribed by subdivision (a) of this rule, unless the alternative procedure prescribed by subdivision (b) of this rule is followed. In the latter event, the filing of the certified list and the part of the record filed pursuant to subdivision (b) shall ~~constitute~~ **constitutes** filing of the record.

**PRACTICE COMMENT:** The court has established Security Procedures for Safeguarding Confidential Information in the Custody and Control of the Clerk. These procedures apply to confidential information or privileged information received by the court and may include: trade secrets, commercial or financial information, and information provided to the United States by foreign governments or foreign businesses or persons. These procedures do not pertain to national security information.

Section 11(a) of Security Procedures regulates the transmittal of confidential information to and from the clerk by governmental agencies and private parties. A copy of Section 11(a) is available ~~upon~~ **on** request from, and is posted in the Office of the Clerk.

~~**PRACTICE COMMENT:** Pursuant to the renumbering of the Rules, the former Rule 71 now will be identified as Rule 73.2. New Rule 71 conforms to Rule 71 of the Federal Rules of Civil Procedure.~~

(Added Sept. 30, 2003, eff. Jan. 1, 2004.); **and amended \_\_\_\_\_, 2009, eff. \_\_\_\_\_, 2010.)**

#### **Advisory Committee Note**

The language of Rule 73.2 has been amended as part of the general restyling of these rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Practice Comment that was added in 2004, which noted changes to the rule numbers in this title, has been deleted because these changes have been in place for a number of years.