RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

Revised May 1, 2002

TABLE OF CONTENTS

I. SCOPE OF RULES--ONE FORM OF ACTION 2
Rule 1. Scope and Purpose of Rules 2
Rule 2. One Form of Action 2

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS 2
Rule 3. Commencement of Action 2
Rule 3.1. Transfers and Referrals 2
Rule 4. Serving Complaints Upon the United States 3
Rule 4.1. Serving Orders in Contempt Proceedings 4
Rule 5. Serving and Filing of Pleadings and Other Papers 4
Rule 5.1. Proof of Service 6
Rule 5.2. Content of Briefs or Memoranda; Length of Briefs or Memoranda . . . 7
Rule 5.3. Form, Size, and Duplication of all Papers 9
Rule 6. Time 10
Rule 6.1. Enlargements of Time 11

III. PLEADINGS AND MOTIONS 11
Rule 7. Pleadings Allowed; Form of Motions 11
Rule 7.1. Time for Filing 12
Rule 8. General Rules of Pleading 12
Rule 9. Pleading Special Matters 13
Rule 10. Form of Pleadings 15
Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions 16
Rule 12. Defenses and Objections 17
Rule 13. Counterclaim 20
Rule 14. Third-Party Practice 20
Rule 15. Amended and Supplemental Pleadings 22
Rule 16. Pretrial Conferences; Scheduling; Management 24

IV. PARTIES 26
Rule 17. Parties Plaintiff and Defendant; Capacity 26
Rule 18. Joinder of Claims and Remedies 27
Rule 19. Joinder of Persons Needed for Just Adjudication 27
Rule 20. Permissive Joinder of Parties 28
Rule 21. Misjoinder and Non-Joinder of Parties 28
Rule 22. Interpleader. [Not used]. 29

Rule 23. Class Actions 29
Rule 23.1. Derivative Actions by Shareholders 31
Rule 23.2. Actions Relating to Unincorporated Associations [Not used.] 31
Rule 24. Intervention 31
Rule 25. Substitution of Parties 32
Rule 26. General Provisions Governing Discovery; Duty of Disclosure 33
Rule 27. Depositions Before Action or Pending Appeal 39
Rule 28. Persons Before Whom Depositions may be Taken 40
Rule 29. Stipulations Regarding Discovery Procedure 41
Rule 30. Depositions Upon Oral Examination 41
Rule 31. Depositions Upon Written Questions 45
Rule 32. Use of Depositions in Court Proceedings 47
Rule 33. Interrogatories to Parties 49
Rule 34. Production of Documents and Things and Entry Upon Land 50
Rule 35. Physical and Mental Examinations of Persons 51
Rule 36. Requests for Admission 52
Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions . . 53

TITLE VI. TRIALS 57
Rule 38. Jury Trial of Right [Not used.] 57
Rule 39. Trial by Jury or by the Court [Not used.] 57
Rule 40. Setting Cases for Trial 57
Rule 40.1. Assignment and Transfer of Cases 57
Rule 40.2. Related Cases 57
Rule 40.3. Complaints Against Judges 59
Rule 41. Dismissal of Actions 59
Rule 42. Consolidation; Separate Trials 60
Rule 42.1. Motions to Consolidate 61
Rule 43. Taking of Testimony 61
Rule 44. Proof of Official Record 62
Rule 44.1. Determination of Foreign Law 63
Rule 45. Subpoena 63
Rule 46. Exceptions Unnecessary 65
Rule 47. Selection of Jurors [Not used.] 66
Rule 48. Number of Jurors - Participation in Verdict [Not used.] 66
Rule 49. Special Verdicts and Interrogatories [Not used.] 66
Rule 50. Judgment as a Matter of Law in Jury Trials [Not used.] 66
Rule 51. Instructions to Jury: Objection [Not used.] 66
Rule 52. Findings by the Court; Judgment on Partial Findings 66
Rule 53. Masters 67

VII. JUDGMENT 69
Rule 54. Judgments; Costs 69
Rule 55. Default 71
Rule 56. Summary Judgment 72
Rule 56.1. Review of Decision on the Basis of Administrative Record 74
Rule 56.2. Remand; Extension or Termination of Stay of Proceedings 75
Rule 57. Declaratory Judgments 76
Rule 58. Entry of Judgment 76
Rule 58.1. Notice of Appeal 77
Rule 59. New Trials; Rehearings; Amendment of Judgments; Reconsideration 77
Rule 60. Relief from Judgment or Order 78
Rule 61. Harmless Error 79
Rule 62. Stay of Proceedings to Enforce a Judgment 79
Rule 63. Inability of a Judge to Proceed 80

VIII. PROVISIONAL AND FINAL REMEDIES 80
Rule 64. Seizure of Person or Property [Not used.] 80
Rule 65. Injunctions 80
Rule 65.1. Security: Proceedings Against Sureties 82
Rule 66. Receivers Appointed by Federal Courts [Not used.] 82
Rule 67. Deposit in Court [Not used.] 82
Rule 68. Offer of Judgment 82
Rule 69. Execution [Not used.] 83
Rule 70. Judgment for Specific Acts; Vesting Title [Not used.] 83
Rule 71. Process in Behalf of and Against Persons Not Parties [Not used.] . . 83
Rule 71A. Condemnation of Property [Not used.] 83

IX. SPECIAL PROCEEDINGS 83
Rule 72. Notice of Appeal [Abrogated.] 83
Rule 73. Magistrate Judges; Trial by Consent and Appeal Options [Not used.] 83
Rule 74 - 76. [Abrogated.] 83

TITLE X. COURT AND CLERK 83
Rule 77. Court and Clerk 83
Rule 77.1. Business Hours, Scheduling and Fees 85
Rule 77.2. Authorization to Act on Certain Motions 85
Rule 77.3. Withdrawal of Papers, Exhibits 86
Rule 78. Motions Day [Not used.] 87

Rule 79. Books and Records Kept by the Clerk and Entries Therein 87
Rule 80. Record or Transcript as Evidence 87
Rule 80.1. Instructions to Reporters 87

TITLE XI. GENERAL PROVISIONS 89
Rule 81. Applicability in General [Not used.] 89
Rule 82. Jurisdiction and Venue Unaffected [Not used.] 89
Rule 83. Rules by Court of Federal Claims; Judge's Directives 89
Rule 83.1. Attorneys 89
Rule 83.2. Rules of Disciplinary Enforcement. 93
Rule 83.3. Legal Assistance by Law Students 99
Rule 83.4. Advisory Council 101
Rule 84. Forms 102
Rule 85. Title 102
Rule 86. Effective Date 102

APPENDIX A CASE MANAGEMENT PROCEDURE 103

APPENDIX B VACCINE RULES 109

APPENDIX C PROCEDURE IN PROCUREMENT PROTEST CASES 121

APPENDIX D PROCEDURE IN CONGRESSIONAL REFERENCE CASES 127

APPENDIX E PROCEDURE IN CARRIER CASES 130

APPENDIX F PROCEDURE IN TAX PARTNERSHIP CASES 139

APPENDIX G PROCEDURE IN INDIAN CLAIMS COMMISSION CASES 148

APPENDIX H PROCEDURE FOR ALTERNATIVE DISPUTE RESOLUTION . . . 149

APPENDIX OF FORMS 151
FORM 1 ADMISSION INSTRUCTIONS 151
FORM 2 COVER SHEET 153
FORM 3A REPORTER FORMS 155
FORM 3B CERTIFICATE OF REPORTER 156
FORM 4 BILL OF COSTS 157
FORM 5 EAJA FORM 158
FORM 6 SUBPOENA 160

FORM 7 CAPTION OF ALL FILINGS IN VACCINE CASES 162
FORM 7A SUBPOENA IN VACCINE CASES 163
FORM 8 PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES 165
FORM 9 APPLICATION FOR ACCESS TO INFORMATION 169
FORM 10 APPLICATION FOR ACCESS TO INFORMATION 172
FORM 11 SURETY BOND 175
FORM 12 SUPERSEDEAS BOND 177
FORM 13 BOND WITH COLLATERAL 179

RULES OF THE UNITED STATES
COURT OF FEDERAL CLAIMS

Revised May 1, 2002

The United States Court of Federal Claims (formerly designated United States Claims Court) was created by the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)). The court inherited the jurisdiction formerly exercised by the United States Court of Claims. Title 28 U.S.C. § 2503(b) authorizes the United States Court of Federal Claims to prescribe rules of practice and procedure for its proceedings.

The Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury have been incorporated into the following rules to the extent appropriate for proceedings in this court.

Rules Committee Note

In this 2002 revision, the court has endeavored to create a set of rules that conforms to the Federal Rules of Civil Procedure as amended through November 30, 2001, to the extent practicable given differences in jurisdiction between the United States district courts and the United States Court of Federal Claims. Consistent with this objective, interpretation of the court's rules will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure. The court's own Rules Committee Notes are intended primarily to state the source of a given rule but in some instances also provide interpretive guidance.

Future revisions to these rules will be posted on the court's website at www.uscfc.uscourts.gov.

I. SCOPE OF RULES--ONE FORM OF ACTION

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States Court of Federal Claims in all suits. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rules Committee Note

The Rules of the United States Court of Federal Claims are drawn under the authority of 28 U.S.C. §§ 2071(a),(c); 2503(b) (generally) and 2521(a) (subpoena and incidental powers). These rules may be cited as "RCFC." Rule 1 has been revised to: (i) reflect the change in the court's name; (ii) eliminate, as no longer necessary, the previous reference to proceedings pending in the court on October 1, 1982–the year of the court's establishment; (iii) incorporate the 1993 revision to Rule 1 of the Federal Rules of Civil Procedure (FRCP) emphasizing that the rules are to be both construed and administered to ensure that civil litigation is resolved, not only fairly, but without undue cost and delay; (iv) delete (a)(3) for consistency with the federal rules (while retaining the substance of this provision in RCFC 83(b), which is modeled on FRCP 83(b)); and to move subdivision (b) to the preamble, because it is explanatory rather than prescriptive.

Rule 2. One Form of Action

There shall be one form of action to be known as a "civil action."

Rules Committee Note

RCFC 2 is identical to its FRCP counterpart.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court. See RCFC 40.2(a).

Rules Committee Note

In the interest of achieving greater uniformity with the corresponding federal rule, a number of changes have been made to RCFC 3. First, subdivision (a) was fully conformed to the federal rule; the reference to RCFC 40.2 calls attention to this court's "related case" rule. Second, former subdivision (b), which addressed disputes regarding filing dates, was deleted–both in the interest of uniformity and in the belief that it was inappropriate to include a rule of decision as part of a procedural rule. Third, former subdivision (c) (prescribing a cover sheet and identifying the number of copies required for filing), was moved to RCFC 5.3(d).

Rule 3.1. Transfers and Referrals

(a) Transfers from Other Courts.

(1) Filing and Fee. When the transfer of a case from another court to this court is permitted by law, including compliance with 28 U.S.C. §1292(d)(4)(B), the case shall be filed in this court upon the receipt by the clerk of a certified copy of the record made in the other court, including the order of that court granting the transfer. The clerk shall serve a notice of this filing on the parties as provided in RCFC 5. Where all required fees in the other court are shown to have been paid, no filing fee will be required.

(2) Complaint; Copies. Eight

copies of the complaint filed in the other court, containing the necessary changes in the caption and duplicated in conformity with RCFC 5.3, shall be filed with the clerk within 28 days after the filing required in subdivision (a)(1). In lieu thereof and within the same time period, an original and 7 copies of an amended complaint may be filed in conformity with the rules of this court setting forth the claim or claims transferred. Service shall be made on the United States as provided in RCFC 4.

(3) Procedure. After the filing and service as provided for in subdivision (a)(2), all further proceedings shall be in accordance with the rules prescribed for cases filed in this court in the first instance.

(b) Referral of Cases by the Comptroller General.

(1) Service of Notice; Time for Response. Upon the filing of a case referred to the court by the Comptroller General, the clerk shall serve a notice, as provided in RCFC 5, on each person whose name and address are shown by the papers transmitted and who appears to be interested in the subject matter of the reference, which notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days after such service within which to appear and assert such person's claim by filing a complaint. At the same time, the clerk shall forward a copy of each such notice to the Attorney General.

(2) Procedure After Notice. After the service of notice upon the interested person or persons, all further proceedings for the disposition of the case shall be in accordance with the rules prescribed herein for other cases.

(3) Failure of Party to Appear. If no interested plaintiff appears to file a complaint within the time specified in the notice served by the clerk, the case shall be submitted to the court upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

Rules Committee Note

RCFC 3.1 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 84. The renumbering of RCFC 84 is intended to reflect its more logical placement in the organizational structure of the court's rules.

Rule 4. Serving Complaints Upon the United States

(a) Service upon the United States. Service of the complaint upon the United States shall be made through the delivery by the clerk to the Attorney General, or to an agent designated by authority of the Attorney General, of copies of the complaint in numbers prescribed by subdivision (b).

(b) Copies. The clerk shall serve on the Attorney General or his designated agent 5 copies of the complaint.

(c) Proof and Date of Service. At the time the clerk serves a complaint, the clerk shall enter the fact of service on the docket, and such entry shall be prima facie evidence of service. For the purposes of this rule, the date of service shall be the

date of filing with the clerk.

Rules Committee Note

The title of the rule is changed to more closely conform to FRCP 4(i). Other provisions of FRCP 4(i) – those dealing with service upon agencies, corporations, or officers of the United States – have not been made a part of this court's RCFC 4 because, in this court (with the exception of vaccine cases), only the United States is properly the named defendant. *See* RCFC 10(a).

Rule 4.1. Serving Orders in Contempt Proceedings

An order initiating a contempt proceeding directed at a person other than a party shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall deliver a copy of the order to the person named therein. Proof of such service shall be as provided in RCFC 45(b)(3). All other orders relating to contempt proceedings shall be served in the manner prescribed in RCFC 4 (if against an agent or attorney of the United States) or in RCFC 5 (if against a plaintiff, a plaintiff's representative, or a non-party).

Rules Committee Note

New RCFC 4.1 implements the contempt authority granted to this court by § 910 of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4519-20. That section, now codified at 28 U.S.C. § 2521(b),(c) (1994), reads in relevant part as follows:

> (b) The United States Court of Federal Claims shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority as –
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions; or
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree or command.
>
> (c) The United States Court of Federal Claims shall have assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Court of Federal Claims is sitting shall, when requested by the chief judge of the Court of Federal Claims, attend any session of the Court of Federal Claims in such district.

The rule adopts the mode of service specified in FRCP 4.1, which requires that service of process, other than a summons, be effected upon non-parties through means more formal than mailing. *See generally* FRCP 4.1 Advisory Committee Notes (recognizing a distinction in service requirements between parties and non-parties); *I.A.M. Nat'l Pension Fund v. Wakefield Indus.*, 699 F.2d 1254, 1259-62 (D.C. Cir. 1983) (discussing service of contempt orders).

Rule 5. Serving and Filing of Pleadings and Other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

(b) Making Service.

(1) Service under RCFC 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under RCFC 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery.

(3) Service by electronic means under RCFC 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) [Not used.]

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after the service, but disclosures under RCFC 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission, except that depositions upon oral examination and notices thereof, written questions, interrogatories, requests for documents, requests for admission, and answers and responses thereto and other related discovery materials shall not be filed unless on order of the court. See RCFC 83.

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. The court may by an amendment to these rules permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the

United States establishes. A paper filed by electronic means in compliance with such amendment constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules.

Rules Committee Note

The changes made in RCFC 5 are intended to bring the rule into closer conformity with FRCP 5. Thus, in addition to a change in sequence, changes in text include the following:

First, the text of subdivision (b) has been modified to reflect the December 1, 2001 changes to the FRCP which significantly affect organization and which also make possible consensual service by electronic means. In addition, the clause "but filing is not" has been deleted from the last sentence of that subdivision. The deleted language was not in conformity with the federal rule. Filing is not complete on mailing; filing is controlled by subdivisions (d) and (e) of this rule.

Second, subdivision (e) adopts the language of the federal rule recognizing the appropriateness of permitting papers to be "filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." It should be noted that no decision has yet been made by the court to implement electronic filing. Such a decision, when made, will be accomplished through an amendment to the rules. Until the issuance of such amendment, the clerk's office will not accept electronic filings. Individual chambers, however, may allow counsel to transmit "courtesy" copies of filed documents by electronic means.

Third, subdivision (e) also adds the final sentence from FRCP 5(e) stating that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules." The addition of this language to the rule is not intended to alter the court's practice of treating all non-conforming complaints as filed upon receipt in the clerk's office, while referring other non-conforming papers received in the clerk's office to a judge for instructions as to whether to permit their filing or to require counsel's correction of the papers' defects.

Finally, former subdivision (e) titled, "Proof of Service" does not appear in FRCP 5. In order to conform more closely to FRCP 5, former subdivision (e) was deleted from this rule and now appears as RCFC 5.1.

Rule 5.1. Proof of Service

(a) Service shall be made by the party, attorney of record or any other person acting under the attorney of record's direction. The person making service shall execute a certificate of service that contains the following information:

(1) the day and manner of service;

(2) the person and/or entity served; and

(3) the method of service employed, e.g., personal, mail, substituted, etc.

(b) The certificate of service shall be attached at the end of the original document, including appendices, and copies thereof. If service other than by mail is used and it is impractical to attach the certificate at the time of filing, such certificate may be filed subsequently.

(c) The certificate may at any time be amended or supplied unless to do so would result in material prejudice to the substantial rights of any party.

Rules Committee Note

RCFC 5.1 has no FRCP counterpart. The text of this rule formerly appeared as subdivision (e) of former RCFC 5.

Rule 5.2. Content of Briefs or Memoranda; Length of Briefs or Memoranda

(a) Content of Briefs or Memoranda.

(1) Initial Brief or Memorandum. Except in briefs or memoranda of 10 pages or less or pretrial filings under Appendix A, the first brief or memorandum due shall contain, under proper headings and arranged in the following order:

(A) a table of contents, including the specific contents of any appendix or appendices to the brief or memorandum, listing the various items in the appendix, including the number and description of every item and exhibit which is being reproduced, together with the number of the page at which the item appears;

(B) a table of constitutional provisions, treaties, statutes, regulations, and cases cited, giving the volume and page in the official edition where they may be found, and arranging the cases in alphabetical order. All United States Claims Court and United States Court of Federal Claims orders and opinions published in either the United States Claims Court Reporter or the Federal Claims Reporter shall be cited to reporters;

(C) a succinct statement of the questions involved, setting forth each question separately;

(D) a concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate reference to specific findings, the stipulation of facts, or other pertinent portions of the record, and setting out verbatim in the brief or memorandum or in an appendix thereto the pertinent portions of constitutional provisions, treaties, statutes, and regulations, as well as the texts of all administrative decisions directly involved in the case, unless previously reproduced in or as an exhibit to the complaint; the appendix or appendices to the brief or memorandum shall be numbered consecutively within themselves so as to enable the court more easily to find and read the material in the appendix or appendices;

(E) the argument, exhibiting clearly the points of fact and of law being presented, and citing the authorities relied upon;

(F) a conclusion, indicating the relief sought; and

(G) if an appendix is used, and is not incorporated into the same volume as the brief, there shall be, at the beginning of the appendix, a table of contents or index listing the various items in the appendix, including the number and description of every exhibit which is being reproduced, together with the number of the page of the appendix at which the item begins.

(2) Opposing Brief or Memorandum. An opposing or answering brief or memorandum shall conform to the requirements set out in subdivision (a)(1), except that the items referred to in subparagraphs (C) and (D) of that subdivision need not be included unless the party is dissatisfied with the presentation by the other side.

(3) Reply Brief or Memorandum. A reply brief or memorandum shall conform to the requirements of subdivision (a)(2).

(4) General. Briefs or memoranda must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs or memoranda not complying with this rule may be disregarded by the court.

(b) Length of Briefs or Memoranda.

(1) Except by leave of the court on motion, a party's initial brief or memorandum shall not exceed 40 pages (50 pages for a cross-movant) by any process of duplicating or copying, exclusive of (A) pages containing tables of contents, citations to constitutional provisions, treaties, statutes, regulations, and cases, and (B) any appendix setting out verbatim the pertinent portions of constitutional provisions, treaties, statutes, regulations, agency or board decisions, court decisions, excerpts from transcripts of testimony, and documentary exhibits.

(2) Except by leave of the court on motion, reply briefs or` memoranda shall not exceed 20 pages by any process of duplication or copying or 30 pages where a response to a motion is included.

(3) A brief or memorandum previously filed may not be incorporated by reference; any such incorporation will be disregarded. A party wishing to rely upon a previously filed brief or memorandum may do so by reproducing in an appendix either (A) excerpts thereof now relied upon, or (B) the entire brief or memorandum. In either event, the party shall identify the total number of pages considered pertinent in a footnote which is to appear on the first page of the brief or memorandum. The pages so identified shall be included in the maximum allowable length set forth in subdivisions (1) and (2).

Rules Committee Note

RCFC 5.2 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 83.1. The renumbering of RCFC 83.1 is intended to reflect its more logical placement in the organizational structure of the court's rules.

Several changes have been made to the rule; they include:

First, the deletion from subdivision (a) of language identifying the plaintiff's brief or memorandum as "the first brief or memorandum" normally to be filed.

Second, subparagraphs (A) and (G) of subdivision (a) were revised to indicate that any index to a separate appendix should be included both at the beginning of the appendix and at the beginning of the accompanying brief or memorandum.

Third, subdivision (b)(4), relating to "a motion for leave to exceed the page limitation," was deemed unduly burdensome and was therefore stricken.

Rule 5.3. Form, Size, and Duplication of all Papers

(a) General. All papers filed with the clerk shall conform with these rules as to methods of duplication, form, size, and number.

(b) Duplication. All requirements of duplication may be satisfied by the use of any photocopy method capable of producing a clear black image on white paper, provided that in each instance the duplication shall conform to the requirements of subdivision (c) as to paper, size, form, and pagination.

(c) Form and Size. All papers pursuant to the provisions of this rule shall be duplicated on pages not exceeding 8 ½ by 11 inches, with type matter on all papers other than exhibits to be of letter quality. Type size for both text and footnotes shall not be smaller than 12 point and margins shall not be less than 1" on all sides. Papers duplicated shall be double spaced, except that quoted and indented material and footnotes may be single spaced, and, if covering both sides of the sheet, shall be duplicated on paper of sufficient quality that the duplication process does not bleed through the sheet. Except for submissions of fewer than 50 pages, which may be stapled in the upper left-hand margin, all submissions must be bound or attached along the entire left margin in book form and shall have legible margins when bound or attached. Such pages need not be justified on the right margin. All pages, including appendices, shall be numbered.

Page numbers shall be in large, distinct type and shall appear in the center of the bottom margin of the page.

(d) Number of Copies. Plaintiff shall file an original and 7 copies of the complaint, the original of which shall be accompanied by the completed cover sheet as shown in the Appendix of Forms (Form 2) utilizing the Cover Sheet Information. Except as provided in RCFC 58.1, the parties shall file an original and 2 copies of each other paper required by these rules to be filed with the clerk. In congressional reference cases, an original and 4 copies of each such paper shall be filed. All copies shall be identical, or otherwise conformed, to the original.

(e) Date. Each paper shall bear the date it is signed on the signature page.

(f) Telephone and Facsimile Numbers. The telephone and facsimile numbers (including area code) of the attorney of record must appear beneath the signature line of every pleading or other paper.

(g) Name of Judge. In pleadings and papers other than the complaint, the name of the judge assigned to the case shall be included under the docket number.

Rules Committee Note

New RCFC 5.3 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 82 and 83. The consolidation and renumbering of RCFC 82 and 83 are intended to reflect their more logical placement in the organizational structure of the court's rules.

In addition to the renumbering, the text of former RCFC 82 has been modified in several respects: First, subdivision (a) has been modified by deleting the last sentence of that subdivision which read, "[t]he clerk shall refuse to file any paper which is not in substantial conformity with this rule or not in clear type." The deletion corresponds to the change made in RCFC 5(e)

directing that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form." However, as noted in the Advisory Committee Note to FRCP 5(e), the "clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court."

Second, subdivision (c) has been modified to eliminate certain redundancies; to fix the type size; and to clarify binding and pagination requirements. Appendices will be subject to pagination. The binding requirement changes are intended to discourage rubber bands, paper clips and other non-secure binding.

Third, former subdivision (e), now subdivision (f), has been amended to include a requirement listing a facsimile number for the attorney of record.

Fourth, subdivision (d) is an addition to the rule that incorporates the "number of copies" requirement that formerly appeared as RCFC 83, as well as the requirement formerly found in RCFC 3(c) regarding the number of copies to be filed when filing a complaint.

Finally, subdivision (g) is also an added provision. The text of this subdivision formerly appeared as part of RCFC 10(a).

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in RCFC 77(c), "legal holiday" includes New Year's Day, Inauguration Day, Birthday of Martin Luther King Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under RCFC 52(b), 54(d)(1), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) [Rescinded in federal rule.]

(d) [Not used.]

(e) Additional Time After Service under RCFC 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper

upon the party, and the notice or paper is served upon the party under RCFC 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Rules Committee Note

RCFC 6 has been changed to conform to FRCP 6. In particular, that part of subdivision (b) which specified the content of motions for enlargement has been moved to a new RCFC 6.1 "Enlargements of Time."

Rule 6.1. Enlargements of Time

Every motion for enlargement of time must set forth therein the specific number of additional days requested, the day to which the enlargement is to run, the extent to which the time for the performance of the particular act has been previously enlarged, and the reason or reasons upon which the motion for enlargement is based. Motions for enlargement of time must include a representation that the moving party has discussed the motion with opposing counsel and a statement indicating whether an opposition will be filed or, if opposing counsel cannot be consulted, an explanation of the efforts that were made to do so.

Rules Committee Note

New RCFC 6.1 has no FRCP counterpart. The text of the new rule formerly appeared in these rules as part of RCFC 6(b). However, the language in former RCFC 6(b) which addressed the content of the reasons offered in support of a motion for enlargement of time has been stricken as unnecessary.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(a) Pleadings. There shall be a complaint and an answer; if the answer contains a counterclaim or offset or a plea of fraud, there shall be a reply thereto. There shall be such third-party pleadings as are permitted by RCFC 14. No other pleading shall be allowed, except that the court may order a reply to an answer or to a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Any motion, objection, or response may be accompanied by a brief or memorandum, and, if necessary, by supporting affidavits that shall be attached to the motion. Any motion may be accompanied by a proposed order.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. See RCFC 5.1, 5.2 and 10(a).

(3) All motions shall be signed in accordance with RCFC 11. See RCFC 5.3 (d).

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rules Committee Note

Minor grammatical changes have been introduced.

Rule 7.1. Time for Filing

(a) Responses and Objections. Unless otherwise provided in these rules or by order of the court, responses or objections to written motions shall be filed within 14 days after service of the motion.

(b) Replies. Replies to responses or objections shall be filed within 7 days after service of the response or objection.

(c) Motions Under RCFC 12(b), 12(c), 56 and 56.1. Responses to these motions shall be filed within 28 days after service of the motion and replies thereto within 14 days of the service of the response.

(d) Leave of Court. If the subject filing is pursuant to leave of court on motion by a party, time for any response runs from the date of filing and not the date of service.

(e) Cross-motions. Where the responding party files a cross-motion, it shall be contained in the same document as the response to the original motion; the response to the cross-motion shall be contained in the same document as the reply subject to page limitations in RCFC 5.2(b)(2). Where a cross-motion is filed, the parties shall have the same times to respond and to reply to the cross-motion as to an original motion.

Rules Committee Note

RCFC 7.1 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 83.2. The renumbering of RCFC 83.2 is intended to reflect its more logical placement in the organizational structure of the court's rules.

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader

expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in RCFC 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in RCFC 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rules Committee Note

Minor changes have been made in subdivisions (b) and (c) to conform this rule to FRCP 8. In addition, subdivision (c) was amended to require the pleading, as an affirmative defense, of assumption of risk and contributory negligence. Although these defenses are typically associated with tort claims (i.e., with claims outside of this court's jurisdiction), there can be circumstances in which reliance on these defenses would be appropriate, for example, in congressional reference cases, in some aspects of contract litigation, and with respect to counterclaims asserted pursuant to 28 U.S.C. § 2508.

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the

extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Special Matters Required in Complaint. The complaint shall include:

(1) Action by Other Tribunal or Body. Any action on the claim taken by Congress or by any department or agency of the United States, or in any judicial proceeding, including any in the Tax Court of the United States.

(2) Citations of Statutes, Regulations, Orders. A clear citation of the Act of Congress, regulation of an executive department or agency, or Executive Order of the President, where the claim is founded upon such an act, regulation, or order.

(3) Contracts or Treaties. If the claim is founded upon a contract or treaty with the United States, a description of the contract or treaty sufficient to identify it. In addition, the plaintiff shall plead the substance of those portions of the contract or treaty on which the plaintiff relies, or shall annex to the complaint a copy of the contract or treaty, indicating the provisions thereof on which the plaintiff relies.

(4) Patent Suits. In any patent suit, the claim or claims of the patent or patents alleged to be infringed.

(5) Ownership of Claim; Assignment. If the plaintiff is the owner by assignment or other transfer of the claim, in whole or in part, when and upon what consideration the assignment or transfer was made.

(6) Tax Refund Suits. In any

action for refund of federal tax, for each tax year or period for which a refund is sought, the amount, date, and place of each payment to be refunded; the date and place the return, if any, was filed; the name, address, and identification number of the taxpayer or taxpayers appearing on the tax return; the date and place the claim for refund was filed; and the identification number for each plaintiff, if different from the identification number of the taxpayer. A copy of the claim for refund shall be annexed to the complaint.

(7) Inverse Condemnation Suits. In any action for the payment of just compensation pursuant to the Fifth Amendment to the United States Constitution, identification of the specific property interest which plaintiff contends has been taken by the United States.

Rules Committee Note

Subdivision (a) (relating to "Capacity") is modified so as to conform the text to FRCP 9.

Subdivision (h)(6) (relating to special requirements applicable to complaints in "Tax Refund Suits") is amended by prescribing, as additional information to be included as part of a tax refund complaint, the following: (i) the taxpayer's or filer's identification number and (ii) a copy of the claim for refund.

Subdivision (h)(7) was added as a means to clarify the nature of the property interest asserted to have been taken in an inverse condemnation action.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in RCFC 7(a). In the complaint the title of the action shall include the names of all the parties, see RCFC 20(a), the United States being designated as the party defendant, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. (For Notice of Appeal see RCFC 58.1).

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rules Committee Note

RCFC 10 has been changed in minor respects in order to achieve closer textual conformity with FRCP 10. The deleted last sentence of subdivision (a) was moved to RCFC 5.3.

The last sentence of former subdivision (c) ("unless otherwise indicated, but the adverse party shall not be deemed to have admitted the truth of

the allegations in such exhibit merely because the adverse party has failed to deny them explicitly") was omitted as not in conformity with the federal rule, and because it was deemed unnecessary.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, motion, and other paper shall be signed by or for the attorney of record in the signing attorney's own individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in RCFC 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing

the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of RCFC 26 through 37.

Rules Committee Note

The changes to RCFC 11 reflect the corresponding revision of FRCP 11 that was introduced in December 1993. For a detailed explanation of the reasons for revision of FRCP 11, see 28 U.S.C.A. Rule 11 Advisory Committee Notes (West Supp. 2001).

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings

(a) When Presented.

(1) The United States shall file its answer to the complaint within 60 days after service of the pleading in which the claim is asserted. After service of an answer containing a counterclaim, offset, or plea of fraud, plaintiff shall have 20 days within which to file a reply to the counterclaim, offset, or plea of fraud. If a reply to an answer or a responsive pleading to a third-party complaint or answer is ordered by the court, the reply or responsive pleading

shall be filed within 20 days after service of the order unless the order otherwise directs.

(2) Unless a different time is fixed by court order, the service of a motion permitted under this rule or RCFC 56 alters these periods of time, as follows:

(A) if the court denies or partially denies or partially allows the motion or postpones its disposition until the trial on the merits or the motion is withdrawn, the responsive pleading shall be filed within 10 days after notice of the court's action, or the date on which the motion is withdrawn, or by the date the response otherwise would have been due, whichever is later;

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person,(3) [not used]; (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under RCFC 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56.

(d) Preliminary Hearings. The defenses specifically enumerated in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and

determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person; or insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by RCFC 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under RCFC 19, and an objection of failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under RCFC 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rules Committee Note

To more closely parallel FRCP 12, subdivisions (b) and (h) of the court's rule are enlarged by adding the defense of "insufficiency of service of process" and the defense of "failure to join a party indispensable under Rule 19." Further, as an aid to practitioners, most of whom are familiar with practice in the district courts, the enumeration of defenses in subdivision (b) has been brought into conformity with the corresponding subdivision of the Federal Rules of

Civil Procedure. Finally, subdivision (i) ("Suspension of Discovery") is deleted. That subdivision is not part of the comparable federal rule, and its subject matter is more appropriately dealt with as a case management matter.

Rule 13. Counterclaim

(a) Compulsory Counterclaims. The answer shall state as a counterclaim any claim which, at the time of serving the answer, the defendant has against any plaintiff, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the answer need not state the claim if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims. The answer may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the defendant after serving its pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When the defendant fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, it may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. [Not used.]

(h) Joinder of Additional Parties. [Not used.]

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in RCFC 42(b), judgment on a counterclaim may be rendered in accordance with the terms of RCFC 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rules Committee Note

Subdivision (d) was changed to add the language of FRCP 13(d) in recognition of the fact that there is no statutory bar to third-party defendants filing counterclaims against the United States. *See* 41 U.S.C. § 114 and RCFC 14. Other significant differences between this version and the federal rule have been preserved as necessary in light of the fact that the United States is the only defendant in this court.

Rule 14. Third-Party Practice

(a) Summoned Parties.

(1) On motion of the United States, the court may summon any third person against whom the United States may be asserting a claim or contingent claim

for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party and defend the third party's interest, if any, in such suit.

(2) The motion for a summons shall be accompanied by an appropriate pleading setting forth the claim or contingent claim which it is asserting against such third person.

(3) If the court grants the motion of the United States, the clerk shall issue an original and one copy of such summons for each person to be summoned. The summons shall contain the names of the parties and a statement of the time within which the party summoned is required to appear and answer. The summons shall also state that the United States is asserting a claim against such person, as described in the accompanying pleading of the United States. The summons shall indicate that it is accompanied by a copy or copies of all pleadings filed in said action, naming such pleadings which shall be attached by the moving party. Upon issuance of the summons, the clerk shall deliver the summons to the Attorney General for personal service and the return of such service shall be made directly to the clerk.

(b) Notice to Interested Parties.

(1) The court, on its own motion or on the motion of a party, may notify any person with legal capacity to sue and be sued and who is alleged to have an interest in the subject matter of any pending action. Such notice shall advise of the pendency of the action and of the opportunity to seek intervention and to assert an interest in the action.

(2) A motion made by the plaintiff shall be filed at the time the complaint is filed. Copies and service of such a motion shall be as provided in RCFC 4 and 5.3(d). A motion made by the United States shall be filed on or before the date on which the answer is required to be filed. For good cause shown, the court may allow any such motion to be filed at a later time.

(3) The motion for notice shall state the name and address of such person, and set forth the interest which such person appears to have in the action.

(4) If the court, on its own motion or on the motion of a party, orders any third person to be notified, the clerk shall issue an original and one copy of the notice for each third person to be notified. The notice shall contain the names of the parties and a statement of the time within which such third person may appear. The notice shall indicate that it is accompanied by a copy of the pleadings, which shall be attached by the moving party.

(5) Upon the issuance of such notice upon motion of a party, the notice shall be delivered by the clerk to the moving party, who shall at the moving party's expense cause the same to be served on the person to be notified by registered or certified mail, return receipt requested, with the

moving party to file with the clerk the return of such service, which return shall include the copy of the notice with return receipt attached.

(6) When the court directs the issuance of a notice to a third person on its own motion, each of the existing parties shall, on request of the clerk, deliver to the clerk a sufficient number of copies of the pleadings filed by such party to provide the third party to be notified with a copy of each of such pleadings, and the clerk shall forthwith issue such notice as specified in subdivision (b)(4) and shall forward the same with accompanying copies of the pleadings to the Attorney General for service as provided in subdivision (b)(5).

(7) When service of the notice required by subdivision (b)(4) is to be effected upon a third person in a foreign country, service of the notice may be made by the moving party or the court, as required by subdivisions (b)(5) and (6), and proof of such service may be made in the manner authorized by FRCP 4(f).

(c) Pleadings of Third Parties. Within 42 days after service upon a third person of a summons or notice issued pursuant to this rule, such person may file an answer, a complaint setting forth the person's interest, if any, in the subject matter of the action and the nature of the person's claim against the United States, or both, which pleadings shall comply with the requirements of these rules with respect to the filing of original complaints and answers, except that only an original and 2 copies of a complaint are to be filed with proof of service.

Rules Committee Note

RCFC 14 was substantially revised. The order of the rule has been changed to distinguish more clearly between the two types of actions it permits with respect to entities that are not yet parties to the suit. New subdivision (a) deals exclusively with summons to persons whom the United States seeks to join formally as third parties. The procedures for such summons are now gathered under that subdivision. The same has been done with respect to motions for notice to inform non-parties of the pendency of the action and the opportunity to join as parties. In addition, language in the old rule with respect to service of notice by publication, as well as the consequences of failing to appear in response to such notice, have been stricken. The law in this area is unsettled; hence the possibility existed that the manner and method of notice prescribed by the rule might not be found constitutionally adequate in all potential situations.

It is important to note that RCFC 14 notice requirements do not apply to the procedures for notifying potential intervenors in procurement protest cases filed pursuant to 28 U.S.C. § 1491(b). RCFC 14 implements the authority set forth in 41 U.S.C. § 114. For service of third-party complaints see RCFC 5.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse

party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rules Committee Note

Significant changes were made to FRCP 15 in 1991; minor changes were made in 1993. Most notable is the listing of criteria for relation back of amendments in subdivision (c). RCFC 15 was conformed to the comparable federal rule, with two exceptions:

First, the language in FRCP subdivision (c)(3), relating to the timing of an amendment changing the name of a party, was omitted as inapplicable.

Second, language in subdivision (c) of the federal rule, relating to faulty service on federal officers, also was omitted.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of trial through more thorough preparation;

(5) facilitating the settlement of the case; and

(6) assessing the utility of dispositive motions.

(b) Scheduling and Planning. Except in actions exempted by the judge, the court shall, after receiving the Joint Preliminary Status Report from the parties pursuant to Appendix A or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include:

(4) modifications of the times for disclosures under RCFC 26(a) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial;

(6) a direction that the parties file any of the submissions set out in Appendix A ¶¶ 14, 15, 16 or 17; and

(7) any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 4 days after any preliminary scheduling conference or, if no preliminary scheduling conference is held, as soon as practicable after the Joint Preliminary Status Report is filed. A schedule shall not be modified except upon a showing of good cause and by leave of the judge.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity

of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudications under RCFC 56 and 56.1;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to RCFC 26 and RCFC 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a master;

(9) settlement and the use of special procedures to assist in resolving the dispute;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to RCFC 42(b) with respect to a claim, counterclaim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law or a judgment on partial findings under RCFC 52(c).

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including the program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. The order following a final pretrial conference shall be modified only to

prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in RCFC 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(g) Additional Pretrial Procedures. See Appendix A to these rules ("Case Management Procedure") for additional provisions controlling pretrial procedures.

Rules Committee Note

RCFC 16 was completely revised to parallel the structure and content of its counterpart in the Federal Rules of Civil Procedure. The limited number of changes to the current federal rule reflect those deemed necessary to accommodate procedural requirements particular to this court. Except for these changes, the rule shown conforms fully to the text of FRCP 16.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the applicable state, except (1) that a partnership or other unincorporated association which has no capacity by the law of its state may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the

United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rules Committee Note

RCFC 17 was modified in minor respects in order to achieve closer conformity with FRCP 17. A difference between the court's rule and the corresponding federal rule occurs in subdivision (b). Subdivision (b) of the federal rule, subtitled "Capacity to Sue or be Sued," provides generally that, in those cases for which no rule of decision is provided, "capacity to sue or be sued shall be determined by the law of the state in which the district court is held." In recognition of this court's nationwide jurisdiction, the quoted language was rewritten by substituting "by the law of the applicable state" for "by the law of the state in which the district court is held."

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim or counterclaim, may join, either as independent or as alternate claims, as many claims as the party has against an opposing party. A third party may join, to the extent permitted by law, as many claims as the party has against the opposing party.

(b) Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

Rules Committee Note

The final sentence added to subdivision (a) was intended to recognize both the right of a third party to assert a claim and the limitations on that right as set forth in 41 U.S.C. § 114 and applicable case law.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person

should join as a plaintiff but refuses to do so, the person may be made an involuntary plaintiff.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to provisions of RCFC 23.

Rules Committee Note

Reference to RCFC 14 was deleted from subdivision (a) and other minor changes were made in order to more closely conform to FRCP 19. Some differences, however, were retained – the most significant being the deletion of the last sentence of FRCP 19(a) from this court's rule. The last sentence addresses objections to venue raised by a joined party. Such objections would not be assertable in this court.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. A plaintiff need not be interested in obtaining all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

Rules Committee Note

The authority previously contained in RCFC 20(a)(1)-(2), permitting unrestricted joinder of additional plaintiffs to a pending multi-party action, proved cumbersome in practice and an impediment to sound case management. The joinder of additional plaintiffs should proceed by appropriate motion under RCFC 15. Accordingly, RCFC 20 was modified so as to more closely parallel the text of the corresponding Federal Rule of Civil Procedure.

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative

at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rules Committee Note

The last sentence of the former rule, "To add plaintiffs, see RCFC 20(a)(1)-(2)," was eliminated to more closely conform the rule to FRCP 21.

Rule 22. Interpleader. [Not used].

Rules Committee Note

The interpleader practice permitted under FRCP 22 is, for the most part, incompatible with the jurisdiction exercisable by this court. However, in those cases where the United States is in the position of a stakeholder facing the risks of double liability, RCFC 14 provides the means for summoning a third party.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the United States has acted or refused to act on grounds generally applicable to the class, and

(2) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class; and (C) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained, the court shall direct to the potential members of the class the best notice practicable under the circumstances, including notice to all individuals who can be identified through reasonable effort. The notice shall advise that (A) the court will include the individual in the class action if the individual so requests by a specified date; and (B) the judgment(s), whether favorable or not, will bind the member(s) of the class.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1) or (b)(2), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have requested inclusion, and whom the court finds to be members of the class.

(4) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under RCFC 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. [Not used.]

Rules Committee Note

RCFC 23 was completely rewritten. Although the court's rule is modeled largely on the comparable federal rule, there are significant differences between the two rules. In the main, the court's rule adopts the criteria for certifying and maintaining a class action as set forth in *Quinault Allottee Ass'n v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

Because the relief available in this court is generally confined to individual money claims against the United States, the situations justifying the use of a class action are correspondingly narrower than those addressed in FRCP 23. Thus, the court's rule does not accommodate, *inter alia*, the factual situations redressable through declaratory and injunctive relief contemplated under FRCP (b)(1), (2).

Additionally, unlike the federal rule, the court's rule contemplates only opt-in class certifications, not opt-out classes. The latter were viewed as inappropriate here because of the need for specificity in money judgments against the United States, and the fact that the court's injunctive powers – the typical focus of an opt-out class – are more limited than those of a district court.

Finally, the court's rule does not contain a provision comparable to FRCP 23(f). That subdivision, which provides that a "court of

appeals may in its discretion permit an appeal from an order . . . granting or denying class certification" has its origin in 28 U.S.C. § 1292(e), which authorizes the Supreme Court to promulgate rules that provide for an appeal of an interlocutory decision other than those set out in Section 1292. Because no comparable statutory authority exists for this court's promulgation of a similar rule, subdivision (f) was omitted. It should be noted, however, that the Court of Federal Claims may certify questions to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. §§ 1292(b) and 1295.

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on this court which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rules Committee Note

This is a new rule. This version of RCFC 23.1 is in conformity with the corresponding federal rule. The Federal Circuit has ruled that, under certain circumstances, this court has jurisdiction to hear shareholder derivative suits. *First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279 (Fed. Cir. 1999). *Cf. Branch v. United States,* 69 F.3d 1571 (Fed. Cir. 1995); and *California Housing Sec., Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992).

Rule 23.2. Actions Relating to Unincorporated Associations [Not used.]

Rules Committee Note

This rule is procedurally unnecessary in light of the opt-in class-action procedures of RCFC 23.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in RCFC 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

Rules Committee Note

Minor changes were made to subdivision (c) of this rule in order to more closely conform to FRCP 24.

Rule 25. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party, and shall be served as provided in RCFC 5. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs in an action in which the right sought to be enforced survives only to the surviving plaintiffs, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office. [Not used.]

Rules Committee Note

RCFC 25 omits the text of subdivision (d) of FRCP 25 which addresses the substitution of a successor in an action naming a public officer who dies or is separated from service while the action is pending.

V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in RCFC 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; and

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under RCFC 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

(D) [Not used.]

(E) The following categories of proceedings are exempt from initial disclosure under RCFC 26(a)(1):

(i) an action for review on an administrative record, including procurement protest and military pay cases;

(ii) [Not used.];

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv, v, vi and vii) [Not used.];

(viii) an action to enforce an arbitration award; and

(ix) an action under the National Vaccine Injury Compensation Act.

These disclosures must be made within 14 days after the filing of the Joint Preliminary Status Report (see Appendix A ¶ 4) unless a different time is set by stipulation or court order, or unless a party objects during the Early Meeting of Counsel (see Appendix A ¶ 3) that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Joint Preliminary Status Report. In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Joint Preliminary Status Report must make these disclosures within 30 days after being

served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, see Appendix A ¶¶ 5, 8, the disclosures shall be made at least 70 days before the scheduled close of discovery or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. [Not used. See Appendix A ¶¶ 13, 15, 16.]

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under RCFC 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of

documents or things or permission to enter upon land or other property under RCFC 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by RCFC 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under RCFC 30. By order, the court may also limit the number of requests under RCFC 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under RCFC 26(c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the

court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of RCFC 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in RCFC 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to the discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will

enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of RCFC 37(a)(4) apply to award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under RCFC 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Appendix A ¶ 3. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its

disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Conference of Parties; Planning for Discovery. [Not used. See Appendix A ¶ 3.]

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or Appendix A ¶¶ 13, 15, and 16 shall be signed by the attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by the attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the

request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rules Committee Note

RCFC 26 has been revised to parallel the structure and content of its counterpart in the Federal Rules of Civil Procedure. The limited number of changes to the current federal rule, as amended in 2000, reflect those deemed necessary to accommodate the nature and jurisdiction of this court. Except for these changes, the rule shown conforms fully to the text of FRCP 26. Because the Appendix A Early Meeting of Counsel substantially accomplishes the same purpose as the FRCP 26(f) conference of counsel, the timing of initial disclosures was keyed to the former. Consequently, in lieu of the language of FRCP 26(f), cross reference is made to Appendix A ¶ 3.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in the court may file a verified petition. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in the court but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, [Not used.], and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petition shall be served upon the United States in the same manner as a complaint. See RCFC 4. The petitioner may thereafter, by motion served upon counsel for the United States (see RCFC 5), request a hearing or the court may, *sua sponte*, by order, set a hearing on the petition.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character

provided for by RCFC 34 and 35.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in this court, in accordance with the provisions of RCFC 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of the court or before the taking of an appeal if the time therefor has not expired, the court may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in this court. In such case the party who desires to perpetuate the testimony may make a motion for leave to take the depositions, upon the same notice and service thereof as if the action was pending in this court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by RCFC 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in this court.

(c) Perpetuation by Action. [Not used.]

Rules Committee Note

RCFC 27 closely parallels FRCP 27, the only differences being those necessary for compatibility with the jurisdiction and other rules of the court.

Rule 28. Persons Before Whom Depositions may be Taken

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court. A person so appointed has power to administer oaths and take testimony. The term officer as used in RCFC 30, 31 and 32 includes a person appointed by the court or designated by the parties under RCFC 29.

(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is

impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rules Committee Note

RCFC 28 parallels in form and content FRCP 28. The single difference between the two rules occurs in subdivision (a): the court's rule eliminates the reference to other courts by omitting the phrasing "in which the action is pending."

Rule 29. Stipulations Regarding Discovery Procedure

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in RCFC 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

Rules Committee Note

RCFC 29 conforms to FRCP 29.

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in RCFC 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in RCFC 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or RCFC 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the

case; or

(C) a party seeks to take a deposition before the time specified in RCFC 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under RCFC 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the

custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with RCFC 34 for the production of documents and tangible things at the taking of the deposition. The procedure of RCFC 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and RCFC 28(a), a deposition taken by such means is taken at the place where the deponent is to answer questions.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections.

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-

suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under RCFC 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with RCFC 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4) At any time during the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in RCFC 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of RCFC 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing.

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) Certification and Delivery by Officer; Exhibits; Copies.

(1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction,

tampering, or deterioration. Documents and things produced for inspection during the examination of the witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) [Not used.]

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

Rules Committee Note

RCFC 30 parallels the structure and content of its counterpart in the Federal Rules of Civil Procedure. The limited number of differences reflect those necessary for compatibility with the jurisdiction and other rules of the court.

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions

without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in RCFC 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in RCFC 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or RCFC 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined has already been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in RCFC 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of RCFC 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by RCFC 30(c), (e) and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver the deposition to the party taking it, attaching thereto the copy of the notice and the questions received by the officer.

(c) Notice of Receipt. When the deposition is received, the party taking it shall promptly give notice thereof to all other parties.

Rules Committee Note

RCFC 31 closely parallels the text of FRCP 31. Subdivision (a) is identical in wording to the current federal civil rule. Subdivisions (b) and (c) are nearly identical, the only differences being those necessary to reflect the court's practice of not requiring depositions to be filed.

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under RCFC 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that the witness is at a greater distance than 100 miles from the place of trial or hearing, unless the court also finds (i) that the absence of the witness was procured by the party offering the deposition or (ii) that it is not in the interests of justice, with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under RCFC 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days

notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under RCFC 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to RCFC 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of RCFC 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of

parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. **(C)** Objections to the form of written questions submitted under RCFC 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, or otherwise dealt with by the officer under RCFC 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rules Committee Note

RCFC 32 is identical to FRCP 32, except for (i) omission of the last sentence in subdivision (c), applicable only in jury trials, (ii) deletion of the word "filed" in subdivision (d)(4), because this court does not require that depositions be routinely filed, and (iii) revisions of subparagraphs (a)(3)(B) and (E) to require application and notice for the use of depositions of a witness who is at a greater distance than 100 miles from the place of hearing.

Rule 33. Interrogatories to Parties

(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of RCFC 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in RCFC 26(d).

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to RCFC 29.

(4) All grounds for an objection to

an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under RCFC 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under RCFC 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) Option to Produce Business Records.

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rules Committee Note

RCFC 33 is identical to FRCP 33.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of RCFC 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated

object or operation thereon, within the scope of RCFC 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in RCFC 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to by the parties, subject to RCFC 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under RCFC 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in RCFC 45.

Rules Committee Note

RCFC 34 is identical to FRCP 34.

Rule 35. Physical and Mental Examinations of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examiner.

(1) If requested by the party against whom an order is made under RCFC 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination,

previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

Rules Committee Note

RCFC 35 is identical to FRCP 35, except for the omission of the words, "in which the action is pending," in subdivision a.

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of RCFC 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in RCFC 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to RCFC 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party

has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of RCFC 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of RCFC 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of RCFC 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

Rules Committee Note

RCFC 36 is identical to FRCP 36.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. [Not used.]

(2) Motion.

(A) If a party fails to make a disclosure required by RCFC 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under RCFC 30 or 31, or a corporation or other entity fails to make a designation under RCFC 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under RCFC 33, or if a party, in response to a request for

inspection submitted under RCFC 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under RCFC 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under RCFC 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions Concerning Deponents. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions Concerning Parties. If a party or an officer, director, or managing agent of a party or a person designated under RCFC 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or RCFC 35, or if a party fails to obey an order entered under RCFC 16(b), the court may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under RCFC 35(a) requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by RCFC 26(a) or 26(e)(1), or to amend a prior response to discovery as required by RCFC 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of

this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under RCFC 37(b)(2)(A), (B), and (C).

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under RCFC 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to RCFC 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under RCFC 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under RCFC 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under RCFC 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by RCFC 26(c).

(e) [Abrogated in federal rule.]

(f) [Repealed.]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Appendix A ¶ 3, the court may,

after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rules Committee Note

RCFC 37 parallels the structure and content of FRCP 37. The limited number of differences reflect those necessary for compatibility with the jurisdiction and other rules of the court.

TITLE VI. TRIALS

Rule 38. Jury Trial of Right [Not used.]

Rule 39. Trial by Jury or by the Court [Not used.]

Rule 40. Setting Cases for Trial

Setting a case for trial is the responsibility of the judge to whom the case is assigned, and may be made (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems expedient. All trials shall be scheduled by the judge by order filed with the clerk. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rules Committee Note

The text of RCFC 40 parallels, but is not identical to, FRCP 40. Like its federal rules counterpart, however, the purpose of the rule is to identify the responsibility of the judge in scheduling a matter for trial. The changes made to the text of the rule are minor and intended to clarify the rule's essential purpose, i.e., that it is the judge's responsibility to determine the date and place of trial in accordance with 28 U.S.C. §§ 173, 798(a), and 2503(c).

Rule 40.1. Assignment and Transfer of Cases

(a) After the complaint has been served on the United States, or after recusal or disqualification of a judge to whom a case has been assigned, the case shall be assigned (or reassigned) forthwith to a judge at random.

(b) To promote docket efficiency, to conform to the requirements of any case management plan, or for the efficient administration of justice, a case may be transferred by order of the assigned judge to another judge upon the agreement of both judges. A motion to transfer may be initiated by a party. See RCFC 40.2.

(c) The chief judge may reassign any case if the chief judge deems such action necessary for the efficient administration of justice.

Rules Committee Note

RCFC 40.1 has no FRCP counterpart. The substance of the rule formerly appeared in these rules as part of paragraph (1) of RCFC 77(f). The renumbering of RCFC 77(f) reflects its more logical placement in the structure of the court's rules.

The new language introduced by the rule – subdivision (b) – represents a codification of internal procedures.

Rule 40.2. Related Cases

(a) Directly-Related Cases.

(1) At the time a complaint is filed, the filing attorney (or *pro se* plaintiff) shall file and serve on all parties who have appeared a Notice of Directly-Related Case(s). Cases are deemed directly related when an earlier-filed case and the action being filed:

(A) involve the same parties and are based on the same or similar claims; or

(B) involve the same contract, property or patent.

(2) Where a Notice of Directly-Related Cases is filed along with the new complaint, the clerk shall assign the case to the judge to whom the earliest-filed directly-related case is assigned. If the judge to whom the related case is assigned determines that the case in question is not in fact directly related, the judge will return the case to the clerk for random assignment.

(3) Where the existence of directly-related cases becomes apparent only after initial assignment, the Notice of Directly-Related Cases shall be filed in all related cases, captioned in the name of the earliest-filed case. Solely for the purpose of filing this notice, counsel in the later-filed case may appear in the earlier-filed case. The Notice may be accompanied by a motion to transfer and a suggestion for consolidation under RCFC 42.1. The judge in the earliest-filed case, after consultation with the judge in the later-filed case, will grant or deny the motion to transfer.

(4) Content of the Notice of Directly-Related Case(s). The notice of related case shall contain: the title and case number of the related case; a brief statement of the relationship of the actions according to the criteria set forth in subdivision (a); and a statement addressing whether assignment to a single judge or other action, including consolidation, is or is not likely to conserve judicial resources and promote an efficient determination of the actions.

(b) Indirectly-Related Cases.

(1) Whenever it appears to a party that there are two or more cases before the court that present common issues of fact and that transfer, consolidation, or the adoption of a coordinated discovery schedule would significantly promote the efficient administration of justice, the party may file a Notice of Indirectly-Related Cases. The notice shall be captioned in the name of the earliest-filed case which is related. Solely for purposes of filing the notice, counsel may appear in an earlier-filed case.

(2) The notice shall list the name and docket number of all indirectly-related cases and shall detail the reasons supporting the proposed action. Counsel shall serve all parties in the related cases. The clerk shall file the notice in those cases and furnish a courtesy copy of the notice to the chief judge. Solely for the purpose of responding to the notice, counsel in the related cases may appear in the earliest-filed case to file a response to the notice. The response shall be filed within 21 days of service and captioned in the name of the earliest-filed case. Responses shall be served on counsel in all cases. The clerk shall file copies of the responses in each of the cases and shall furnish courtesy copies to the

chief judge.

(3) The presiding judge of the earliest-filed case shall call a meeting of all of the presiding judges to determine what, if any, action is appropriate. The parties to each action shall be notified of any resulting decision.

Rules Committee Note

RCFC 40.2 has no FRCP counterpart. The subject of the rule – Related Cases – previously appeared in these rules as RCFC 77(f)(as revised by General Order No. 36). The renumbering of the rule reflects its more logical placement in the structure of the court's rules.

Unlike the predecessor rule, RCFC 40.2 recognizes two types of related cases: directly-related cases and indirectly-related cases. Directly-related cases retain the definition that applied under former RCFC 77(f). Thus, cases that "involve the same parties and are based on the same or similar claims" or "involve the same contract, property, or patent" are deemed to be directly related. Cases that are directly related share an identity of parties and/or subject matter that, for the sake of consistency in outcome, warrant their assignment to a single judge. Indirectly-related cases, by contrast, share only "common issues of fact." In the interests of efficiency and the conservation of resources, such cases may warrant consolidated management during their pretrial stage.

In addition to recognizing two forms of related cases, RCFC 40.2 also prescribes the notice procedures that are to be followed for the identification of such cases to the court and interested counsel.

Rule 40.3. Complaints Against Judges

(a) The Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c)(18), directs the United States Court of Federal Claims to prescribe rules for the filing of complaints against judges of the court who have engaged in conduct prejudicial to the effective and expeditious administration of the business of the court or who are unable to discharge all the duties of the office by reason of mental or physical disability.

(b) A copy of these rules, titled "Rules of the United States Court of Federal Claims Governing Complaints of Judicial Misconduct and Disability," is available upon request from the Office of the Clerk of the United States Court of Federal Claims, 717 Madison Place, NW, Washington, DC 20005. Pursuant to these rules, written complaints may be filed with the clerk.

Rules Committee Note

RCFC 40.3 has no FRCP counterpart. However, the notice provided by the rule is in accordance with the recommendations of the Judicial Conference of the United States, urging that such notice be made part of the court's rules.

The rule replaces former Appendix B ("Procedures for Processing Complaints of Judicial Misconduct") and its supplementing order, General Order No. 34 dated June 3, 1993. Inclusion of the rule as a subpart of RCFC 40 is intended to further a more coherent organizational structure for the court's rules.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing

a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under RCFC 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rules Committee Note

Minor changes were made to more closely conform the rule to FRCP 41. Substantively, however, the rule remains unchanged.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be

conducive to expedition and economy, may order a separate trial of any claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, counterclaims, third-party claims, or issues.

(c) Separate Determination of Liability. Upon stipulation of the parties, approved by the court, or upon order of the court, a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings. In any case, whether or not a stipulation or order has been made under subdivision (c) of this rule, the court, upon determining that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. Any motion for reconsideration shall be filed not later than 10 days after a separate determination of liability.

Rules Committee Note

RCFC 42 remains unchanged. Thus, as before, the rule parallels in part FRCP 42 and, in addition, includes subdivision (c)("Separate Determination of Liability") permitting the liability phase of a lawsuit to be separated from, and decided independently of, the quantum phase.

Rule 42.1. Motions to Consolidate

Motions to consolidate shall be directed to the judge to whom the relevant cases are assigned. In the event the relevant cases are assigned to different judges, a motion to transfer may be made pursuant to RCFC 40.1, with a suggestion of the appropriateness of consolidation.

Rules Committee Note

RCFC 42.1 has no FRCP counterpart. It identifies the procedure applicable to motions for the consolidation of actions pending before different judges.

Rule 43. Taking of Testimony

(a) Form. In every trial the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

(b), (c) [Abrogated in federal rule.]

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court.

Rules Committee Note

The rule is identical to FRCP 43.

Rule 44. Proof of Official Record

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Rules Committee Note

RCFC 44 is identical to FRCP 44.

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Rules Committee Note

The rule is identical to FRCP 44.1.

Rule 45. Subpoena

(a) Form (See Appendix of Forms, Forms 6 and 7A); Issuance.

(1) Every subpoena shall

(A) state the name of the court; and

(B) state the title of the action and its docket number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) [Not used.]

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court, authorized to sign filings under RCFC 83.1, may also issue and sign a subpoena on behalf of the Court of Federal Claims.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. See 28 U.S.C. § 1821. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by RCFC 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena; but the court upon proper application and good

cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in

person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Rules Committee Note

RCFC 45 conforms to FRCP 45 to the extent feasible given the court's nationwide jurisdiction.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders

of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Rules Committee Note

The rule is identical to the corresponding FRCP.

Rule 47. Selection of Jurors [Not used.]

Rule 48. Number of Jurors - Participation in Verdict [Not used.]

Rule 49. Special Verdicts and Interrogatories [Not used.]

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings [Not used.]

Rule 51. Instructions to Jury: Objection [Not used.]

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to RCFC 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under RCFC 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings - or make additional findings - and may amend the judgment accordingly. The motion may accompany a motion for a new trial under RCFC 59. The sufficiency of the evidence to support the findings may be questioned whether or not the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) Judgment on Partial Findings. If during a trial a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable

finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rules Committee Note

The principal change in RCFC 52 relates to the enlargement of subdivision (c) to include, among issues subject to judgment on partial findings, the adjudication of issues critical to the legal sufficiency of a "defense." The amendment makes clear that judgments as a matter of law may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 53. Masters

(a) Appointment and Compensation. The chief judge, at the request of the presiding judge, may appoint a special master. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. Save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless

the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in RCFC 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in RCFC 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. Unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) Acceptance of Report. The court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. [Not used.]

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the master's report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application to Magistrate Judge. [Not used.]

Rules Committee Note

Subdivision (a) recognizes that the chief judge has the power to appoint special masters pursuant to 28 U.S.C. § 798. Paragraph (2) of subdivision (d) recognizes the court's power to utilize contempt procedures in appropriate circumstances.

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Costs other than attorneys' fees may be awarded to the prevailing party to the extent permitted by law. See 28 U.S.C. § 2412(a).

(A) Filing Bill of Costs. A prevailing party may request the clerk to tax allowable costs by filing a Bill of Costs as set forth in the Appendix of Forms (Form 4) within 30 days after the date of final judgment, as defined in 28 U.S.C. § 2412(d)(2)(G). In any case where any costs other than the

fee for filing the action are being requested, the bill of costs shall be supported by affidavit and accompanied by a memorandum setting forth the grounds and authorities supporting the request. Any vouchers, receipts or invoices supporting the cost being requested shall be attached as exhibits.

(B) Objections to Bill of Costs. (i) An adverse party may object to the Bill of Costs or to any item claimed therein by filing objections within 28 days after the service of the Bill of Costs. Within 7 days after service of the objections, the prevailing party may file a reply. Unless a conference is scheduled by the clerk, the taxation of costs or any disallowance will be made by the clerk on the record. (ii) A party may request the court to review the clerk's action by filing a motion within 14 days after action by the clerk. The court's review of the clerk's action will be made on the existing record unless otherwise ordered.

(C) Costs in Settlements. The clerk will not tax costs on any action terminated by settlement wherein the judgment is entered pursuant to RCFC 68 or is dismissed pursuant to RCFC 41(a). Settlement agreements must resolve any issue relating to costs. In the absence of special agreement, parties will bear their own costs.

(D) No Extensions. No extensions of time under this rule will be permitted and the failure of a prevailing party to timely file a Bill of Costs shall constitute a waiver of any claim for costs.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. See Appendix of Forms, Form 5.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 30 days after the date of final judgment, as defined in 28 U.S.C. § 2412(d)(2)(G); must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in RCFC 52(a).

(D) The responding party shall

have 28 days from the service of the motion pursuant to subdivision (d)(2)(A) to file a response, to which plaintiff may reply within 14 days after service of the response. After the filing of a motion, and response and reply, if any, the judge will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate. In addition, the court may refer issues relating to the value of services to a special master under RCFC 53 without regard to the provisions of subdivision (b) thereof.

(E) The provisions of subdivisions (d)(2) (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. §1927.

Rules Committee Note

RCFC 54(d) was revised in several respects. The subdivision was modified to conform its structure to FRCP 54(d). In addition, the subdivision, as re-written, departs from its FRCP counterpart in several respects:

First, because the allowance of attorneys' fees and costs in this court is almost always determined under the provisions of 28 U.S.C. § 2412 (a) & (d) (the Equal Access to Justice Act), it was deemed advisable to reflect this fact in paragraph (d)(2) rather than to retain the broader, but potentially misleading, language that appears in FRCP 54(d)(1). *See Neal & Co. v. United States*, 121 F.3d 683 (Fed. Cir. 1997).

Second, Subdivision (d)(1) was enlarged beyond the scope of its FRCP counterpart by the incorporation of RCFC 77.4 ("Taxation of Costs").

Third, Subdivision (d)(2) brings together relevant sections of its FRCP counterpart and former RCFC 81(e) ("Application for Attorneys' Fees").

Finally, the time periods for objecting to a Bill of Costs and for requesting review of the clerk's action are enlarged.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. No judgment by default shall be entered unless the claimant establishes a claim or right to relief by evidence satisfactory to the court. The party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and

proper.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with RCFC 60(b).

(d) Plaintiffs; Counterclaimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a counterclaim. In all cases a judgment by default is subject to the limitations of RCFC 54(c).

Rules Committee Note

RCFC 55 recognizes the distinction between entry of default and entry of judgment for default. Substantial changes were made. The language in former subdivision (b)(1), permitting entry of default judgment by the clerk, is omitted. Additionally, the protection previously afforded only to the United States–prohibiting entry of default judgments absent a showing by the claimant of a right to relief by evidence satisfactory to the court–is expanded to include all parties. Judgment requires proof and involvement of the court.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim or counterclaim or to obtain a declaratory judgment may, at any time after the expiration of 60 days from the commencement of the action in this court or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in such party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim or counterclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set

forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Procedures. The following procedures shall be followed with respect to motions for summary judgment other than in actions seeking review of a decision on the basis of an administrative record:

(1) The moving or cross-moving party shall file, together with its motion, a separate document titled Proposed Findings of Uncontroverted Fact. This document shall contain concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.

(2) The opposing party shall file, together with its opposition, a response to the requested findings by indicating, immediately below each finding, whether it agrees or disagrees with the finding as stated. If the opposing party does not agree with the proposed finding, it shall note the basis for its objection and <u>may</u> draft a proposed revision of the finding directly below the challenged finding. The opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered by the

moving party's statement. Such additional statements of proposed findings shall be set forth with the proposed findings applicable to any cross-motion, but in the absence of a cross-motion shall be set forth in a separate document. Responses to such additional proposed findings shall be filed in a format which conforms to the instructions noted above.

(3) The parties may dispense with the documents called for in subdivision (h)(1)-(2) if they file, no later than the time of the initial motion, a comprehensive stipulation of all of the material facts upon which they intend to rely. In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are controverted by affidavit or other written or oral evidence.

Rules Committee Note

The subdivision structure of RCFC 56 was re-ordered to more closely conform to FRCP 56. In addition, the subdivision outlining the procedures for filing a RCFC 56 motion was changed to eliminate the Statement of Genuine Issues and to require parties to express their views on any particular fact by noting them on a single page, which may include a redraft of the challenged finding.

Rule 56.1. Review of Decision on the Basis of Administrative Record

(a) Standards. RCFC 56(a) - (b) applies, with the exception that any supplementation of the administrative record shall be by stipulation or by court order.

(b) Procedures.

(1) The moving or cross-moving party shall file, together with its motion, a separate document titled Statement of Facts setting forth the facts necessary to resolve the issues presented on review. This document shall contain concise, separately numbered paragraphs setting forth all of the facts upon which the party bases its motion and which are supported by the record. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence in the record.

(2) The opposing party shall file, together with its opposition or cross-motion, a separate document titled Counter-Statement of Facts. This document shall indicate immediately below each statement of fact whether it agrees or disagrees with the fact as stated. The party shall state the precise nature of its disagreement and give its version of the events supported by record citations. The opposing party may also file Proposed Additional Facts as to any relevant matters not covered by the moving party's statement to which the movant shall respond in like format.

Rules Committee Note

RCFC 56.1 has no FRCP counterpart. In the interests of procedural clarity, the text of subdivision (a) was modified to reflect current practice with respect to supplementation of the administrative record and subdivision (b)(2) was modified to make explicit an opposing party's right to file an opposition as well as a cross-motion. In

addition, the rule was conformed to RCFC 56 practice, in that the statement of facts and counter-statement of facts are presented in a single document. In other respects, RCFC 56.1 remains unchanged.

Rule 56.2. Remand; Extension or Termination of Stay of Proceedings on Remand; Disposition of Case

(a) Remand.

(1) Issuance of Remand Order. At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official with such direction as may be deemed proper and just.

(2) Content of Remand Order. An order of remand shall (A) delineate the area of further consideration or action deemed warranted on the remand, (B) fix the duration of the remand period, not to exceed 6 months, and (C) specify the extent to which court proceedings shall be stayed during the remand period.

(3) Service of Order. A certified copy of any order issued pursuant to this rule shall be served by the clerk on the administrative or executive body or official to whom the order is directed. A copy of the order shall be served on each party in conformity with RCFC 5.

(4) Transmittal of Administrative Record. Following service of the order as provided for in this rule, the clerk shall transmit the administrative record, if any, to the Department of Justice for return to the administrative or executive body or official to whom the order of remand is directed.

(5) Advice of Administrative Action. In every case in which an order of remand is entered pursuant to this rule, the attorney of record for the party so designated in the order of remand shall report to the court the status of proceedings on remand at intervals of 90 days or less, beginning with the date of the order.

(b) Extension or Termination of Stay of Proceedings on Remand; Disposition of Case.

(1) Extension. If the administrative or executive body or official has not, during the period of stay provided for in an order of remand pursuant to subdivision (a), rendered a decision on the matter remanded, the party to whom opportunity was afforded to obtain further administrative consideration shall, by motion pursuant to RCFC 6, request an extension of the stay of proceedings, or, by motion pursuant to RCFC 7, request the initiation of proceedings toward otherwise disposing of the case.

(2) Disposition at Administrative Level. If, during the period of the stay of proceedings as provided for in a remand order, the parties dispose of the case at the administrative level, the plaintiff shall file a motion to dismiss the case with prejudice.

(3) Decision on Remand. Upon completion of proceedings pursuant to an order of remand under subdivision (a), the administrative or executive body or official to whom the order was directed shall forward to the clerk for filing 4 copies of the decision or final

action on remand. A copy of such decision or action shall be served on each party by the clerk.

(4) Action by the Parties. Within 30 days after the filing of a decision or final action pursuant to subdivision (3), each party shall file with the clerk a notice indicating whether or not the decision or final action on remand affords a satisfactory basis for disposition of the claim at the administrative level, or whether further proceedings before the court are deemed required, and, if such proceedings are desired, what those proceedings should be. A copy of such notice shall be served on each adverse party in conformity with RCFC 5. Thereafter, the court will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate.

Rules Committee Note

RCFC 56.2 has no FRCP counterpart. The rule formerly appeared in these rules as RCFC 60.1. The renumbering of RCFC 60.1 is intended to reflect its more logical placement in the organizational structure of the court's rules.

Rule 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. §§1491(b)(2) and 1507 shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rules Committee Note

The reference to 28 U.S.C. §1491(a) was amended to reflect the corresponding change in that statute. The court's authority to render declaratory judgments in the context of procurement protests is found in 28 U.S.C. §1491(b)(2).

Rule 58. Entry of Judgment

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) to amend or make additional findings of fact under RCFC 52(b);

(B) for attorney fees under RCFC 54;

(C) for new trial, or to alter or amend the judgment, under RCFC 59; or

(D) for relief under RCFC 60.

(2) Subject to RCFC 54(b):

(A) the clerk must, without awaiting the court's direction, promptly prepare, sign and enter the judgment when the court awards only costs or a sum certain, or denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when the court grants relief not described in paragraph (a)(2) of this rule.

(b) Time of Entry. Judgment is entered for purposes of RCFC 52, 54(d)(2)(B), 59, 60, and 62:

(1) when it is entered in the civil docket under RCFC 79(a), and

(2) if a separate document is required by paragraph (a)(1) of this rule, upon the earlier of these events:

(A) when it is set forth on a separate document, or

(B) when 60 days have run from entry on the civil docket under RCFC 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees except as provided in RCFC 58(c)(2).

(2) When a timely motion for attorney fees is made under RCFC 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under RCFC 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by RCFC 58(a)(1).

Rules Committee Note

RCFC 58 is essentially identical to the text that was proposed in August 2000 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, with the exception of any references to trial by jury.

Rule 58.1. Notice of Appeal

Review of a decision of this court shall be obtained by filing with the clerk an original and the requisite number of copies of a notice of appeal (but not fewer than four) within the time and manner prescribed for appeals to United States courts of appeal as provided for in Rule 3 of the Federal Rules of Appellate Procedure, together with the fee provided in RCFC 77.1(c)(2) of the Rules of the United States Court of Federal Claims.

Rules Committee Note

Although the rule has no FRCP counterpart, it is a necessary component of the court's rules because it prescribes the time and manner for the filing of an appeal from a decision of this court.

Rule 59. New Trials; Rehearings; Amendment of Judgments; Reconsideration

(a) Grounds.

(1) A new trial or rehearing or reconsideration may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States. On a motion under this rule, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(2) The court, at any time while a suit is pending before it, or after proceedings for review have been instituted, or within 2 years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United

States.

(b) Time for Motion and Response. Except as provided in subdivision (a)(2), a motion for a new trial, or for amendment or reconsideration of a judgment, shall be filed no later than 10 days after the entry of the judgment. When such a motion is based on affidavits, they shall be filed with the motion. No response to any motion under this rule may be filed, unless requested by the court. The court will not rule in favor of any motion under this rule without first requesting by order a response to the motion.

(c) [Not used.]

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Rules Committee Note

Minor changes in wording were made to more closely conform to FRCP 59. Subdivision (c) was deleted to reflect the difference in Court of Federal Claims practice, set out in subdivision (b), which directs that a response to a RCFC 59 motion is only required when directed by the court, even if the motion is accompanied by an affidavit. Other differences were retained, including the distinction between final and non-final orders, which can be the subject of motions for reconsideration at any time before final judgment.

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion

shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rules Committee Note

Minor changes in wording were made to more closely conform to FRCP 60. Necessary differences were retained.

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rules Committee Note

The rule as written is identical to FRCP 61.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions-Injunctions and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to RCFC 59, or of a motion for relief from a judgment or order made pursuant to RCFC 60, or of a motion for amendment to the findings or for additional findings made pursuant to RCFC 52(b).

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the

security of the rights of the adverse party.

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay According to State Law. [Not used.]

(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in RCFC 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Rules Committee Note

Minor changes in text were made to subdivision (a) in order to more closely conform the rule to FRCP 62. However, certain necessary differences were retained.

Rule 63. Inability of a Judge to Proceed

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Rules Committee Note

Subdivisions (b) and (c) were deleted as unnecessary. The substance of each is covered in 28 U.S.C. § 455 and in the Codes of Conduct for Judges and Judicial Employees. The rule as re-written is essentially identical to FRCP 63.

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of Person or Property

[Not used.]

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the attorney's claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of RCFC 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting

an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee.

Rules Committee Note

Minor textual changes were made to subdivision (b) in order to more closely conform to its FRCP counterpart. Additionally, subdivision (f) (titled "Procedures") has been relocated to Appendix C. (Appendix C supersedes former General Order No. 38, dated May 7, 1998, which described the court's standard practices in procurement protest cases filed pursuant to 28 U.S.C. § 1491(b).)

Rule 65.1. Security: Proceedings Against Sureties

(a) Proceedings. Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

(b) Sureties. Acceptable sureties on bonds shall be those bonding companies holding certificates of authority from the Secretary of the Treasury. See the latest U.S. Treasury Dept. Circ. 570. When a court decision provides for the giving of security, the clerk will furnish counsel with the appropriate bond form.

Rules Committee Note

Subdivision (a) is identical to FRCP 65.1. Subdivision (b) (titled "Sureties"), although unique to this court, provides information useful to the court's practitioners and is therefore being retained.

Rule 66. Receivers Appointed by Federal Courts [Not used.]

Rule 67. Deposit in Court [Not used.]

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon the clerk shall enter judgment.

An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rules Committee Note

A minor change in wording was made in order to more closely conform to FRCP 68.

Rule 69. Execution [Not used.]

Rule 70. Judgment for Specific Acts; Vesting Title [Not used.]

Rule 71. Process in Behalf of and Against Persons Not Parties [Not used.]

Rule 71A. Condemnation of Property [Not used.]

IX. SPECIAL PROCEEDINGS

Rule 72. Notice of Appeal [Abrogated.]

Rules Committee Note

Chapter IX of the Federal Rules of Civil Procedure, titled "Special Proceedings," (comprising FRCP 71A -- FRCP 73) has not been included in the main body of the court's rules. Instead, rules relating to the court's special proceedings appear in the appendices to the rules.

Rule 73. Magistrate Judges; Trial by Consent and Appeal Options [Not used.]

Rule 74 - 76. [Abrogated.]

TITLE X. COURT AND CLERK

Rule 77. Court and Clerk

(a) Court Always Open. The court shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Proceedings in Chambers.

(1) Proceedings Generally. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials or at any other place designated by order.

(2) Trials or Hearings in Foreign Countries. Upon motion of a party or upon the judge's own initiative, and

upon a determination by the judge to whom the case is assigned that the interests of economy, efficiency, and justice will be served, the chief judge of the Court of Federal Claims may issue an order authorizing a judge of the court to conduct proceedings, including evidentiary hearings and trials, in a foreign country whose laws do not prohibit such proceedings.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and the following holidays: New Year's Day, Inauguration Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day designated as a holiday by the President or the Congress of the United States. All motions and applications in the clerk's office for issuing process, process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in RCFC 5 upon each party who is not in default for failure to appear and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in RCFC 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Rules Committee Note

In order to more closely parallel the structure and content of FRCP 77, RCFC 77 has been modified as follows:

Former subdivisions (a) (referring to the court's "Name"), (b) (referring to the court's "Seal"), (d) (captioned "Citations") and (e) (identifying the court's judicial power as being exercisable by a single judge, except in congressional reference cases), have been deleted as unnecessary.

Subdivision (b) (formerly subdivision (h) of this rule) is changed in two respects. First, in order better to reflect its content, the subdivision is retitled to read "Trials and Hearings; Proceedings in Chambers" (in lieu of "Trials and Hearings; Orders in Chambers"). Second, the subdivision has been divided into paragraphs (1) and (2). Paragraph (1), captioned "Proceedings Generally," retains the rule's earlier language; paragraph (2), captioned "Trials or Hearings in Foreign Countries," is new. Paragraph (2) was added to recognize the court's authority under 28 U.S.C. § 798(b) to conduct trials or hearings in foreign countries.

Former subdivision (f) (titled "Assignment of Cases") was renumbered as RCFC 40.1.

Former subdivision (g) (titled "Signing of Orders for Absent Judges") was renumbered as RCFC 77.2(b).

Former subdivisions (l) & (k) (titled, respectively, "Scheduling Courtrooms" and "Fee Schedule"), were renumbered as RCFC 77.1.

Finally, former subdivision (m) was deleted in order to recognize the right of certain court employees to participate in pro bono legal work under the guidelines prescribed for that purpose by the Codes of Conduct for Judicial Employees.

Rule 77.1. Business Hours, Scheduling and Fees

(a) Business Hours. The Office of the Clerk is open during the hours 8:45 a.m. to 5:15 p.m. on business days. A night box is provided for filing with the Office of the Clerk between the hours of 5:15 p.m. and 12:00 midnight on any business day for papers due that day. The box is located inside the gate at the garage entrance on H Street. It is suggested that counsel telephone the clerk's office by 9:30 a.m. of the next day as to receipt, (202) 219-9562.

(b) Scheduling. The clerk shall schedule the use of courtrooms in Washington, D.C., and shall be responsible for all arrangements for courtrooms and other facilities required by the court at locations other than in Washington, D.C. All conferences, oral arguments, trials, and other recorded appearances shall be scheduled by the judge by order filed with the clerk.

(c) Fee Schedule.

(1) Fees for services rendered by the clerk are payable in advance; all checks are to be made payable to "Clerk, United States Court of Federal Claims."

(2) Fees are:

Admission to practice and certificate thereof.....$50.00
(Calligraphied certificate .....$25.00)
Duplicate certificate of admission or certificate of good standing....$15.00
Filing complaint.....$150.00
Filing intervening complaint.....$150.00
Certifying any document or paper.....$7.00
Reproducing any record, entry or other paper for a maximum of 50 pages .....$50.00 per page
Filing Notice of Appeal.....$105.00
(includes $5.00 notice of appeal and $100.00 Court of Appeals fees)
Receipt of monthly listing of court orders and opinions $15.00

Such other fees as authorized by the Judicial Conference of the United States.

Rules Committee Note

Former RCFC 77.1 was deleted in its entirety. Current RCFC 77.1 reflects portions of the text of former subdivisions (c) as well as subdivisions (h) and (i) of RCFC 77.

Rule 77.2. Authorization to Act on Certain Motions

(a) Clerk Authorization. Any motion for enlargement of time to answer or respond to the complaint or, for substitution of counsel, may be acted upon by the clerk of the court if (1) the motion states that opposing counsel has no objection, (2) no opposition to the motion has been timely filed, or (3) opposing counsel files a consent.

In acting on motions for enlargement of time under this subdivision of the rule, the total enlargement of time allowed by the clerk with respect to any matter shall not exceed 60 days.

(b) Signing of Orders for Absent Judges. If the judge to whom the action is assigned is not available and there is an emergency necessitating an order, the matter shall be presented to the chief judge, or to another judge designated by the assigned judge.

Rules Committee Note

This rule has no FRCP counterpart. The rule was changed in several respects. First, former subdivisions (a) and (b) were combined into a new subdivision (a). Second, language in former subdivision (a) relating to the "permanent withdrawal of papers" was deleted to reflect corresponding changes in RCFC 77.3 that abolish the practice of permitting the withdrawal of papers from the clerk's office. Third, former subdivisions (c) and (d) were deleted as unnecessary. Finally, new subdivision (b) reflects text transferred from former subdivision (g) of RCFC 77.

Rule 77.3. Withdrawal of Papers, Exhibits

(a) Withdrawal for Trial. The reporter engaged to transcribe the evidence may temporarily withdraw all papers and exhibits for use during any trial session. All exhibits admitted into evidence or designated to accompany the transcript shall remain in the reporter's custody until the transcript of the court session is filed with the clerk.

(b) Withdrawal of Papers and Exhibits. No papers or exhibits filed with the court shall be temporarily or permanently withdrawn from the office or custody of the clerk except by order of the court. No such order will be entered except in extraordinary circumstances. In the event of such withdrawal, a record of the filing and the order of withdrawal shall be preserved.

(c) Disposition of Physical Exhibits. All physical exhibits, including models, diagrams, depositions, transcripts, briefs, tables, and charts shall be removed from the clerk's custody by the party by whom they were produced or offered within sixty (60) days after the entry of final judgment by this court, or, in the event of an appeal, within ninety (90) days after the receipt and filing of a mandate or other process or certificate showing the disposition of the case by the appellate court; otherwise, such exhibits shall be deemed abandoned and shall be destroyed or otherwise disposed of by the clerk.

(d) Sealed Materials. Unless otherwise specified by order, no earlier than five years after the entry of final judgment by this court, or, in the event of appeal, within five years after the receipt and filing of a mandate or other process or certificate showing disposition of the case by the appellate court, the clerk may notify the parties that materials maintained under seal shall be unsealed, absent timely notice of objection by either party.

Rules Committee Note

This rule has no FRCP counterpart. The rule has been amended in several respects:

First, former subdivision (a) was deleted, thereby eliminating the practice of permitting temporary withdrawal of exhibits and papers by the parties. The need to accommodate the copying of extensive parts of a record should be addressed directly through arrangements made by the clerk.

Subdivision (a), formerly subdivision (b), was amended to clarify that the reporter is to retain custody of the transcript and exhibits until they are filed with the clerk.

New subdivision (b), formerly subdivision (c), clarifies that no withdrawal of papers or exhibits from the clerk's office may occur in the absence of a court order, and then only in extraordinary circumstances. The fact of withdrawal shall be preserved in the court's docketing entries.

New subdivision (c), formerly subdivision (d), was rewritten to clarify the practice with respect to the disposition of physical exhibits and to make clear the parties' obligation to retrieve such exhibits, to avoid their loss through routine disposal. The reference to *in camera* materials was omitted, because such materials are not filed with

the Office of the Clerk.

New subdivision (d) establishes a procedure for handling materials filed under seal, requiring the parties affirmatively to indicate a desire to maintain filings in closed cases under seal.

Rule 78. Motions Day [Not used.]

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, except for subpoenas, all appearances, orders, and judgments shall be entered chronologically in the docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court.

(d) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Rules Committee Note

The word "civil" was added to subdivision (a) to more closely conform the rule to FRCP 79. RCFC 79 as it now reads is essentially identical to FRCP 79.

Rule 80. Record or Transcript as Evidence

Whenever the testimony of a witness at a trial or hearing which was reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Rules Committee Note

Former subdivisions (a), (b) and (c) were deleted and minor changes were made to former subdivision (d) in order to more closely conform the rule to FRCP 80.

Rule 80.1. Instructions to Reporters

(a) Record of Proceedings. The court will furnish a reporter to take down the trial proceedings and transcribe the same in any trial.

(b) Reporter; Control. The reporter shall be under the jurisdiction and control of the judge.

(c) Caption Page. There shall be stated on the caption page: (a) the style of the cause in which the testimony is taken; (b) the place and date of its taking; (c) the identity of the party by whom each witness is called; (d) the name of the judge; and (e) the appearances of counsel. See Appendix of Forms, Form 3.

(d) Testimony. It shall appear in the transcript of the proceedings and testimony by whom each witness was examined and cross-examined. At the top of each page shall appear the name of the witness and the nature of his examination, such as Roe-direct, Roe-cross, Roe-redirect.

(e) Preparation of Transcript. The reporter shall transcribe all testimony on nontransparent white paper, either 8 1/2 inches wide by 11 inches long, or 8 inches wide by 10 1/2 inches long, bound on the left margin. The pages shall be numbered consecutively, with a minimum of 25 lines per page. It is not necessary for the witnesses to sign the transcripts of their testimony.

(f) Exhibits. All exhibits offered by either of the parties shall bear the caption and number of the case, the exhibit numbers, in figures, whether for plaintiff or defendant unless the court provides for the offering parties to otherwise designate their exhibits, and the number of sheets in each exhibit. All exhibits admitted in evidence or designated to accompany the transcript shall accompany and be filed with the transcript of the testimony, but shall not be affixed thereto.

(g) Certificate of Reporter. The reporter shall append to the transcript of the testimony a certificate similar to Appendix of Forms (Forms 3A and 3B). The certificate shall be signed by the reporter.

(h) Index. At the beginning of each volume of the transcript of testimony, there shall be an index containing: (a) the names of the witnesses examined, citing the pages of the transcript where direct, cross, redirect, or recross-examination of the respective witnesses began; and (b) the exhibits in the case, first for the plaintiff and then for the defendant, with a brief statement of the nature of each of the exhibits and with references to the pages of the transcript where said respective exhibits were (1) offered and (2) received in evidence. In addition, upon the preparation of the final transcript, where the number of pages exceeds 500, a master index containing the same information shall be prepared and bound separately.

(i) Return of Transcript and Exhibits. Unless otherwise ordered by the judge, the reporter shall file the transcript of trial proceedings, including the exhibits admitted in evidence or designated to accompany the transcript, with the clerk within 30 days after the conclusion of the trial session at which such proceedings were had. The filing may be accomplished by personal delivery of the transcript and exhibits to the clerk's office or by enclosing them in a packet and transmitting them to the Clerk, United States Court of Federal Claims, 717 Madison Place, N.W., Washington, D.C. 20005, in sufficient time for the transcript and exhibits to be filed within the prescribed period. The obligation for the filing of the transcript and exhibits within the prescribed period

rests upon the reporter.

Rules Committee Note

RCFC 80.1 has no FRCP counterpart. The rule's principal text formerly appeared in these rules as Appendix A. The incorporation of former Appendix A into the main body of the rules reflects a more logical placement of its subject matter in the organizational structure of the court's rules. Additionally, as part of this rule's relocation, Forms A and B of former Appendix A (pertaining to reporter certifications) were assigned to the new Appendix of Forms. They appear there as Forms 3A and 3B.

Other changes introduced in this rule include the following:

Subdivision (a) of the rule formerly appeared in these rules as paragraph (b)(1) of RCFC 39. The changes introduced in new subdivision (a) were deemed necessary in order to eliminate uncertainty as to the court's authority to furnish a reporter for trials scheduled outside of the United States.

Subdivision (b) of the rule formerly appeared as paragraph (b)(2) of RCFC 39.

Subdivision (i) of the rule formerly appeared as paragraph (b)(3) of RCFC 39. Additionally, subdivision (i) reflects the change in the court's name.

TITLE XI. GENERAL PROVISIONS

Rule 81. Applicability in General [Not used.]

Rule 82. Jurisdiction and Venue Unaffected [Not used.]

Rule 83. Rules by Court of Federal Claims; Judge's Directives

(a) Rules. The United States Court of Federal Claims, acting by a majority of its judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. Such rules, to the extent permitted by this court's jurisdiction, shall be consistent with the Federal Rules of Civil Procedure and to any uniform numbering system prescribed by the Judicial Conference of the United States. A rule takes effect on the date specified by the court and remains in effect unless amended by the court. Copies of rules and amendments shall be made available to the public.

(b) Procedures When There is no Controlling Law. A judge may regulate practice in any manner consistent with federal law or rules adopted under 28 U.S.C. §§ 2072, or 2503(b). No sanction or other disadvantage may be imposed for non-compliance with any requirement not in federal law, federal rules, or these rules, unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rules Committee Note

RCFC 83 is modeled after FRCP 83. The rule recognizes the court's rule-making authority as set forth at 28 U.S.C. § 2503, as well as the individual judge's authority to regulate practice in an individual case, so long as that practice is consistent with federal law and rules.

Rule 83.1. Attorneys

(a) Attorneys Eligible to Practice. Only attorneys who are members of the bar of this court and who comply with these rules may enter an appearance, file pleadings, and practice in this court, provided that any attorney admitted to practice before the highest court of any state, territory, possession or the District of Columbia may participate *pro hac vice* in

any proceeding at the request of and in the presence of the attorney of record for a party to the proceeding, or otherwise with the approval of the court. All attorneys who were members in good standing of the bar of the United States Court of Claims are eligible to practice herein. See RCFC 83.1(c)(2) concerning authorization to sign filings.

(b) Admission to Practice.

(1) Qualifications; Oath. Any person of good moral character who has been admitted to practice before the Supreme Court of the United States, the United States Court of Appeals for the Federal Circuit, or the highest court of any state, territory, possession, or the District of Columbia, and is in good standing therein, may be admitted to practice before this court upon oral motion or by verified application, as provided in this rule, and upon taking or subscribing to the following oath: I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and that I will conduct myself in an upright manner as an attorney of this court.

(2) Upon Oral Motion.

(A) In Washington, D.C. An oral motion for admission may be made by a member of the bar of this court before any judge, and the judge or the clerk shall administer the oath. Motions for admission will be heard the first Thursday of each month which is not a legal holiday as defined by RCFC 6(a). Where the first Thursday of the month falls on a legal holiday, admissions will be held on the second Thursday of the month. Applicants for admission must appear in the clerk's office no later than 9:30 a.m. to pay the admission fee and fill out the necessary papers. Motions will be heard promptly at 10:00 a.m., in Courtroom No. 4, Room 501, National Courts Building, 717 Madison Place, N.W., Washington, D.C. 20005. Applicants who for special reasons are unable to appear for admission on the first Thursday of the month should contact the Office of the Clerk to make appropriate arrangements.

(B) Outside Washington, D.C. An oral motion for admission may be made by a member of the bar of this court before a judge outside Washington, D.C., who shall administer the oath. As a preliminary to the motion, the attorney who moves the admission shall submit to the judge the appropriate form obtained from the judge and completed by the applicant. In the absence of an oral motion for admission in conformity with this subdivision, the applicant may advise the judge of the applicant's qualifications as set forth in subdivision (b)(1). Upon consideration thereof, and upon representation by the attorney that such attorney will promptly apply to the clerk for admission by verified application as provided in

subdivision (b)(3), the judge may permit the applicant to participate in the particular proceeding.

(3) By Verified Application. Without need for appearing in person, admission may be made upon presentation to the clerk of a verified application showing that the applicant is possessed of the qualifications described in subdivision (b)(1). See Appendix of Forms, Form 1. The application shall be accompanied by: (A) a certificate of a judge or of the clerk of any of the courts specified in subdivision (b)(1) indicating that the applicant is a member of the bar of such court and is in good standing therein; (B) two letters or signed statements of members of the bar of this court or of the Supreme Court of the United States, not related to the applicant, affirming that the applicant is personally known to them, that the applicant possesses all the qualifications required for admission to the bar of this court, that they have examined the application, and that the applicant's personal and professional character and standing are good; and (C) an oath in the form prescribed in subdivision (b)(1) signed by the applicant and administered by an officer authorized to administer oaths in the state, territory, possession, or the District of Columbia, where the oath is administered, or as permitted by 28 U.S.C. §1746.

(4) Fee for Admission. Unless the applicant is an attorney representing the United States before this court, an admission fee as provided for in RCFC 77.1 (c)(2) shall be paid in advance in cash or by check payable to "Clerk, United States Court of Federal Claims."

(5) Admission of Foreign Attorneys. An attorney, barrister, or advocate who is qualified to practice in the highest court of any foreign state may be specially admitted for purposes limited to a particular case. Such attorney, barrister or advocate shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admission shall be only on written motion of a member of the bar of this court, filed with the clerk at least 3 days prior to the consideration of the motion by the court.

(c) Attorneys of Record.

(1) One for Each Party. There shall be but one attorney of record for a party in any case at any one time, and such attorney of record shall be an individual (and not a firm) who has been admitted to practice before this court. Any other attorneys assisting the attorney of record shall be designated as "of counsel."

(2) Authorization to Sign Filings. Any attorney who is a member of the bar of this court may sign any filing in the attorney of record's name. An attorney who signs the name of the attorney of record shall so indicate by adding the following after the name of the attorney of record: "by [the signing attorney's full name]." Authorization to sign filings shall not relieve the attorney of record from the provisions

of RCFC 11.

(3) Appearance. For parties other than the United States, the attorney of record shall include on the initial pleading or paper said attorney's name, address, telephone, and facsimile number. For the United States the attorney who is to appear as the attorney of record shall, promptly after service of the complaint, file with the clerk and serve on all other parties a notice of appearance setting forth the identical information. The attorneys of record for all parties shall promptly file with the clerk and serve on all other parties a notice of any change in address.

(4) Change by Parties Other than the United States. A party other than the United States may by leave of court on motion change the party's attorney at any time. The motion may be signed by said party in person or by the newly designated attorney accompanied by an affidavit of appointment executed by such attorney. If the consent of the previous attorney of record is annexed to or endorsed on the motion, substitution shall be accomplished by an appropriate entry on the docket by the clerk. When the motion is not thus shown to have the consent of the previous attorney, such attorney shall be served with the motion, and shall have 14 days to show cause why the motion should not be allowed.

(5) Change by the United States. A new notice of appearance shall be filed and served on all parties by the United States whenever a case is reassigned to another attorney.

(6) Withdrawal of Attorney. No attorney of record for a plaintiff or a third party may withdraw such attorney's appearance except by leave of the court on motion and after notice is served on such attorney's client.

(7) Death of Attorney. If the attorney of record dies, a suggestion of such attorney's death shall be made, and a motion to substitute another attorney admitted to practice before this court may be made by the plaintiff.

(8) Unrepresented Party. An individual may represent oneself or a member of one's immediate family as a party before the court. Any other party, however, must be represented by an attorney who is admitted to practice in this court. A corporation may only be represented by counsel. The terms counsel or attorney in these rules shall include unrepresented parties.

(d) Honorary Membership. Honorary membership in the bar of the court may be granted from time to time to distinguished professionals of the United States or of other nations who are knowledgeable in the affairs of law and government in their respective countries. After nomination by the chief judge and approval by the court, the candidate for honorary membership will be presented at the bar in person. A certificate of honorary membership in the bar will be presented to the person so honored.

Rules Committee Note

This rule has no FRCP counterpart. Former RCFC 83.1 ("Content of Briefs or Memoranda; Length of Briefs or Memoranda") has been renumbered as RCFC 5.2. The renumbering of

RCFC 83.1 was intended to reflect its more logical placement in the organizational structure of this court's rules.

The substance of the rule reflects the text of former RCFC 81, as modified. Paragraph (2) of subdivision (c) (formerly paragraph (d)(2) of RCFC 81) was amended to formalize the court's practice of allowing joint filings to be signed by one counsel, on behalf of both counsel, when authorized to do so by opposing counsel. Also, subdivision (e) of former RCFC 81 (relating to attorneys' fees and expenses) was not retained as part of this rule but was, instead, incorporated into RCFC 54 (d)(2).

In addition, former General Order No. 15, "Honorary Bar Membership," was slightly modified and moved to new subdivision 83.1(d).

Rule 83.2. Rules of Disciplinary Enforcement.

The United States Court of Federal Claims, in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding pursuant to RCFC 83.1(a) and (b)(5), promulgates the following Rules of Disciplinary Enforcement superseding all of its other rules pertaining to disciplinary enforcement heretofore promulgated.

(a) Attorneys Convicted of Crimes.

(1) Upon the filing with the court of a certified copy of a judgment of conviction demonstrating that any attorney admitted to practice before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the court shall enter an order immediately suspending that attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served upon the attorney. Upon good cause shown, the court may set aside such order when it appears in the interest of justice so to do.

(2) The term serious crime shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime.

(3) A certified copy of a judgment of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based upon the conviction.

(4) Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court shall, in addition to suspending that attorney in accordance with the provisions of this rule, refer the matter to counsel for the institution of a disciplinary proceeding before the court in which the sole issue to be

determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded.

(5) Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a serious crime, the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court; provided, however, that the court may in its discretion make no reference with respect to convictions for minor offenses.

(6) An attorney suspended under the provisions of this rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed, but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

(b) Discipline Imposed by Other Courts; Disbarment on Consent or Representation in Other Courts.

(1) Any attorney admitted to practice before the court shall, upon being subjected to public discipline by any other court of the United States or District of Columbia, or by a court of any state, territory, commonwealth or possession of the United States, promptly inform the clerk of such action.

(2) Any attorney admitted to practice before the court shall, upon being disbarred on consent or resigning from the bar of any other court of the United States or the District of Columbia, or from the bar of any state, territory, commonwealth, or possession of the United States while an investigation into allegations of misconduct is pending, promptly inform the clerk of such disbarment on consent or resignation.

(3) Upon the filing of a certified copy of a judgment or order demonstrating that an attorney admitted to practice before the court has been disciplined by another court or upon accepting disbarment on consent or resignation, the court shall forthwith issue a notice directed to the attorney containing: a copy of the judgment or order from the other court or a copy of the communication indicating disbarment on consent or resignation; and an order to show cause directing that the attorney inform the court within 30 days after service of that order upon the attorney, personally or by mail of any claim by the attorney predicated upon the grounds set forth in paragraph (5), and that the imposition of the identical discipline by the court would be unwarranted and the reasons therefor.

(4) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal

discipline imposed in the court shall be deferred until such stay expires.

(5) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of paragraph (3), the court shall impose the identical discipline unless the respondent-attorney demonstrates, or the court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) or that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject;

(C) or that the imposition of the same discipline by the court would result in grave injustice;

(D) or that the misconduct established is deemed by the court to warrant substantially different discipline.

Where the court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

(6) In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the court.

(7) The court may at any stage appoint counsel to prosecute the disciplinary proceedings.

(c) Standards for Professional Conduct.

(1) For misconduct defined in this rule and after notice and opportunity to be heard, any attorney admitted to practice before the court may be disbarred, suspended from practice before the court, publicly reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(2) Acts or omissions by an attorney admitted to practice before the court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by the court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by the court is the American Bar Association Model Rules of Professional Conduct, as amended from time to time by the Association, except as otherwise provided by specific rule of the court.

(d) Disciplinary Proceedings

(1) When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before the court shall come to the attention of a judge or special master of the court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by this rule, the judge or special master shall refer the matter to

the chief judge for determination whether the matter should be referred to a disciplinary judge for a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

(2) Should the disciplinary judge conclude after review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney the disposition of which in the judgment of the disciplinary judge should be awaited before further action by the court is considered or for any other valid reason, the disciplinary judge shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

(3) To initiate formal disciplinary proceedings, the disciplinary judge shall file an order of the court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days after service of that order upon that attorney, personally, or by mail, why the attorney should not be disciplined.

(4) Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, the disciplinary judge shall set the matter for prompt hearing.

(e) Disbarment on Consent While Under Disciplinary Investigation or Prosecution

(1) Any attorney admitted to practice before the court who is the subject of an investigation into or a pending proceeding involving allegations of misconduct may consent to disbarment, but only by delivering to the court an affidavit stating that the attorney desires to consent to disbarment and that:

(A) the attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(B) the attorney is aware that there is a presently pending investigation or proceeding involving allegations that there exist grounds for the attorney's discipline the nature of which the attorney shall specifically set forth;

(C) the attorney acknowledges that the material facts so alleged are true; and

(D) the attorney so consents because the attorney knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, the attorney could not successfully defend himself.

(2) Upon receipt of the required affidavit, the court shall enter an order disbarring the attorney.

(3) The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this

rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of the court.

(f) Reinstatement.

(1) After Disbarment or Suspension. An attorney suspended for three months or less shall be automatically reinstated at the end of the period of suspension upon the filing with the court of an affidavit of compliance with the provisions of the order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of the court, except as provided in subdivision (a) of this rule.

(2) Time of Application Following Disbarment. A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least one year from the effective day of the disbarment.

(3) Hearing on Application. Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the , and directed to the chief judge of the court. Such petitions shall demonstrate by clear and convincing evidence that the petitioner has the moral qualifications, competency and learning in the law before the court and that the petitioner's resumption to the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest. Upon receipt of the petition, the chief judge shall promptly assign the petition to one or more judges of the court for prompt action. The judge or judges assigned to the matter shall within 30 days after referral issue an order of reinstatement based upon the petition or, schedule a hearing at which the petitioner shall have the burden of demonstrating the elements listed above.

(4) Deposit for Costs of Proceeding. The court may direct that petitions for reinstatement under this rule shall be accompanied by an advance cost deposit in an amount to be set from time to time by the court to cover anticipated costs of the reinstatement proceeding.

(5) Conditions of Reinstatement. If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate the petitioner, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further, that if the petitioner has been suspended or disbarred for 5 years or more, reinstatement may be conditioned, in the discretion of the judge or judges before whom the matter is heard, upon the furnishing of proof of competency and learning in law, which proof may include certification by the bar examiners of a state or other jurisdiction of the

attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(6) Successive Petitions. No petition for reinstatement under this Appendix shall be filed within one year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

(g) Attorneys Specially Admitted.

Whenever an attorney applies to be admitted or is admitted to the court for purposes of a particular proceeding pursuant to RCFC 83.1(a) or(b)(5), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon the court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

(h) Service of Papers and Other Notices.

(1) Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the respondent-attorney at such attorney's last known address. If service by registered or certified mail is ineffective, the court shall enter an order as appropriate to effect service.

(2) Service of any other papers or notices required by this rule shall be deemed to have been made if such paper or notice is addressed to the respondent-attorney at such attorney's last known address or the respondent-attorney at the address indicated in the most recent pleading or other document filed in the course of any proceeding.

(i) Appointment of Counsel.

The court may appoint as counsel one or more members of the bar of the court to investigate allegations of misconduct or to prosecute disciplinary proceedings under this rule, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or has been engaged as an adversary of the respondent-attorney in any matter. Counsel, once appointed, may not resign unless permission to do so is given by the court.

(j) Payment of Fees and Costs.

At the conclusion of any disciplinary investigation or prosecution, if any, under this rule, counsel may make application to the court for an order awarding reasonable fees and reimbursing costs expended in the course of such disciplinary investigation or prosecution. Any such order shall be submitted to the clerk who shall pay the amount required thereunder from the funds collected pursuant to subdivision (j).

(k) Duties of the Clerk.

(1) Upon being informed that an attorney admitted to practice before the court has been convicted of any crime, the clerk shall determine whether the clerk of the convicting court has forwarded a certificate of such conviction to the court. If a certificate has not been so forwarded, the clerk shall promptly obtain a certificate and file it with the court.

(2) Upon being informed that an attorney admitted to practice before the court has been subjected to discipline by another court, the clerk shall determine whether a certified copy of

the disciplinary judgment or order has been filed with the court, and, if not, the clerk shall promptly obtain a certified copy of the disciplinary judgment or order and file it with the court.

(3) Whenever it appears that any person disbarred or suspended or censured or disbarred on consent by the court is admitted to practice law in any other jurisdiction or before any other court, the clerk shall, within 10 days of that disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certified copy of the order of disbarment, suspension, censure, or disbarment on consent, as well as the last known office and residence address of the defendant or respondent-attorney.

(4) The clerk shall notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney admitted to practice before the court.

(5) The clerk shall utilize a portion of the fee for admission required by RCFC 77.1(c) to defray the payment of fees and costs under subdivision (i) of this rule and any other costs incurred by the administration of this rule.

(l) Jurisdiction.

Nothing contained in this rule shall be construed to deny to the court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt, issuance of public reprimands, or imposition of fines of not more than $1,000.00.

Rules Committee Note

Former RCFC 83.2 has been renumbered RCFC 7.1. New RCFC 83.2 formerly appeared in these rules as Appendix F. The incorporation of former Appendix F into the main body of the court's rules reflects a more logical placement of its subject matter in the organizational structure of the court's rules.

Rule 83.3. Legal Assistance by Law Students

(a) Appearance. Subject to the provisions of this rule, an eligible law student may enter an appearance in this court on behalf of any party provided the party on whose behalf the student appears has consented thereto in writing and a "supervising attorney," as defined in this rule, has also indicated approval of that appearance in writing. In each case, the written consent and approval shall be filed with the clerk.

(b) Activities.

(1) Appearance on Briefs and Other Written Pleadings, Participation in Oral Argument and Other Activities. A law student who has entered an appearance in a case pursuant to paragraph (a) may:

(A) Appear on the brief(s) and other written pleadings, provided the supervising attorney has read, approved, and co-signed the brief(s);

(B) Participate in all proceedings ordered by a judge or special master provided the supervising attorney is present at such proceedings;

(C) Engage in all other activities on behalf of the client in all ways that a licensed attorney may, subject to the general direction of the supervising attorney. However, a student may make no binding commitments on behalf of a client absent prior approval of both the client and the supervising attorney. In any matter in which testimony is taken, including depositions, the student must be accompanied by the supervising attorney. Documents or papers filed with the court must be read, approved, and co-signed by the supervising attorney.

(2) Limitations on Activities. The court retains the authority to establish exceptions to the activities in paragraph (1), and also to limit a student's participation in any individual case.

(c) Eligibility. In order to be eligible to make an appearance pursuant to this rule, the law student must:

(1) Be a law student in good standing, enrolled in a law school approved by the American Bar Association;

(2) Have completed legal studies amounting to at least two semesters, or the equivalent if the school is on some basis other than a semester basis;

(3) Have knowledge of the Rules of the United States Court of Federal Claims, the Federal Rules of Evidence, and the American Bar Association Model Rules of Professional Conduct;

(4) Be enrolled for credit in a clinical program at an accredited law school that maintains malpractice insurance for its activities and conducts its activities under the direction of a faculty member of such law school;

(5) Be certified by the dean of the law school as being of good character and sufficient legal ability, and as being adequately trained, in accordance with paragraphs (1)-(4) above, to fulfill the responsibilities of a legal intern to both the client and the court. Such certification must be filed with the clerk and may be withdrawn at any time by the dean upon written notice to the clerk;

(6) Be certified by the chief judge to practice pursuant to this rule. This certification may be withdrawn at any time by the chief judge or, in a given case, by the judge or special master before whom the law student has entered an appearance, without notice of hearing and without any showing of cause; and

(7) Neither ask for nor receive any fee or compensation of any kind from the client on whose behalf service is rendered. However, this rule shall not prevent a lawyer, legal aid bureau, law school, or the Government from paying compensation to the eligible law student, nor shall it prevent any of them from making such charges for its services as may otherwise be proper, nor shall it prevent any clinical program from receiving otherwise proper fees and expenses under RCFC 54(d)(2).

(d) Supervising Attorneys. A supervising attorney referred to in this rule shall be deemed the attorney of record

pursuant to RCFC 83.1(c) and must:

(1) Be a member in good standing of the bar of this court;

(2) Be an attorney whose service as a supervising attorney for the clinical program is approved by the dean of the law school in which the law student is enrolled;

(3) Be certified by this court as a student supervisor;

(4) Assist and counsel the student in activities allowed under this rule and review such activities with the student, all to the extent appropriate under the circumstances, for the proper practical training of the student and the protection of the client;

(5) Assist the student in his or her preparation of the case to the extent the supervising attorney considers necessary and be available for consultation with represented clients;

(6) Be present with the student in any proceedings before a judge or special master;

(7) Co-sign all pleadings and other documents filed with the court;

(8) Be responsible to supplement oral or written work of the student as necessary to ensure proper representation of the client;

(9) Assume full professional responsibility for the student's guidance in any work undertaken and for the quality of the student's work; and

(10) Agree to notify the dean of the appropriate law school of any alleged failure on the part of the student to abide by the letter and spirit of this rule.

Rules Committee Note

RCFC 83.3 replaces former General Order No. 35, adopted on September 3, 1993. The only changes are stylistic or to correct cross-references.

Rule 83.4. Advisory Council

(a) Membership. The United States Court of Federal Claims Advisory Council is established to advise the court on matters pertaining to the administration of the court and its relationship to the bar and the public. The Council shall consist of no fewer than 20 members of the bar of the court and shall include representatives of all of the court's practice areas. Members shall serve three year terms. The chief judge shall fill any vacancies. The chief judge shall designate one or more of the judges as a liaison member between the court and the Council.

(b) Organization. The Council shall meet at such times and places as agreed upon by the members. All members of the Council, including the chief judge and the court's liaison member[s], may attend meetings and participate in discussions. The chief judge shall designate a chairperson. The council members may designate other officers, and committees and take all other steps appropriate to the conduct of the council's business. Each member, except the liaison member[s], shall be entitled to vote on matters before the Council. The chief judge shall provide facilities at the court to accommodate meetings of the Council.

(c) Function. The Council may consider any matters its members deem relevant to the operation of the court. The Council may transmit its recommendations to the court informally or formally by letter

to the chief judge. The Council shall promptly consider and make a recommendation on any matter referred to it by the court. The court may consider any recommendation of the Council and take such action as it deems appropriate.

Rules Committee Note

New RCFC 83.4 replaces General Order No. 7, which established the Advisory Council on April 5, 1983. In addition to minor stylistic and formatting changes, the new rule changes the number of members allowed on the Council and makes the chief judge responsible for designating the chairperson.

Rule 84. Forms

Forms referenced in these rules are set forth in the Appendix of Forms.

Rule 85. Title

These rules may be known and cited as the Rules of the United States Court of Federal Claims.

Rules Committee Note

The rule has been changed to reflect the change in the court's name. These rules may be cited as "RCFC."

Rule 86. Effective Date

These rules as revised are effective on May 1, 2002. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Rules Committee Note

The rule reflects the effective date of the most recent revisions to the court's rules. In addition, the rule adopts the practice of the federal civil rules to presume application of rule changes to pending cases.

Future revisions to these rules will be posted on the court's website at www.uscfc.uscourts.gov.

APPENDIX A
CASE MANAGEMENT PROCEDURE

I. PURPOSE

1. These case management procedures are intended to promote cooperation among counsel, assist in the early identification of issues, minimize the cost and delay of litigation and enhance the potential for settlement. (As used in this appendix, "counsel" shall be construed to include unrepresented parties.)

2. Uniformity of practice within the court also is an important goal of these procedures. For the purpose of promoting the efficient administration of justice, a judge may modify these procedures as appropriate, or the parties may suggest the modification of these procedures to meet the needs of a particular case.

II. EARLY MEETING OF COUNSEL

3. Subsequent to the filing of defendant's answer or, if applicable, a reply to a counterclaim, and, in any event, within sufficient time to permit the parties to file a Joint Preliminary Status Report in accordance with paragraph 4, plaintiff's counsel shall communicate with defense counsel, and counsel shall confer:

(a) To initiate preparation of the Joint Preliminary Status Report pursuant to paragraphs 4-6.

(b) To identify each party's factual and legal contentions.

(c) To discuss each party's discovery needs and discovery schedule, including the initial disclosures required by RCFC 26(a)(1) and additional documents that are to be the subject of discovery, *e.g.*, determine what is needed; the objections, if any, to supplying it; and where it is available, with follow-up letters to provide a record. Informal discovery is encouraged. The parties are encouraged to cooperate in the conduct of discovery and to make additional voluntary disclosures through informal discovery.

(d) To discuss the expected means of resolving the dispute, i.e., whether by trial or dispositive motion.

(e) To discuss settlement of the action, including use of alternative dispute resolution. See Appendix H.

Participating counsel shall be counsel of record and such other attorneys as necessary so that participating counsel for each party are knowledgeable about the case and the identity of witnesses and location of documents.

III. JOINT PRELIMINARY STATUS REPORT

4. No later than 49 days after defendant's answer or plaintiff's reply to a counterclaim is served, the parties shall file with the clerk a Joint Preliminary Status Report signed by both parties, setting forth answers to the following questions. Separate views may be set forth on any point on which parties cannot agree.

(a) Does the court have jurisdiction over the action?

(b) Should the case be consolidated with any other case and

the reasons therefor?

(c) Should trial of liability and damages be bifurcated and the reasons therefor?

(d) Should further proceedings in this case be deferred pending consideration of another case before this court or any other tribunal and the reasons therefor?

(e) In cases other than tax refund actions, will a remand or suspension be sought and the reasons therefor and the proposed duration?

(f) Will additional parties be joined and, if so, a statement describing such parties, their relationship to the case, and the efforts to effect joinder and the schedule proposed to effect joinder?

(g) Does either party intend to file a motion pursuant to RCFC 12(b), 12(c) or 56 and, if so, a schedule for the intended filing?

(h) What are the relevant factual and legal issues?

(i) What is the likelihood of settlement? Is alternative dispute resolution contemplated?

(j) Do the parties anticipate proceeding to trial? Does any party, or do the parties jointly, request expedited trial scheduling and, if so, the reasons why the case is appropriate therefor? A request for expedited trial scheduling is generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day period, the case may be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought. The requested place of trial shall be stated. Before such a request is made, the parties shall confer specifically on this subject.

(k) Are there special issues regarding electronic case management needs?

(l) Is there other information of which the court should be aware at this time?

5. If discovery is required, the Joint Preliminary Status Report should set forth a proposed discovery plan, including proposed deadlines. The parties should propose a deadline for fact discovery, for the disclosure of any experts' reports, and for depositions or other discovery of experts. See RCFC 26(a)(2) concerning disclosure of experts and discovery planning.

6. Unless otherwise ordered, the Joint Preliminary Status Report shall be deferred indefinitely if on or before the date the Joint Preliminary Status Report is due a dispositive motion addressing all issues is filed.

IV. PRELIMINARY SCHEDULING CONFERENCE AND SCHEDULING ORDER

7. Preliminary Scheduling Conference. After the filing of the Joint Preliminary Status Report the judge will ordinarily conduct the preliminary scheduling conference contemplated by RCFC 16(b) the Joint Preliminary Status Report to acquaint the court with the issues in the case, to discuss any special problems that may exist, and to establish a schedule for further proceedings. In the interest of justice and judicial economy, a Preliminary Scheduling Conference will not be scheduled if, in the court's discretion,

further discussion of the matters presented in the Joint Preliminary Status Report would not be useful.

8. Scheduling Order. After the preliminary scheduling conference or, if none is held, after the filing of the Joint Preliminary Status Report, the judge shall promptly enter the scheduling order called for by RCFC 16(b).

V. DISCOVERY

9. Interrogatories, Requests for Admission, Responses. A party shall number interrogatories and requests for admission sequentially without repeating the numbers it has used in any prior set of interrogatories or requests for admission. By counsel's signature to the answers and pursuant to RCFC 11, counsel for the responding party shall certify that counsel has made diligent effort to provide answers to all portions of interrogatories or requests for admission not specifically objected to.

10. Discovery Motions. A motion to compel or protect from discovery shall contain a statement that the movant has in good faith conferred or attempted to confer to resolve the matters in dispute.

VI. POST-DISCOVERY PROCEEDINGS

11. Post-Discovery Conference. Upon completion of all discovery (including discovery of any experts), the court will hold a post-discovery conference to determine how the case will proceed. The attorneys appearing at the post-discovery conference shall be the attorneys who are expected to try the case and are thoroughly familiar with it. At the conference, counsel will be called upon to (i) address the factual and legal issues in dispute, (ii) discuss the evidence and decisional law that each side offers in support of its position, and (iii) identify the best means of resolving the dispute, *i.e.*, whether by summary judgment, trial, or by an alternative method of dispute resolution.

12. Scheduling Order. See generally RCFC 16 and 56. Promptly after the post-discovery conference, the judge shall enter a scheduling order to address further proceedings. For cases that will proceed by summary judgment in accordance with RCFC 56, the order shall establish a schedule for the filing of summary judgment motions and briefs. For cases to be resolved by trial, the order may set (1) the time and place of trial, (2) the time and place of the final pretrial conference and (3) the date by which the memoranda and disclosures called for by paragraphs 14-18 are due.

13. Meeting of Counsel. For cases to be resolved by trial, counsel for the parties shall meet no later than 63 days before the pretrial conference and accomplish the following.

(a) Exhibits. Exchange a list of all exhibits (including summaries, see Fed. R. Evid.1006) to be used at trial for case-in-chief or rebuttal purposes, except those to be used exclusively for impeachment. Each exhibit on the list shall be identified by an exhibit number and description. Unless previously exchanged, counsel for the parties shall exchange a copy of each exhibit listed. In the case of exhibits to be offered as summaries under Fed. R. Evid. 1006, the offering party shall provide opposing counsel with a statement with respect to each

summary exhibit describing the source(s) for the items or figures listed (e.g., ledgers, journals, payrolls, invoices, checks, time cards, etc.), the location(s) of the source(s), the time when the source(s) may be examined or audited by the opposing party, the name and address of the person(s) who prepared each summary and who will be made available to the opposing party during any examination or audit of the source material to provide information and explanations necessary for verification of the information in the summary. Failure to list an exhibit shall result, absent agreement of the parties or a showing of a compelling reason for the failure, in an exclusion of the exhibit at trial. See also RCFC 26(a)(1), (2) and (3).

(b) Witnesses. Exchange a final list of names, addresses, and telephone numbers of witnesses, including expert witnesses, who may be called at trial for case-in-chief or rebuttal purposes, except those to be used exclusively for impeachment. Failure of a party to list a witness shall result, absent agreement of the parties or a showing of a compelling reason for the failure, in the exclusion of that witness' testimony at trial. Any witness whose identity has not been previously disclosed shall be subject to discovery. As to each witness, the party shall indicate the specific topics to be addressed in the expected testimony.

(c) Confer:

(1) To disclose to opposing counsel the intention to file a motion for leave to file transcript of deposition for introduction at trial;

(2) To resolve, if possible, any objections to the admission of testimony (including deposition testimony) or exhibits;

(3) To disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed;

(4) To engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial;

(5) To consider agreement to submitting the case to the court for resolution (including any factual disputes) on the basis of a submitted documentary record by the parties. See also RCFC 43(e); and

(6) To exhaust all possibilities of settlement.

14. Memorandum of Contentions of Fact and Law.

(a) Plaintiff's Memorandum. No later than 49 days before the pretrial conference, plaintiff shall file a Memorandum of Contentions of Fact and Law. The memorandum shall contain the following:

(1) A full but concise statement of the facts plaintiff expects to prove and a discussion of plaintiff's position with respect to the facts on which defendant is expected to rely.

(2) A statement of the issues

of fact and law to be resolved by the court. The issues should be set forth in sufficient detail to enable the court to resolve the case in its entirety by addressing each of the issues listed.

(3) A discussion of the legal principles plaintiff contends are applicable, as well as plaintiff's response to defendant's anticipated legal position. Any objection to a witness or exhibit listed under paragraph 13 shall be made in the Memorandum of Contentions of Fact and Law, or in a separate motion filed on the same date.

(4) If plaintiff believes that bifurcation of issues for trial is appropriate, the memorandum shall contain a request therefor, together with a statement of reasons.

(b) Defendant'sMemorandum. No later than 21 days before the pretrial conference, defendant shall file its responsive memorandum with the same form and contents as plaintiff's.

(c) Responses. The parties will cooperate in the exchanges specified in paragraph 13. Consequently, any responses to matters expected to be raised by the opposing party should be included in each party's Memorandum of Contentions of Fact and Law. However, if anything new or unexpected is discovered, it may be addressed in a brief response which must be filed under cover of motion for leave immediately upon learning of it.

(d) Proposed Findings of Fact and Conclusions of Law. The judge may, in lieu of the memoranda of contentions of fact and law, order the filing of proposed findings of fact and conclusions of law, including, at the judge's direction, annotations to the exhibits or witnesses on which the party will rely to prove the findings.

15. Witness List.

(a) Each party shall file, together with the Memorandum of Contentions of Fact and Law, a separate statement setting forth a list of witnesses to be called at trial for case-in-chief or rebuttal purposes, except those to be used exclusively for impeachment. The witness list shall separately identify those whom the party expects to present and those whom the party may call if the need arises. As to each witness, the party shall indicate the specific topics to be addressed in the expected testimony and the time needed for direct examination.

(b) Any party intending to present substantive evidence by way of deposition testimony, other than as provided by Federal Rule of Evidence 801(d), shall serve and file a separate motion for leave to file the transcript of this testimony. The motion shall show cause why the deposition testimony should be admitted and identify specifically the portions of the transcript(s) the party intends to use at trial. See RCFC 32(a)(2) & (3). If the motion is granted, only those portions of the transcript may be filed.

16. Exhibit List. Each party shall file, together with the Memorandum of Contentions of Fact and Law, a separate

statement setting forth a list of exhibits it expects to offer at trial for case-in-chief or rebuttal purposes (including summaries to be offered pursuant to Fed. R. Evid. 1006), other than those to be used exclusively for impeachment. The exhibit list shall separately identify those exhibits which the party expects to offer and those which the party may offer if the need arises.

17. Stipulations. The parties are encouraged before or after the pretrial conference to file a stipulation setting forth all matters as to which they agree.

VII. OTHER MATTERS

18. Joint Exhibits. Prior to the final pretrial conference, the parties should review the exhibit lists filed with the court and consolidate as many exhibits as possible into a set of joint exhibits for use at trial. All joint exhibits shall be identified in a joint exhibit list that identifies each exhibit by a joint exhibit number and description.

19. Post-Trial Briefing. The judge may order the filing of post-trial briefs, which may include, at the judge's direction, either a statement of facts or proposed findings of fact, together with citations to the record. Post-trial briefing is not a matter of right.

Rules Committee Note

Appendix A represents the court's standard pretrial order. The case management procedures contained in Appendix A reflect those procedures which, in the collective experience of the court and the members of its bar, are considered most beneficial in securing the prompt and expeditious resolution of claims and disputes. Some important changes have been introduced. Chief among these are procedures calling for a preliminary scheduling conference to be set following the filing of the Joint Preliminary Status Report, and a post-discovery conference following the completion of discovery. The expectation reflected in these conference procedures is that early and ongoing involvement of the court during the pretrial development of a case can contribute both to a prompt identification of the issues and to a narrowing of the scope of the dispute.

The promulgation of Appendix A as a synthesis of the views of the bench and the bar is intended to encourage standardization in pretrial practice procedures. Appendix A recognizes, however, that the pretrial procedures to be followed in any particular case ultimately depend upon the needs of that case. Hence, Appendix A permits modifications of its procedures, either at a judge's initiative (or at the parties' suggestion), when such modification will promote "the efficient administration of justice."

APPENDIX B
VACCINE RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

I. SCOPE OF RULES; COMMENCEMENT OF PROCEEDINGS

Rule 1. Scope of Rules.

These rules govern all proceedings before the United States Court of Federal Claims pursuant to the National Vaccine Injury Compensation Program established by 42 U.S.C. §§ 300aa-10 et seq. (1994) (Vaccine Act). These rules govern both proceedings before the Office of Special Masters, as well as any subsequent proceedings before a judge of the Court of Federal Claims. These rules are to be cited as the Vaccine Rules. In all matters not specifically provided for by the Vaccine Rules, the special master or the court may regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide cases promptly and efficiently. In proceedings before the Office of Special Masters, the Rules of the United States Court of Federal Claims (RCFC) apply only to the extent referenced in the Vaccine Rules. In proceedings before a judge, the RCFC will apply except to the extent that such rules are inconsistent with the Vaccine Rules.

Rule 2. Commencement of Proceedings.

(a) Petition. A proceeding for compensation under the Vaccine Act shall be commenced by the filing of a petition, accompanied by the documents required under 42 U.S.C. § 300aa-11(c) and the Vaccine Rules, in the United States Court of Federal Claims. Petitioner shall forward an original and two copies of the petition, by mail or other delivery, to

Clerk
United States Court of Federal Claims
717 Madison Place, N.W.
Washington, D.C. 20005

(b) Fee. The petition shall be accompanied by a $ 150 filing fee.

(c) Service upon Respondent.

(1) Petitioner shall serve one copy of the petition and accompanying documents upon the Secretary of Health and Human Services, by first class or certified mail,c/o Director, Bureau of Health Professionals 5600 Fishers Lane Suite 8-05 Rockville, Maryland 20857.An executed certificate of such service shall accompany the petition filed with the clerk.

(2) The clerk shall serve one copy of the petition on the Attorney General.

(d) Content of the Petition.

(1) The petition shall set forth a short and plain statement of the grounds for an award of compensation. The petition shall set forth to whom, when, and where the vaccine in question was administered, and further shall describe specifically the alleged injury. If an injury within the Vaccine Act's Vaccine Injury Table, 42 U.S.C. § 300aa-14(a), is claimed, the particular injury shall be set forth. The

petition shall also contain a specific demand for relief to which petitioner asserts entitlement or a statement that such demand will be deferred pursuant to 42 U.S.C. § 300aa-11(e).

(2) Only one petition may be filed with respect to each administration of a vaccine.

(e) Documents Required with the Petition.

(1) As required by 42 U.S.C. § 300aa-11(c), every petition shall be accompanied by the following:

(A) Medical records and detailed affidavit(s) supporting all elements of the allegations made in the petition. If petitioner's claim does not rely on medical records alone, but is based in any part on the observations or testimony of any persons, the substance of each person's proposed testimony in the form of an affidavit executed by the affiant must accompany the petition.

(B) All available physician and hospital records relating to (A) the vaccination itself; (B) the injury or death, including, if applicable, any autopsy reports or death certificate; (C) any post-vaccination treatment of the injured person including all in-patient and out-patient records, provider notes, test results, and medication records; and, if the vaccinee was younger than five years old when vaccinated, (D) the mother's pregnancy and delivery and the infant's lifetime, including physicians' and nurses' notes and test results and all well baby visit records, as well as growth charts, until the date of vaccination.

(C) If any records required by the rules are not submitted, an affidavit detailing the efforts made to obtain such records and the reasons for their unavailability.

(2) If filed on behalf of a deceased person, or if filed by someone other than the injured person or a parent of an injured minor, the petition shall also be accompanied by documents establishing the authority to file the petition in a representative capacity or a statement explaining when such documentation will be available.

(3) All documents accompanying the petition shall be assembled into one or more bound volumes or three-ring notebooks. Each bound volume or notebook must contain the caption of the case and a table of contents, and all pages of all documents shall be numbered consecutively.

II. PROCEEDINGS BEFORE THE SPECIAL MASTER

Rule 3. Role of Special Master–Generally.

(a) Assignment. Once a petition has been filed by the clerk, the case shall be assigned by the chief special master to a special master to conduct proceedings in accordance with the Vaccine Rules. All proceedings prior to the issuance of the special master's decision are to be conducted exclusively by the special master.

(b) Duties. The special master shall be responsible for conducting all proceedings,

including requiring such evidence as may be appropriate, in order to prepare a decision, including findings of fact and conclusions of law, determining whether an award of compensation should be made under the Vaccine Act and the amount of any such award. The special master shall determine the nature of the proceedings, with the goal of making the proceedings expeditious, flexible, and less adversarial, while at the same time affording each party a full and fair opportunity to present its case and creating a record sufficient to allow review of the special master's decision.

(c) Absence; Reassignment. In the absence of the special master to whom a case is assigned, the chief special master may act on behalf of the assigned special master, or designate another special master to act. When necessary for the efficient administration of justice, the chief special master may reassign a case to another special master.

Rule 4. Respondent's Review and Report.

(a) Respondent's Review of Completeness of the Records. Within 30 days of the filing of a petition, respondent shall review the medical and other records to determine whether, in respondent's view, all records necessary to enable respondent to evaluate the merits of the claim have been supplied with the petition. If respondent considers that relevant records are missing, respondent's counsel shall immediately notify petitioner's counsel regarding the perceived omissions. If the parties disagree about the completeness of the records filed or the relevance of requested records, either party may request that the special master resolve the matter. If the special master concludes that records called for by Vaccine Rule 2(e) have not been submitted, the petition may be subject to dismissal, without prejudice, under Vaccine Rule 21(c).

(b) Respondent's Report. Within 90 days after the filing of the petition, respondent shall file a report that shall set forth a full and complete statement of respondent's position as to why an award should or should not be granted. The report shall contain respondent's medical analysis of petitioner's claims. It shall also present any legal arguments that respondent may have in opposition to the petition. General denials are not sufficient.

Rule 5. Informal Review and Tentative Findings and Conclusions.

The special master shall schedule an off-the-record conference to be held within 30 days of the filing of respondent's report pursuant to Vaccine Rule 4(b). At this conference, after affording the parties an opportunity to address each other's positions, the special master will review the materials submitted, evaluate the respective positions, and orally present tentative findings and conclusions. At the conclusion of this conference, the special master may issue a scheduling order outlining the necessary proceedings for resolving the issues presented in the case.

Rule 6. Status Conferences.

The special master shall conduct conferences from time to time in order to expedite the processing of the case. The conferences will be informal in nature and ordinarily will be conducted by telephone

conference call. Either party may request a status conference at any time. At such conferences, counsel for both parties will have the opportunity to propose procedures by which to process the case in the least adversarial, most efficient way possible.

Rule 7. Discovery.

There shall be no discovery as a matter of right.

(a) Informal Discovery Preferred. The informal and cooperative exchange of information is the ordinary and preferred practice.

(b) Formal Discovery. If a party considers that informal discovery is not sufficient, that party may seek to utilize the discovery procedures provided by RCFC 26-37 by filing a motion indicating the discovery sought and stating with particularity the reasons therefor, including an explanation why informal techniques have not been sufficient. Such a motion may also be made orally at a status conference.

(c) Subpoena. When necessary, the special master upon request by a party may approve the issuance of a subpoena. In so doing, the procedures of RCFC 45 shall apply. See RCFC Appendix of Forms (Form 7A).

Rule 8. Taking of Evidence and Argument; Decision.

(a) General. The special master in each case, based on the specific circumstances thereof, shall determine the format for taking evidence and hearing argument. The particular format for each case will be ordered after consultation with the parties.

(b) Hearing. When necessary, the special master may conduct an evidentiary hearing. The special master will determine the format for such a hearing. The special master may permit direct examination of a witness or may permit or require that the direct testimony be submitted in written form. The special master may question a witness and may, on request, permit questioning by opposing counsel. Upon order by the special master, the clerk or counsel may issue a subpoena requiring the attendance of a witness at such hearing. A transcript of the hearing shall be prepared in conformity with RCFC 80.1 and RCFC Appendix of Forms (Forms 3A and 3B).

(c) Evidence. In receiving evidence, the special master will not be bound by common law or statutory rules of evidence. The special master will consider all relevant, reliable evidence, governed by principles of fundamental fairness to both parties. Evidence may be taken in the form of documents, affidavits, or oral testimony, which may be given in person or via telephone, videoconference, or videotape. Sworn written testimony may be submitted in lieu of oral testimony.

(d) Decision Without Evidentiary Hearing. The special master may decide a case on the basis of written filings without an evidentiary hearing. In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

(e) Argument. Argument may be received by telephone conference call or at a hearing or in written submissions. The special master may establish requirements for such filings, *e.g.*, contents or page

limitations, as appropriate.

(f) Waiver of Argument. Any fact or argument not raised specifically in the record before the special master shall be considered waived and cannot be raised by either party in proceedings on review of a special master's decision. This rule shall not apply to legal arguments raised by the party that stands in the role of the appellee on review.

Rule 9. Suspension of Proceedings.

(a) General. On the motion of a party, for good cause shown, the special master may suspend proceedings on the petition. The special master shall grant one such suspension for 30 days on the motion of either party. Further motions by either party for suspension may be granted, totaling not more than 150 additional days, in the special master's discretion.

(b) Effect. Such periods of suspension shall be excluded for purposes of the time limitations of 42 U.S.C. § 300aa-12(d)(3) and Vaccine Rules 4(b) and 10.

Rule 10. Special Master's Decision.

(a) General. The special master shall issue a final decision determining whether or not an award of compensation shall be made and, if so, the amount thereof. This decision shall be filed within 240 days of the date on which the petition was filed, exclusive of periods of suspension pursuant to Vaccine Rule 9.

(b) Certain Retrospective Cases. In cases in which the vaccination in question occurred prior to October 1, 1988, and in which the vaccine recipient is not deceased, the special master shall defer ruling on the limited issue of the amount of any compensation for lost earnings and pain and suffering, 42 U.S.C. § 300aa-15(a)(3) and (4), and combine that ruling with the decision under Vaccine Rule 13.

(c) Reconsideration. Within 21 days of the issuance of the special master's decision, if neither a judgment nor a motion for review of the special master's decision has yet been filed, either party may file a motion for reconsideration of the special master's decision. The special master may seek the non-moving party's response to such a motion, determining the method of and time schedule for any such response. The special master will not rule in favor of such a motion without first requesting a response to it. The special master shall have discretion to grant or deny such motion, in the interest of justice.

(1) If granted. If the special master elects to grant the motion for reconsideration, the special master shall do so by filing an order withdrawing the decision in question. The withdrawn decision then becomes void for all purposes, and the special master must subsequently enter a superseding decision. An order withdrawing the decision may be filed only if neither a judgment nor a motion for review has yet been filed.

(2) If not granted. The filing of a motion for reconsideration will not negate the running of the 30-day period for filing a motion for review of the special master's decision. If the special master denies such a motion, or during any period in which the special master has not yet acted upon such a motion, the 30-day period for the filing of a motion for review of the special

master's decision shall continue to run and either side may file a motion for review.

III. JUDGMENT AND FURTHER PROCEEDINGS

Rule 11. Judgment

(a) In the Absence of Motion for Review. In the absence of the filing of a motion for review pursuant to Vaccine Rule 23 within 30 days of the filing of the special master's decision, or if prior to the expiration of such period each party files a notice stating that it will not seek such review, the clerk shall forthwith enter judgment in accordance with the special master's decision.

(b) Stipulation for Judgment. Any stipulation for a money judgment shall be signed by authorized representatives of the Secretary of Heath and Human Services and the Attorney General.

Rule 12. Election.

(a) General. When no motion for review of a decision pursuant to Vaccine Rule 10 is filed by either party pursuant to Vaccine Rule 23, petitioner shall, within 90 days after the entry of judgment, file with the clerk an election in writing either (1) to accept the judgment or (2) to file a civil action for damages for the alleged injury or death. Upon failure to file an election within the time prescribed, petitioner shall be deemed to have filed an election to accept the judgment.

(b) Declining Award. An election to decline an award of compensation may be accompanied by a motion for the limited compensation provided by 42 U.S.C. § 300aa-15(f)(2). If such a motion has not been filed by time the election is filed, petitioner will be deemed to have waived that limited compensation. Such motion shall be forwarded to the special master for a decision thereon. The decision of the special master on the motion shall be considered a separate "decision" for purposes of Vaccine Rules 11, 18, and 23.

Rule 13. Attorneys' Fees and Costs.

Any request for attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e) shall be filed no later than six months following the filing of an election pursuant to Vaccine Rule 12. The clerk shall forward the fee request to the special master to whom the case was assigned for consideration and decision. The decision of the special master on the fee request shall be considered a separate decision for purposes of Vaccine Rules 11, 18, and 23.

IV. GENERAL PROVISIONS

Rule 14. Attorneys.

(a) Attorneys Eligible to Practice. Only attorneys who are members of the bar of the United States Court of Federal Claims and who comply with the Vaccine Rules may enter an appearance, file pleadings, and practice before the Office of Special Masters and the court. The clerk's office will not accept for filing any pleading, motion, or other paper that is not signed by the attorney of record in the case or by member of this bar authorized to sign the attorney of record's name on the attorney of record's behalf. For admission to the bar of the court, RCFC 83.1(b) shall apply.

(b) Attorneys of Record. There shall be but one attorney of record for a party in

any case at any one time, and such attorney of record shall be an individual, and not a firm, who has been admitted to practice before the Court of Federal Claims. Any other attorneys assisting the attorney of record shall be designated as of counsel. The attorney of record shall include on all filings the attorney's name, address, and telephone number. The attorney of record for each party shall promptly file with the clerk a notice of any change in address.

(c) Change of Attorneys. RCFC 83.1(c) shall apply.

(d) Unrepresented Party. An individual may represent himself or herself or a member of the individual's immediate family as a party. Any other party, however, must be represented by an attorney who is admitted to practice before the Court of Federal Claims. The term "counsel" or "attorney" in the Vaccine Rules shall include unrepresented parties.

Rule 15. Third Parties.

No person may intervene in a vaccine injury compensation proceeding. However, the special master shall afford all interested persons an opportunity to submit relevant written information. Such information may be submitted within 60 days of publication of notice of the petition in the Federal Register, or later with leave of the special master.

Rule 16. Caption of All Filings.

The petition and other filings shall be captioned with the appropriate title (the petition should leave blank the spaces for the special master's name and the case number; all filings thereafter must include the case number and the name of the assigned special master). See Appendix of Forms, Form 7.

Rule 17. Filing and Service of Papers After the Petition.

(a) Filing with the Clerk Defined. All pleadings and other papers required to be filed with the clerk by the Vaccine Rules or by order of the special master or the court shall be forwarded to the clerk of the court at the address noted in Vaccine Rule 2. A document is filed when actually received and marked filed by the clerk, not when mailed. All matters shall be brought to the attention of the special master or the court through formal filings with the clerk rather than by correspondence.

(b) Service. A copy of every document filed by any party with the clerk shall be served on the opposing party's attorney, or the opposing unrepresented party if no appearance of attorney has been entered. A certificate of service showing date of service shall be appended to the original and copies thereof. See RCFC 5.

(c) Date. Each filing shall bear on the signature page the date on which it is signed.

(d) Number of Copies. The parties shall file an original and two copies of each paper to be filed with the clerk, except that for filings of 50 pages or more, an original and one copy will suffice.

Rule 18. Availability of Filings.

(a) General. All filings with the clerk pursuant to the Vaccine Rules are to be made available only to the special master, judge, and parties, with the exception of certain court-produced documents as set forth in subdivision (b) of this rule. A

transcript prepared pursuant to Vaccine Rule 8(b) shall be considered a filing for purposes of this rule.

(b) Decisions of special masters and judges. When a decision of a special master or of the court is filed with the clerk, each party will be afforded 14 days in which to object to the public disclosure of any information furnished by that party–

> **(1)** that is trade secret or commercial or financial information and is privileged or confidential, or
>
> **(2)** that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.

If the party furnishing information objects to disclosure, that information shall be redacted prior to public disclosure of the decision. In the absence of objection, the entire decision will be made public.

Rule 19. Time.

(a) Computation. In computing any period of time, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Service by mail is complete upon mailing, but filing is not. For legal holidays, see RCFC 6(a).

(b) Enlargement. Motions for enlargement of time may be granted for good cause shown. A motion shall set forth the reason or reasons upon which the motion is based. Such motion must contain a representation that the moving party has discussed the motion with opposing counsel and a statement whether an opposition will be filed or, if opposing counsel cannot be consulted, an explanation of the efforts made to do so.

(c) Additional Time After Service My Mail. Whenever a party has the right or is required to do some act within a prescribed period after the service of a paper, and the service is made by mail, 3 calendar days shall be added to the prescribed period, unless the special master or the court orders otherwise.

Rule 20. Motions.

(a) Motions. A motion, unless made orally, shall be made in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be filed with the clerk. Any motion, objection, or response may be accompanied by a memorandum, and, if necessary, by supporting affidavits. Any motion may be accompanied by a proposed order.

(b) Responses and Replies. Unless otherwise provided by the special master or the court, any response or objection to a written motion shall be filed within 14 days after service of the motion, and any reply shall be filed within 7 days after service of the response or objection.

(c) Oral Argument. Oral argument on a motion may be scheduled. A party desiring oral argument on a motion shall so

request in the motion or response.

Rule 21. Dismissal of Petitions.

(a) Voluntary Dismissal; Effect Thereof. A petition may be dismissed by the petitioner without order of the special master or the court (1) by filing a notice of dismissal at any time before service of respondent's report, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the proceeding. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal may, in the discretion of the special master or the court, be deemed to operate as an adjudication upon the merits when filed by a petitioner who has previously dismissed the same claim.

(b) Failure to Prosecute or Participate. If petitioner fails to prosecute, the petition may be dismissed pursuant to Vaccine Rule 21(c). No judgment shall be entered against respondent despite any failure of participation unless petitioner introduces evidence establishing a right to compensation.

(c) Involuntary Dismissal. For failure of petitioner to prosecute or comply with the Vaccine Rules or any order, the special master or the court may dismiss a petition or any claim therein.

V. REVIEW OF DECISIONS OF SPECIAL MASTERS

Rule 22. [Abrogated.]

Rule 23. Motion for Review and Objections.

To obtain review of a special master's decision, within 30 days after the date on which the decision is filed, a party must file with the clerk a motion for review of the decision. No extensions of time under this rule will be permitted , and the failure of a party to timely file such a motion shall constitute a waiver of the right to obtain review.

Rule 24. Memorandum of Objections.

The motion for review must be accompanied by a memorandum of numbered objections to the decision. This memorandum must fully and specifically state and support each objection to the decision. The memorandum shall cite specifically to the record created by the special master, *e.g.,* to specific page numbers of the transcript, exhibits, etc., and should also fully set forth any legal argument the party desires to present to the reviewing judge. The memorandum shall be limited to 20 pages and must conform to the provisions of RCFC 5.2.

Rule 25. Response.

(a) If a motion for review is filed, the other party may file a response thereto within 30 days of the filing of the motion. No extensions of time under this rule will be permitted, and the failure of a party timely to file such a response shall constitute a waiver of the right to respond. The response shall be in memorandum form and shall fully respond to each numbered objection. The memorandum shall cite specifically to the record created by the special master, *e.g.*, to specific page numbers of the transcript, exhibits, etc., and should also fully set forth any legal argument the party desires to present to the reviewing judge. The memorandum shall

be limited to 20 pages and must conform to the provisions of RCFC 5.2.

(b) If both parties file motions for review, each party may file a response to the other party's motion.

Rule 26. Assignment.

When a motion for review is filed with the Clerk, the case will be assigned to a Court of Federal Claims judge to conduct the review. The assignment shall be made pursuant to RCFC 40.1.

Rule 27. Review.

The assigned judge shall undertake a review of the objections raised and may thereafter:

(a) Uphold the findings of fact and conclusions of law and sustain the special master's decision;

(b) Set aside any finding of fact or conclusion of law found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and issue the judge's own decision; or

(c) Remand the case to the special master for further action in accordance with the judge's direction.

Rule 28. Time for Review.

The judge shall complete the review within 120 days of the last date for the filing of a response under Vaccine Rule 25, excluding any days the case is before a special master on remand. If the judge remands the case to a special master, the total period for any remands shall not exceed 90 days.

Rule 28A. Remand Procedure.

If the judge remands a case to a special master, the master, after completing the remand assignment, shall file a "decision on remand" resolving the case, unless the order of remand directs otherwise. The clerk shall promptly notify the judge who remanded the case of the filing of this decision on remand. Unless specified otherwise in the judge's order remanding the case, this decision shall be considered a separate decision for purposes of Vaccine Rules 11, 18, and 23, *i.e.*, judgment automatically will be entered in conformance with the master's decision unless a new motion for review is filed pursuant to Vaccine Rule 23. If a party seeks review of such decision, the clerk shall assign the case to the judge who remanded the case.

Rule 29. Withdrawal of Petition.

If the judge fails to direct entry of judgment within 420 days after the date on which a petition was filed, excluding any periods of suspension pursuant to Vaccine Rule 9 or remands, the petitioner may file a notice to continue or withdraw the petition. Such a notice shall be filed within 30 days after the expiration of the 420-day period.

Rule 30. Judgment.

(a) After Review. After review and decision by a judge, the clerk shall forthwith enter judgment in accordance with the judge's decision.

(b) Stipulation for Judgment. Any stipulation for a money judgment shall be signed by authorized representatives of the Secretary of Health and Human Services and the Attorney General.

Rule 31. Reconsideration.

If a party files a motion for reconsideration of a judge's decision within 10 days of entry of the judgment, RCFC 59 shall apply.

Rule 32. Notice of Appeal.

Review of a Court of Federal Claims judgment by the United States Court of Appeals for the Federal Circuit may be obtained by filing with the clerk of the Federal Circuit a notice of appeal (petition for review) within 60 days of the date of the entry of judgment.

Rule 33. Election.

After review by the Court of Federal Claims and entry of judgment, an election as described in Vaccine Rule 12 shall be made within 90 days following the entry of judgment. However, if an appeal is taken to the United States Court of Appeals for the Federal Circuit pursuant to Vaccine Rule 32, the 90-day period for the election shall not run from the original date of judgment, but rather from the date of the appellate court's mandate or any subsequent judgment of the Court of Federal Claims on remand, whichever occurs later.

Rule 34. Attorneys' Fee and Costs.

Any request for attorneys' fees and costs, in a case where judgment followed a review by a judge, will be processed pursuant to Vaccine Rule 13.

Rule 35. [Abrogated.]

VI. RELIEF FROM JUDGMENT

Rule 36. Relief from Judgment.

(a) General. Following the entry of judgment by the Court of Federal Claims, if a party files a motion pursuant to RCFC 59 or 60, the clerk of the court shall refer such motion as follows. If the petition has previously been before a judge of the court upon review pursuant to Vaccine Rule 23, then the motion shall be referred to that judge. If the petition has not previously been before a judge of the court upon review pursuant to Vaccine Rule 23, then the motion shall be referred to the Office of Special Masters.

(b) Review of a Special Master's Ruling. When a motion pursuant to RCFC 59 or 60 is referred to a special master pursuant to subdivision (a) of this rule, that master shall file a written ruling upon such motion. That ruling shall become the final ruling of the court on the motion, unless a party files a motion for review of that ruling, accompanied by a memorandum of objections to the ruling, within 30 days of the date of the ruling. If such a review motion is filed, the case will be submitted to a judge of the court, who will review the special master's ruling, setting such ruling aside only if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The non-moving party may file a memorandum response within 30 days of the filing of the review motion. Memorandums for each party shall be limited to 20 pages and must conform to the provisions of RCFC 5.2.

(c) If Judgment is Altered. If the original judgment is modified pursuant to RCFC 59 or 60 or otherwise, and the petitioner is to receive any award for

damages calculated with respect to the "date of judgment," such damages shall be calculated based upon the date of the original judgment, unless the ruling of the special master or court directs otherwise.

Rules Committee Note

Appendix B sets forth rules applicable to proceedings involving claims for the compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10 - 300aa-34 (1994).

APPENDIX C
PROCEDURE IN PROCUREMENT PROTEST CASES PURSUANT TO 28 U.S.C. § 1491(b)

I. INTRODUCTION

1. This Appendix describes standard practices in protest cases filed pursuant to 28 U.S.C. § 1491(b) and supplements the Rules of the United States Court of Federal Claims, which are otherwise fully applicable to these cases.

II. REQUIREMENT FOR PRE- FILING NOTIFICATION

2. In order to expedite proceedings, prior to the filing of a protest case pursuant to 28 U.S.C. § 1491(b), plaintiff's counsel shall (except in exceptional circumstances to be described in moving papers) provide at least 24-hours advance notice of filing the case to the:

(a) Department of Justice, Commercial Litigation Branch, Civil Division– (202) 514- 7300;

(b) Clerk, United States Court of Federal Claims – (202) 219-9657;

(c) procuring agency contracting officer by facsimile transmission, only; and

(d) apparently successful bidder/offeror (in cases where there has been an award and the plaintiff has received notice of the identity of the awardee).

Such notice shall be provided during conventional business hours. The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can be prepared to address relevant issues on a timely basis and to permit the court to insure the availability of appropriate court resources. Failure to provide pre-filing notification will not preclude the filing of the case, but is likely to delay the initial processing of the case including the scheduling of the initial status conference. See paragraph 8, below. Plaintiff's counsel shall apprise the above entities of any material change in respect to the timing of, or intent to file, a protest. Plaintiffs are encouraged to provide earlier notice if possible as a courtesy to the court and to government counsel.

3. The pre-filing notice plaintiff provided pursuant to paragraph 2, above, should include the following information:

(a) The name of the procuring agency and the number of the solicitation in the contested procurement;

(b) The name and telephone number of the contracting officer responsible for the procurement;

(c) Whether plaintiff contemplates requesting temporary or preliminary injunctive relief pursuant to RCFC 65;

(d) Whether the plaintiff has discussed the need for temporary or preliminary injunctive relief with Department of Justice counsel and the response, if any;

(e) Whether the action was preceded by the filing of a protest before the General Accounting Office (GAO) (if so, provide the "B-" number of the protest and indicate whether a decision was issued); and

(f) Whether plaintiff contemplates the need for the court to enter a protective order.

III. FILING UNDER SEAL

4. In the event plaintiff believes its complaint, or any pleadings filed at the same time, contain confidential or proprietary information and plaintiff seeks to protect that information from public scrutiny, plaintiff must file a motion for leave to file the complaint under seal, which shall be filed at the same time the complaint is filed. When a complaint or related papers are filed with an accompanying motion for leave to file under seal, the pleadings will be treated as though filed under seal while the motion is pending.

5. In filing documents under seal, a party shall follow the procedures described in RCFC 5.3(d).

6. Complaints (and other pleadings filed at the same time) that are filed under seal shall be marked or highlighted in such a way that confidential or proprietary information is indicated and shall be accompanied by a redacted version of the pleading (a version that omits confidential or proprietary information), which will be available for public scrutiny. Failure to file the redacted copy may result in denial of the motion for leave to file under seal.

7. To the extent the complaint or any pleadings filed at the same time contain classified information, the filing must conform to the requirements of the classifying agency.

IV. INITIAL STATUS CONFERENCE

8. The court will schedule an initial status conference with the parties to address relevant issues including, but not limited to, the following:

(a) Identification of interested parties;

(b) In post-award cases, admission of the successful offeror as an intervenor;

(c) Requests for temporary or preliminary injunctive relief, if filed. See subdivision 15, below;

(d) The content of a protective order, if requested by one or more of the parties and the requirement for redacted copies;

(e) The content and time for filing of the administrative record;

(f) Whether it may be appropriate to supplement the administrative record; and

(g) The nature of and schedule for further proceedings.

This initial status conference will be held as soon as practicable after the filing of the complaint.

V. INJUNCTIVE RELIEF

9. The court's practice is to expedite protest cases to the extent practicable and to conduct hearings on motions for preliminary injunctions at the earliest practicable time. Accordingly, when a plaintiff seeks a preliminary injunction, it may not need to request a temporary restraining order.

10. An application for a temporary restraining order and/or preliminary injunction shall be filed with the clerk along with the complaint, unless the complaint has been previously filed. The application shall be accompanied by

affidavits, supporting memoranda, and other documents upon which plaintiff intends to rely. The application also shall be accompanied by a statement that plaintiff's counsel has hand delivered or provided for hand delivery, or transmitted by facsimile, copies of the foregoing documents to the Department of Justice, Commercial Litigation Branch, 8th Floor, 1100 L. St. N.W. Washington, D.C. 20530.

11. If the name of the apparently successful bidder/offeror is known (in cases where there has been an award and the plaintiff has received notice of the identity of the awardee), a copy of the foregoing documents shall be provided by hand, facsimile, or overnight delivery to the apparently successful bidder/offeror. The plaintiff shall state in its application whether the documents have been so provided. If the name of the awardee is unknown, the plaintiff shall so state.

12. The apparently successful bidder/offeror may enter a notice of appearance at any hearing on the application for a temporary restraining order/preliminary injunction if it advises the court of its intention to move to intervene pursuant to RCFC 24(a)(2) or has moved to intervene before the hearing.

13. The clerk will promptly inform the parties of the judge to whom the case has been assigned and the time and place of any hearing.

14. Except in an emergency, the court will not consider *ex parte* applications for a temporary restraining order.

15. In cases in which the plaintiff seeks temporary or preliminary injunctive relief, counsel should be prepared to discuss the following matters at the initial status conference:

(a) Whether and to what extent, absent temporary or preliminary injunctive relief, the court's ability to afford effective final relief is likely to be prejudiced;

(b) If a temporary restraining order has been requested, whether the plaintiff has discussed this request in advance with Department of Justice counsel and the response;

(c) If a temporary restraining order has been requested, whether the government will agree to withhold award or suspend performance pending a hearing on the motion for preliminary injunction;

(d) If a preliminary injunction has been requested, whether the government will agree to withhold award or suspend performance pending a final decision on the merits;

(e) An appropriate schedule for completion of the briefing on any motion for a preliminary injunction;

(f) The security requirements of RCFC 65(c) (See Appendix of Forms, Forms 11-13); and

(g) Whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits.

VI. PROTECTIVE ORDERS

16. Preliminary Matters.

(a) The principal vehicle relied upon by the court to insure the protection of sensitive information is the protective order. The protective order defines the procedures to be followed to identify protected information, prepare redacted

versions of such information, and dispose of protected information at the conclusion of the case.

(b) Information a party identifies as protected may be disclosed only to parties who have been "admitted" to the protective order.

(c) Once a protective order is issued by the court, individuals who seek access to protected information, must file an appropriate application. If admitted to the protective order, the individual becomes subject to the terms of the order. It is the responsibility of those admitted to the protective order to take the necessary steps to insure that the information is protected, consistent with the terms of the protective order, while it is under their control (this includes oversight of support personnel who may have access to protected information).

(d) The court, procuring agency, and Department of Justice personnel are automatically admitted to protective orders when issued and are subject to their terms.

17. Issuance of a Protective Order

(a) Motions for protective orders must meet the requirements of RCFC 10. The court may issue a protective order at its discretion.

(b) A sample protective order is found at Appendix of Forms, Form 8. The parties are cautioned that individual judges and the parties themselves may want to amend the sample protective order to meet the needs of specific cases or their individual preferences. It is the specific protective order issued in a case that governs the treatment of protected information in that case.

18. Application for Admission to the Protective Order

(a) Each party seeking access to protected information upon behalf of an individual must file with the court, an appropriate "Application for Admission to the Protective Order." Separate applications for individual outside and in-house counsel, and for consultants or experts retained by counsel for a party, are contained in the Appendix of Forms (Forms 9 and 10). These forms may also be amended by the court in response to individual case needs.

(b) Admission to the protective order will be based upon the contents of the application form submitted by an individual representing a party.

(c) Objections to an Application for Admission to a protective order must be filed with the court within two days of a party's receipt of an application.

(d) In considering objections to Applications for Admission to a Protective Order, the court will consider such factors as the nature and sensitivity of the information at issue, a party's need for access to the data in order to effectively represent its client, the overall number of applications received and other concerns that may affect the risk of inadvertent disclosure.

(e) Admission to a protective order will be made by the court in the form of an order.

19. Designation of Protected Information and Preparation of Redacted Pleadings.

After a protective order is entered the designation of protected information and the preparation and filing of redacted documents shall be governed by the terms

of the protective order.

20. Disposition of Material Containing Protected Information.

The specific procedures to be followed in disposing of protected information at the conclusion of the case shall be as described in the protective order.

VII. THE CONTENT AND FILING OF THE ADMINISTRATIVE RECORD

21. The United States will be required to identify and provide (or make available for inspection) the administrative record in a protest case by the date(s) established at the initial status conference. The filing of all or a part of the administrative record shall be accompanied by a Notice of Filing.

22. Early production of relevant core documents may expedite final resolution of the case. The core documents relevant to a protest case may include, as appropriate the:

(a) agency's procurement request, purchase request, or statement of requirements;

(b) agency's source selection plan;

(c) bid abstract or prospectus of bid;

(d) Commerce Business Daily or other public announcement of the procurement;

(e) solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers;

(f) documents and information provided to bidders during any pre-bid or pre-proposal conference;

(g) agency's responses to any questions about or requests for clarification of the solicitation;

(h) agency's estimates of the cost of performance;

(i) correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

(j) records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;

(k) records of the results of any bid opening or oral motion auction in which the protester, awardee or other interested parties participated;

(1) protester's, awardee's, and other interested parties' offers, proposals, or other responses to the solicitation;

(m) agency's competitive range determination, including supporting documentation;

(n) agency's evaluations of the protester's, awardee's, or other interested parties' offers, proposals or other responses to the solicitation, including supporting documentation;

(o) agency's source selection decision, including supporting documentation;

(p) pre-award audits, if any, or surveys of the offerors;

(q) notification of contract award and executed contract;

(r) documents relating to any pre- or post-award debriefing;

(s) documents relating to any stay, suspension, or termination of award or

performance pending resolution of the bid protest;

(t) justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and

(u) the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.

23. Because a protest case cannot be efficiently processed until production of the administrative record, the court expects the United States to produce the core documents and the remainder of the administrative record as promptly as circumstances will permit. (See RCFC 5.3 (d) which is applicable to administrative records, unless waived by the court.) Materials that otherwise qualify as part of the administrative record are not excluded from it merely because they are only in electronic form.

24. Any additional documents within the administrative record shall be produced at such time as may be agreed to by the parties or ordered by the court.

VIII. ADMISSION OF COUNSEL

25. In those procurement protest cases in which counsel for the plaintiff is not a member of the bar of the court and does not have sufficient time to gain admission prior to the filing of the action, the clerk shall accept for filing any proper complaint and accompanying pleadings under 28 U.S.C. § 1491(b) from such counsel, conditioned upon counsel's prompt pursuit of admission to practice before the United States Court of Federal Claims pursuant to RCFC 83.1. Failure to do so within 30 days of the initiation of the action may result in dismissal of the action, and possible referral for disciplinary action.

Rules Committee Note

This appendix sets forth the procedures applicable to the court's procurement protest jurisdiction. In the main, these procedures reflect those that formerly appeared as General Order No. 38, issued on May 7, 1998. In addition, however, Appendix C now also incorporates – in paragraphs 10 through 14 – those provisions of former RCFC 65(f) (titled "Procedures") which enumerated requirements particular to applications for temporary restraining orders and/or motions for preliminary injunction.

Papers and exhibits are often filed under seal in procurement protests. Procedures for unsealing are addressed at RCFC 77.3(d). The standards for granting access to protected information are addressed in decisions such as *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984) and *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991).

APPENDIX D
PROCEDURE IN CONGRESSIONAL REFERENCE CASES

1. Purpose. The Federal Courts Improvement Act of 1982, amended 28 U.S.C. §§1492 and 2509 to authorize either House of Congress to refer bills to the chief judge of the United States Court of Federal Claims for investigation and report to the appropriate House. Procedures promulgated by the chief judge applicable to such congressional reference cases are specified herein. The RCFC, to the extent feasible, are to be applied in congressional reference cases.

2. Service of notice. Upon referral of a bill to the chief judge by either House of the Congress, the clerk shall docket the reference and serve a notice, as provided in RCFC 5, on each person whose name and address is shown by the papers transmitted and who appears to have an interest in the subject matter of the reference. The notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days within which to file a complaint. The clerk shall forward a copy of each such notice to the Attorney General.

3. Complaint. Any person served with notice who desires to assert a claim may do so by filing a complaint in accordance with RCFC 3(c), 8 and 9 .

4. Failure of party to appear. If no interested person files a complaint within the time specified in the notice served by the clerk, the case may be reported upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

5. Hearing officer; review panel. Upon the filing of a complaint, the chief judge by order will designate a judge of the court to serve as hearing officer and a panel of three judges to serve as a reviewing body. One of the review panel members will be designated by the chief judge as presiding officer of the panel.

6. Subpoenas. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena and the power to administer oaths and affirmations. Subpoenas requiring travel of more than 100 miles to place of trial must have attached thereto an order of approval by the hearing officer.

7. Hearing officer report. The hearing officer shall conduct such proceedings and utilize such rules of the United States Court of Federal Claims as may be required to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. The hearing officer shall find the facts specially. The hearing officer's findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the hearing officer to judge the credibility of witnesses. The hearing officer shall

append to the findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant. The report shall be filed with the clerk, and served by the clerk on the parties.

8. Acceptance or exceptions. Within 30 days after service of the report, each party shall file either (a) a notice of intention to except to the report or (b) a notice accepting the report.

9. Review panel consideration and report. The findings and conclusions of the hearing officer, together with the record of the case, shall be considered by the review panel. When a party or parties have filed a notice of intention to except, the presiding officer by order shall establish a schedule for the parties to file briefs on exceptions to the hearing officer's findings and conclusions and requests for oral argument before the panel. The chief judge will entertain no appeals or requests for review of any rulings or actions by a hearing officer or a review panel. No case shall be returned to the hearing officer unless so ordered by the review panel. On the basis of the entire record, the panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer and shall file its report with the clerk, for service on the parties.

10. Rehearing. Within 10 days after service of the report of the review panel, any party may file a motion for rehearing to alter or amend the report. The motion shall state with particularity any contention of law or fact which the movant believes has been overlooked or misapprehended, and shall contain argument in support thereof. Oral argument in support of the motion shall not be permitted. No response to a motion for rehearing is required, but will be considered if filed within 10 days from the date the motion for rehearing is served. No time extension shall be allowed for filing such a response. If the motion for rehearing is granted, the review panel shall take such further action as in its discretion may be required by the circumstances of the particular case.

11. Transmittal to Congress. When all proceedings are concluded, the report of the review panel shall be transmitted by the chief judge to the appropriate House of Congress.

12. Admission to practice. Any attorney representing a claimant in a congressional reference case may file and appear as attorney of record in the proceeding if such attorney is a member of the bar of the United States Court of Federal Claims or, if not, upon certification to the clerk that such attorney is a member in good standing of the bar of the highest court of any state in the Union or the District of Columbia. Any claimant, except a corporation, in a congressional reference case may proceed *pro se*.

13. Filing fees. Filing fees as set by RCFC 77.1 are required in congressional reference cases.

Rules Committee Note

Appendix D provides the procedures applicable to congressional reference cases. The appendix retains its earlier designation as Appendix D and also retains its earlier text except for the deletion of (i) former paragraph 6 (titled "Captions") and (ii) the reference in paragraph 3 authorizing the filing of a "preliminary complaint."

The reference in paragraph 6 to case captions was deleted as unnecessary and paragraph 3's reference to the filing of a preliminary complaint was stricken because such complaints are no longer authorized under RCFC 27.

APPENDIX E
PROCEDURE IN CARRIER CASES

Rule 1. Carrier's Request For Admission of Facts

(a) Time for Filing Request. In every suit filed by a carrier for the recovery of freight and/or passenger transportation charges, the carrier shall, at the time the complaint is filed or within 30 days thereafter, file with the clerk a request for admission by the defendant of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action.

(b) Form and Content of Request. The request shall conform to the following requirements:

(1) Duplication. The request, with accompanying schedules and documents, may be typewritten, or may be printed, or otherwise mechanically reproduced from a typewritten original, provided that all copies filed with the clerk shall be legible and that the words and figures shown therein shall be large enough type to be read without difficulty.

(2) Copies; Filing; Service. If the request accompanies the complaint, copies and service of such request shall be as provided in RCFC 3(c) and 4. If the request is filed subsequent to the filing of the complaint, copies and service of such request shall be as provided in RCFC 5, and 83, except that 5 copies shall be served on the defendant in lieu of a copy.

(3) Signature of Attorney. The request shall be signed by the attorney of record for the plaintiff.

(4) Numbered Paragraphs; Material Facts. The statements contained therein shall be properly separated and numbered and shall consist of specific statements of material facts which the plaintiff expects to prove as opposed to general allegations of the kind used in pleadings.

(5) Attachments. There shall be attached to the request copies of any contracts, letters, or other documents, excluding tariffs and other documents referred to in the schedules required by subdivisions (b)(7) and (b)(8), which plaintiff proposes to offer in evidence, in order that the genuineness of such documents may be admitted by the defendant and the necessity of calling a witness to identify the same may be avoided.

(6) Nature of Dispute; Statement of Issues. The statement in the request shall be sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the government. The word "dispute" as used in the preceding sentence, means the shipment or shipments with respect to which the General Services Administration (GSA) or other agency of the government determined that the carrier's charges had been overpaid or

refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments. In order to show the nature of the dispute there shall be attached to or included in plaintiff's request a statement of the issues which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of such issue with a reference to (A) court decisions involving the same issue, or (B) the tariffs, contract terms or other authority relied upon by plaintiff, and the tariffs or other authority which plaintiff believes defendant relied upon in making deductions for claimed overpayments to the carrier or in refusing to pay the carrier's supplemental bills for claimed undercharges.

(7) Schedule: Claim for Transportation of Property. Where the claim is for the recovery of charges for the transportation of property for the government, there shall be attached to the request a detailed schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(A) List of Carrier's Bills in Dispute. The number of each of the carrier's bills for the shipments in dispute, as distinguished from the number of a subsequent bill from which GSA made a deduction following its determination of an overpayment on the bill in dispute.

(B) Detail for Each Bill of Lading. For each bill of lading in dispute, covered by each bill referred to in paragraph (A), the following facts:

(i) the number and symbol of each bill of lading;

(ii) the date of the shipment;

(iii) the origin and the destination of the shipment;

(iv) a description of the commodity or commodities shipped, including a description of the packing where this affects the rate;

(v) car number and initial;

(vi) the weight of the shipment, including the minimum carload weight when greater than the actual weight;

(vii) when the shipment in dispute consists of one or more carloads of mixed commodities, a description of the different commodities, and the respective weight thereof loaded in each car, including minimum carload weights where such weights affect the rates;

(viii) the rates claimed for each article in the shipment and for any accessorial

services;

(ix) the total freight charges on each bill of lading;

(x) amounts refunded by carrier, if any, and the dates thereof;

(xi) if the overpayment determined by GSA or other agency has been deducted from the carrier's subsequent bill or bills, the number of such subsequent bill or bills, the amount deducted, and the date thereof;

(xii) the total amount paid the carrier;

(xiii) the balance due;

(xiv) a specific reference to the item or items in designated tariffs authorizing the charges claimed, including the classification rating if necessary, and authorization for any accessorial charges claimed; or to a government rate quotation;

(xv) the government file reference number as obtained from GSA notice of overcharge, the Certificate of Indebtedness, or other document issued by GSA, or, in the event there is no GSA reference number, the name of the government paying agency and bureau, the disbursing office voucher number, and the date of payment;

(xvi) if the shipment in dispute consists in whole or in part of a through transit movement: a. the through assessable charges from the original point of shipment to the final destination, including a description of the commodity, the transited weight, the through rate, the tariff or special authority for the through rate used, and, if local tonnage is involved, the weight thereof, the points between which local tonnage moved, and the rates and charges assessed against such tonnage; b. details of the net amounts paid to and beyond the transit station, including references to the “inbound” and “outbound shipments” by bill of lading number and symbol; c. date of shipment, origin and destination, weight rate, and the net amounts paid to the respective “inbound” and “outbound” carriers, naming them and identifying the bill numbers on which such payments were made; and, d. the balance due, i.e., the difference between the through assessable charges, including the charges on local tonnage, if any, and the respective net amounts paid on the inbound and outbound shipments; and

(xvii) a brief statement as to the basis for the claim or other brief statement which the carrier deems necessary to explain the peculiarities of the

shipment.

(C) Computation for Typical Bill of Lading. Following the listing of the information herein required with respect to each group of carrier's bills involving the same issue or basis of freight charge computation, the carrier shall either (i) include in the schedule a computation of the freight charges for that bill of lading, setting forth the basis or formula used, and referring to the specific items in particular tariffs or other authority which it relied upon for that purpose, or (ii) attach a worksheet showing such computation and information with respect to each typical bill of lading.

(8) Certification and Signature of Carrier: Property. The schedule shall be certified by the general auditor, comptroller, or principal accounting officer of the carrier, as follows:

(Name)(Title)

(Name of Carrier)

I do hereby certify that the above and foregoing schedule has been prepared from the books and records of said company for use in a suit in the United States Court of Federal Claims, entitled _____ v. United States, No. ____ and that to the best of my knowledge, information, and belief the matters contained therein are true and correct. To certify which, witness my hand at _____ this ____ day o f _____, 20__.

(Signature of auditor, comptroller, or principal accounting officer.)

(9) Schedule: Claim for Transportation of Passengers. Where the claim is for the recovery of charges for the transportation of passengers for account of the government, there shall be attached to the request a schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(A) List of Carriers' Bills in Dispute. The number of each of the carrier's bills in dispute, as distinguished from the number of a subsequent bill from which GSA made a deduction following its determination of an overpayment on the bill in dispute.

(B) Detail: Each Transportation Request or Warrant. For each transportation request or warrant in dispute, covered by each bill referred to in subparagraph (A) the following facts:

(i) the symbol and number of each transportation request or warrant in dispute;

(ii) the date of service;

(iii) the origin and destination of the travel;

(iv) the class or type of service;

(v) whether the travel was one way or round trip;

(vi) the number of the special movement, if any;

(vii) the route of travel;

(viii) the number of persons that traveled;

(ix) the gross per capita fare;

(x) the assessable passenger charges;

(xi) the amount paid, and by what government office and where located;

(xii) amounts refunded by carrier, if any, and the dates thereof, and the government office to which refunded and where located;

(xiii) where an overpayment was determined by the government and deducted from a carrier's subsequent bill, the number of such subsequent bill, the amount of the deduction, and the date thereof;

(xiv) the total amount paid, and by what government office and where located;

(xv) the balance due;

(xvi) the tariff reference and item or special rate authority;

(xvii) the government file reference; and

(xviii) a brief statement as to the basis for the claim, including, where appropriate, a brief explanation showing the extent to which the ticket issued by the carrier was not used, and the value of the unused part of the ticket.

(10) Certification and Signature of Carrier: Passengers. The schedule covering the transportation of passengers shall be certified in the same manner as provided in Rule 1(b)(8), except that where a request includes schedules pertaining to claims for both the transportation of passengers and freight, one certification shall suffice for all schedules.

(c) Plaintiff's Noncompliance: Consequences. In the event a plaintiff in any action within the purview of this Appendix fails or refuses to comply with the provisions hereof, the judge may (1) refuse to allow it to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony, or (2) take other appropriate action, which may include a dismissal of the complaint or any part thereof.

Rule 2. Defendant's Response

(a) Time for Filing; Order. Promptly after the filing of the plaintiff's request, the judge to whom the case is assigned shall, by order filed with the clerk, fix a reasonable time within which the defendant shall file its response to the request. A copy of such order shall be served on the parties as provided in RCFC 5.

(b) Copies; Service; Signature. The defendant's response shall consist of an original and two copies to be filed with the clerk and with service to be made on plaintiff as provided in RCFC 5. The response shall be signed by defendant's attorney of record and shall comply with the terms of Rule 1(b)(1).

(c) Agreement; Modification; Denial. The defendant shall file such response within the time fixed by the order, agreeing to the separate items of fact, modifying the same in accordance with the facts known by the defendant, specifically denying the same, or setting forth in detail the reasons why it cannot truthfully admit or deny designated portions of the request.

(d) Defendant's Statement of Issues. If defendant does not agree with plaintiff's statement of the issues, it shall attach to or include in the response its statement of the issues, which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of the issue, as defendant contends, with reference to (1) a court decision involving the same issue, or (2) the tariffs or other authority relied upon by defendant.

(e) Verification of Carrier's Computations. If the defendant finds that the schedule attached to plaintiff's request, or any portion affecting the amount claimed, is incorrect on the basis of the tariffs, government rate quotations, or other authority relied on by plaintiff in its request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures as to the amount of freight charges which defendant asserts would be due on each carrier's bill if the court holds that the tariffs or other authorities relied on by plaintiff in its request are applicable, and showing how the defendant arrived at any changes or corrections in the amounts claimed by plaintiff.

(f) Schedule: Defendant's Basis for Applicable Charges. If the defendant claims that the tariffs, government rate quotations, or other authority relied on by plaintiff are inapplicable with respect to any of the carrier's bills listed in plaintiff's request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures in detail as to the amount of freight or passenger charges defendant claims is due on each disputed carrier's bill and containing a specific reference to the item or items in designated tariffs, government rate quotations, or other authority relied on by defendant in support of its contention. The schedule shall also comply with the terms of subdivision (b)(7)(C).

(g) Failure To Deny or Respond Within Specified Time: Consequences. Except where the response details the reasons why the defendant cannot admit or deny a particular statement in the request, any fact not so modified or denied in the response shall be deemed admitted, and the failure of the defendant to file its response within the time specified by the judge shall be taken as an admission of all of the facts as set forth in the request.

(h) Qualified Denial of Facts Available to Defendant: Consequences. Where the request sets forth any facts that are within the knowledge of the General Services Administration or of the department or agency of the defendant for which the transportation was performed and these specifically include but are not limited to the facts and figures which plaintiff, by this order, is directed to include in its schedules a response stating that defendant cannot truthfully admit or deny such facts, or a denial based on a lack of knowledge by defendant's attorney of

record, shall be deemed an admission thereof, provided, that such a response shall not be deemed an admission if accompanied by the sworn statement of the official in charge of the records that a search has been made for the necessary documents or information and that the documents or information cannot be found.

(i) Relation to Pleadings; Time for Filing Answer or Counterclaim. In all cases to which this procedure applies, the time for filing defendant's answer and any counterclaim asserted by it may, without regard to the provisions of RCFC 12 and 13, be contemporaneous with the date fixed by the judge for filing defendant's response to plaintiff's request, provided, however, that the period of limitations provided by 49 U.S.C. §§ 11705 and 14705 within which the defendant may file a counterclaim is not extended by any rule set forth in this Appendix or by any order. At its option, the defendant may include the response in its answer or counterclaim, which pleadings, nevertheless, shall otherwise comply with the rules applicable to them.

Rule3. Acceptance of Response; Pretrial; Judgment

(a) Plaintiff's Acceptance of Response. If a plaintiff is willing to accept the amount shown to be due it in defendant's response, or, where a counterclaim has been filed, is willing to accept the net amount shown to be due plaintiff in the response after deducting the amount of defendant's counterclaim, plaintiff's attorney of record shall sign and file with the clerk within 30 days an original typewritten and 2 copies of a statement entitled Plaintiff's Acceptance of the Amount Defendant Admits is Due, stating therein that the response shows that a specified sum is due plaintiff or, where a counterclaim has been filed, that the response shows that the net amount of the counterclaim is a specified sum, and that plaintiff consents to the entry of judgment in the amount specified in favor of plaintiff in full settlement and satisfaction of all claims asserted in the complaint and request for admission of facts.

(b) Pretrial Conference; Fixing Amount of Recovery. When plaintiff does not file an acceptance of the amount shown to be due in the response, a pretrial conference shall be held for the purpose of (1) resolving all issues and recording an agreement for the entry of judgment or for a dismissal of the complaint or any part thereof, or (2) segregating the carrier's bills in dispute from those not in controversy and fixing the amount that either party would be entitled to recover in the event of a decision in its favor, and/or (3) taking any other action that may aid in the prompt disposition of the suit.

(c) Entry of Judgment. Where all material issues are disposed of through the filing by plaintiff of its acceptance of the amount shown to be due in defendant's response, or at a pretrial conference, or by the defendant's failure to file its response within the time fixed by the judge, judgment may be entered without further proceedings.

Rule 4. Cases Within Primary Jurisdiction of The Surface Transportation Board

(a) Referral to Surface Transportation Board. In any suit subject to the terms of this order, if defendant contends, whether on the basis of the freight charge computations used by plaintiff or on the basis of the freight charge computations used by defendant, that any of the carrier's bills listed in the request raise issues within the primary jurisdiction of the Surface Transportation Board and intends to move the court to refer such issues to that agency, defendant shall file the motion with the clerk at the time fixed for the filing of its response under this order. The motion shall contain: (1) an identification of the carrier's bills involved unless all the bills in suit are included in the motion; (2) a description of the commodities shipped and a statement respecting any other factors which are pertinent to the issues covered by the motion; (3) a reference to the applicable tariffs and a copy of the pertinent provisions thereof; (4) a precise statement of the issue or issues to be referred; and (5) a statement as to whether the Surface Transportation Board has construed the cited tariffs in prior decisions or has clarified the facts underlying them, citing the pertinent decisions, if any.

(b) Plaintiff's Response to Defendant's Motion for Referral. Plaintiff's response to the motion shall be filed within 30 days after service of the motion, and shall state whether plaintiff concurs in the motion. If plaintiff contends that the Surface Transportation Board has construed the tariffs referred to in defendant's motion or has clarified the factors underlying them in previous decisions, the response shall cite such decision.

(c) Referral to Surface Transportation Board–Plaintiff's Motion. If plaintiff, in any case subject to the terms of this order, contends that any of the carrier's bills in suit raise issues within the primary jurisdiction of the Surface Transportation Board and intends to move the court to refer such issues to that agency, plaintiff's motion shall be filed not later than 30 days from the date defendant's response is filed and shall conform to the requirements of Rule 4(a).

(d) Defendant's Response to Plaintiff's Motion for Referral. Defendant's response to plaintiff's motion shall conform to the requirements of paragraph Rule 4(b).

(e) Effect of Filing Referral Motion. The trial of any case subject to the terms of this order in which a motion for referral is filed shall be deferred until final action on the motion.

(f) Failure To File Referral Motion in Specified Time. The failure of either party to file, within the time prescribed above, a motion requesting the court to refer a pending case or any part thereof to the Surface Transportation Board may be deemed good cause for denying any such motion thereafter filed.

Rules Committee Note

Appendix E formerly appeared in these rules as Appendix C. Additionally, substantive changes have been made:

First, the word “common” has been stricken from the term “common carrier.” The term “common carrier” is no longer used in the

Interstate Commerce Act 49 U.S.C. § 13102. Since deregulation occurred, *see* ICC Termination Act of 1995, Pub. L. No. 104-88, §103, 109 Stat. 803, 852, carriers are no longer required to file tariffs other than for household goods and noncontiguous domestic trade. Certificates of Public Convenience and Necessity are no longer required and thus there are no "common carriers," as the term formerly was used, as a reference to a public utility, fully regulated status.

Second, in subdivision (a)(2)(F), titled "Nature of Dispute; Statement of Issues" the term "General Accounting Office" was replaced with "General Services Administration." The GSA Board of Contract Appeals replaced the General Accounting Office as reviewing authority in GSA transportation audit billing appeals pursuant to the Legislative Branch Appropriations Act of 1996, effective June 30, 1996, and delegations of authority granted thereunder. Also, in subdivision (a)(2)(F)(2), the term "contract terms" was added as authority relied upon by plaintiffs in their statement of issues because, with no tariff filing requirement, individual movements by contract are more common.

Third, all references to a "§ 22 quotation" were replaced with "government rate quotation." Section 22 (49 U.S.C. § 22 (1887)) rates were replaced by "government rates" under 49 U.S.C. § 10721 (rail) and § 13712 (all other modes), and as such, lower rates are not limited strictly for the use of the government.

Fourth, in subdivision (a)(2)(I)(ii)(a), the word "government" was struck in reference to a transportation request or warrant in dispute. Under the provisions of 41 CFR § 102-118.175, Government Bills of Lading will no longer be used for domestic traffic and under 41 CFR § 102-118.180, Government Transportation Requests will no longer be mandatory.

Fifth, in subdivision (b)(9), titled, "Relation to Pleadings, Time for Filing Answer or Counterclaim," the statutory reference was updated.

Finally, all references to the "Interstate Commerce Commission" were stricken and replaced with the "Surface Transportation Board." While carriers are no longer subject to full regulation, the "reasonableness requirement" on "through routes," "divisions of joint rates," and rates "made collectively by [any group of] carriers under agreements approved by the Surface Transportation Board," remains intact and is subject to that body's review.

APPENDIX F
PROCEDURE IN TAX PARTNERSHIP CASES

Rule 1. General

(a) Applicability. This Appendix sets forth the special provisions that apply to actions for readjustment of partnership items under Section 6226 of the Internal Revenue Code (Code) and actions for adjustment of partnership items under Code Section 6228. Except as otherwise provided in this Appendix, the Rules of the United States Court of Federal Claims (RCFC), to the extent pertinent, are applicable to such partnership actions.

(b) Definitions. As used in this Appendix –

(1) the term "partnership" means a partnership as defined in Code Section 6231(a)(1);

(2) a "partnership action" is either an "action for readjustment of partnership items" under Code Section 6226 or an "action for adjustment of partnership items" under Code Section 6228;

(3) the term "partnership item" means any item described in Code Section 6231(a)(3);

(4) the term "tax matters partner" means the person who is the tax matters partner under Code Section 6231(a)(7) or appointed tax matters partner by the court under Rule 9 of this Appendix, and who under these Appendix is responsible for keeping each partner fully informed of the partnership action (see Code Sections 6223(g) and 6230(1));

(5) a "notice of final partnership administrative adjustment" is the notice described in Code Section 6223(a)(2);

(6) the term "administrative adjustment request" means a request for an administrative adjustment of partnership items filed by the tax matters partner on behalf of the partnership under Code Section 6227(b);

(7) the term "partner" means a person who was a partner as defined in Code Section 6231(a)(2) at any time during any partnership taxable year at issue in a partnership action;

(8) the term "notice partner" means a person who is a notice partner under Code Section 6231(a)(8);

(9) the term "5-percent group" means a 5-percent group as defined in Code Section 6231(a)(11);

(10) the term "deposit" means the deposit required by Code Section 6226(e)(1); and

(11) the term "Notice of Assignment" means the notice mailed to the parties by the clerk of the court after the filing of a complaint that advises the parties of the name of the judge to whom the proceeding is assigned.

(c) Jurisdictional Requirements. The court does not have jurisdiction over a partnership action under this Appendix unless the following conditions are satisfied:

(1) Actions for readjustment of partnership items:

(A) the Commissioner of Internal Revenue (Commissioner) has issued a notice of final partnership administrative adjustment (see Code

Section 6226(a) and (b));

(B) a complaint for readjustment of partnership items is filed with the court by the tax matters partner within the period specified in Code Section 6226(a), or by a notice partner (or 5 percent group) subject to the conditions and within the period specified in Code Section 6226(b); and

(C) the partner or partners filing the complaint make a deposit as required by Code Section 6226(e).

(2) *Actions for adjustment of partnership items*:

(A) the Commissioner has not allowed all or some of the adjustments requested in an administrative adjustment request (see Code Section 6228(a)); and

(B) a complaint for adjustment of partnership items is filed with the court by the tax matters partner subject to the conditions and within the period specified in Code Section 6228(a)(2) and (3).

(d) Form and Style of Papers: All papers filed in a partnership action shall be prepared in the form and style set forth in RCFC 5.2 and l0(a), except that the caption shall state the name of the partnership and the full name and surname of any partner filing the complaint and shall indicate whether such partner is the tax matters partner, as for example, "ABC Partnership, Mary Doe, Tax Matters Partner, Complainant" or "ABC Partnership, Richard Roe, A Partner Other Than the Tax Matters Partner, Complainant."

Rule 2. Commencement of Partnership Action

(a) Commencement of Action. A partnership action shall be commenced by filing a complaint with the court. See RCFC 3, relating to commencement of case; RCFC 5.2 and 10, relating to form of pleadings; and RCFC 5.2(d), relating to number of copies to be filed.

(b) Contents of Complaint. Each complaint shall be titled either "Complaint for Readjustment of Partnership Items under Code Section 6226" or "Complaint for Adjustment of Partnership Items under Code Section 6228." Each such complaint shall contain the allegations described in subdivision (c) of this Rule and the allegations described in subdivision (d) or (e) of this Rule.

(c) All Complaints: All complaints in partnership actions shall contain the following:

(1) the name and address of the complainant;

(2) the name, employer identification number, and principal place of business of the partnership and of each partner filing the complaint at the time the complaint is filed;

(3) the city and state of the office of the Internal Revenue Service with which the partnership's return for the period in controversy was filed.

A claim for reasonable litigation costs shall not be included in the complaint in a partnership action. For the requirements as to claims for reasonable litigation costs, see RCFC 54(d)(1).

(d) Complaint for Readjustment of Partnership Items: In addition to including the information specified in subdivision (c) of this Rule, a complaint for readjustment of partnership items shall also contain the following information.

(1) *All complaints*. All complaints for readjustment of partnership items shall contain:

(A) the date of the notice of final partnership administrative adjustment and the city and state of the office of the Internal Revenue Service that issued the notice;

(B) the year or years or other periods for which the notice of final partnership administrative adjustment was issued;

(C) clear and concise statements of each and every error that the complainant alleges to have been committed by the Commissioner in the notice of final partnership administrative adjustment. The assignments of error shall include issues, if any, in respect to which the burden of proof is on the United States. Any issues not raised in the assignments of error, or in the assignments of error in any amendment to the complaint, shall be deemed to be conceded. Each assignment of error shall be set forth in a separately lettered subdivision;

(D) clear and concise lettered statements of the facts on which the complainant bases the assignments of error, except with respect to those assignments of error, if any, as to which the burden of proof is on the United States;

(E) the amount of the deposit made by each partner filing the complaint;

(F) the date and place of the making of each deposit;

(G) a prayer setting forth relief sought by the complainant;

(H) the signature, mailing address, and telephone number of each complainant or of each complainant's counsel. See RCFC 83.1 regarding attorneys of record; and

(I) a copy of the notice of final partnership administrative adjustment, which shall be appended to the complaint, and with which there shall be included so much of any statement accompanying the notice as is material to the issues raised by the assignments of error. If the notice of final partnership administrative adjustment or any accompanying statement incorporates by reference any prior notices, or other material furnished by the Internal Revenue Service, such parts thereof as are material to the assignments of error likewise shall be appended to the complaint.

(2) *Complaints by Tax Matters Partner*: In addition to including the information specified in paragraph (1) of this subdivision, a complaint filed by the tax matters partner during the time period specified in Code Section 6226(b) shall also contain a separate

numbered paragraph stating that the pleader is the tax matters partner.

(3) *Complaints by Other Partners*: In addition to including the information specified in paragraph (1) of this subdivision, a complaint filed by a notice partner or by a 5-percent group during the time period specified in Code Section 6226(b) shall also contain:

(A) a separate numbered paragraph stating that the pleader is a notice partner or a representative of a 5-percent group (see Code Section 6226(b)(1));

(B) a separate numbered paragraph setting forth facts establishing that the pleader satisfies the requirements of Code Section 6226(d);

(C) a separate numbered paragraph stating the name and current address of the tax matters partner; and

(D) a separate numbered paragraph stating that the tax matters partner has not filed a complaint for readjustment of partnership items within the period specified in Code Section 6226(a).

Under subdivision (d)(1)(H) of this Rule, the representative of a five-percent group may sign a complaint on behalf of all members of the group. In such circumstances, the complaint shall contain a separate-numbered paragraph stating that the representative has been duly authorized to sign on behalf of all members of the group.

(e) Complaint for Adjustment of Partnership Items: In addition to including the information specified in subdivision (c) of this Rule, a complaint for adjustment of partnership items shall also contain:

(1) a statement that the complainant is the tax matters partner;

(2) the date that the administrative adjustment request was filed and other proper allegations showing jurisdiction in the court in accordance with the requirements of Code Section 6228(a)(1) and (2);

(3) the year or years or other periods to which the administrative adjustment relates;

(4) the city and state of the office of the Internal Revenue Service with which the administrative adjustment request was filed;

(5) a clear and concise statement describing each partnership item on the partnership return that is sought to be changed, and the basis for each such requested change. Each such statement shall be set forth in a separately lettered paragraph;

(6) clear and concise lettered statements of the facts on which the complainant relies in support of such requested changes in treatment of partnership items;

(7) a prayer setting forth relief sought by the complainant;

(8) the signature, mailing address, and telephone number of the complainant or the complainant's counsel (see RCFC 83.1 regarding attorneys of record); and

(9) a copy of the administrative adjustment request appended to the complaint.

(f) Notice of Filing:

(1) *Complaints by the Tax Matters Partner*: Within 5 days after receiving the Notice of Assignment from the court, the tax matters partner shall serve notice of the filing of the complaint on each partner in the partnership as required by Code Section 6223(g). Said notice shall include the docket number assigned to the case by the court and the date of the Notice of Assignment..

(2) *Complaints by Other Partners*: Within 5 days after receiving the Notice of Assignment from the court, the complainant shall serve a copy of the complaint on the tax matters partner, and at the same time notify the tax matters partner of the docket number assigned to the case by the court and of the date of the Notice of Assignment. Within 5 days after receiving a copy of the complaint and of the aforementioned notification from the complainant, the tax matters partner shall serve notice of the filing of the complaint on each partner in the partnership as required by Code Section 6223(g). Said notice shall include the docket number assigned to the case by the court and the date of the Notice of Assignment.

(g) Copy of Complaint To Be Provided to All Partners. Upon request by any partner in the partnership as referred to in Code Section 6231(a) (2) (A), the tax matters partner shall, within 10 days of receipt of such request, make available to such partner a copy of any complaint filed by the tax matters partner or by any other partner.

(h) Joinder of Parties.

(1) Permissive Joinder. A separate complaint shall be filed with respect to each notice of final partnership administrative adjustment or each administrative adjustment request issued to separate partnerships. However, a single complaint for readjustment of partnership items or complaint for adjustment of partnership items may be filed seeking readjustments or adjustments of partnership items with respect to more than one final partnership administrative adjustment or administrative adjustment request if the notices or requests pertain to the same partnership. A complaint may include a request that the proceeding be assigned to the judge to whom one or more pending cases (whether relating to the same partnership or to another partnership) are assigned, if the other case or cases present common or related issues of law or fact. For the procedures to be followed by partners who wish to intervene or participate in a partnership proceeding, see Rule 4 below.

(2) Severance or Other Orders. With respect to a case based upon multiple notices of final partnership administrative adjustment or administrative adjustment requests, the court may order a severance and a separate case to be maintained with respect to one or more of such notices or requests whenever it appears to the court that proceeding separately is in furtherance of convenience, or will avoid prejudice, or when separate trials will be conducive to expedition or economy.

Rule 3. Other Pleadings

(a) Answer: The United States shall

file an answer or shall move with respect to the complaint within the periods specified in and in accordance with the provisions of RCFC 12.

(b) Reply: For provisions relating to the filing of a reply, see RCFC 7(a).

Rule 4. Intervention and Participation

(a) Tax Matters Partner: The tax matters partner may intervene in an action for readjustment of partnership items brought by another partner or partners by filing a notice of election to intervene with the court. Such notice shall state that the intervenor is the tax matters partner and shall be filed within 45 days from the date of the Notice of Assignment. See Code Section 6226(b) (2) and paragraph 2(d)(3) of this Appendix.

(b) Other Partners: Any other partner who satisfies the requirements of Code Section 6226(d) or 6228(a) (4) (B) may participate in the action by filing a notice of election to participate with the court. Such notice shall set forth facts establishing that such partner satisfies the requirements of Code Section 6226(d) in the case of an action for readjustment of partnership items, or Code Section 6228(a)(4)(B) in the case of an action for adjustment of partnership items, and shall be filed with 45 days from the date of the Notice of Assignment. A single notice may be filed by two or more partners; however, each such partner must satisfy all requirements of this paragraph in order for the notice to be treated as filed by or for that partner.

(c) Enlargement of Time: The court may grant leave to file a notice of election to intervene or a notice of election to participate out of time upon a showing of sufficient cause.

(d) Pleading: No assignment of error, allegation of fact, or other statement in the nature of a pleading shall be included in the notice of election to intervene or notice of election to participate.

(e) Amendments to the Complaint: A party other than the complainant who is authorized to raise issues not raised in the complaint may do so by filing an amendment to the complaint. Such an amendment may be filed, without leave of court, at any time before service of the response to the complaint by the United States. Otherwise, such an amendment may be filed only by leave of court. See RCFC 15(a) for time for responding to amendments to the complaint.

Rule 5. Service of Papers

(a) Complaints: All complaints shall be served by the clerk on the United States.

(b) Papers Issued by Court: All papers issued by the court shall be served by the clerk on the United States, the tax matters partner (whether or not the tax matters partner is a participating partner), and all other participating partners.

(c) All Other Papers: All other papers required to be served (see RCFC 5) shall be served by the parties filing such papers. Whenever a paper (other than a complaint) is required to be filed with the court, the original paper shall be filed with the court with certificates by the filing party or the filing party's counsel that service of the paper has been made on each of the parties set forth in subdivision (b) of this Rule or on such other parties' counsel.

Rule 6. Parties

(a) In General: For purposes of this Appendix, the United States, the partner who filed the complaint, the tax matters partner, and each person who satisfies the requirements of Code Section 6226(c) and (d) or 6228(a)(4) shall be treated as parties to the action.

(b) Participating Partners: Participating partners are the partner who filed the complaint and such other partners who have filed either a notice of election to intervene or a notice of election to participate in accordance with the provisions of RCFC 4. See Code Sections 6226(c) and 6228(a)(4)(A). For purposes of the court's procedural rules other than those set forth in this Appendix, only participating partners, as defined in this subdivision, and the United States shall be considered to be parties.

Rule 7. Settlement Agreements

(a) Consent By the Tax Matters Partner to Entry of Decision: A stipulation consenting to entry of decision executed by the tax matters partner and filed with the court shall bind all parties. The signature of the tax matters partner constitutes a certificate by the tax matters partner that no party objects to entry of the decision. See Rule 10 below.

(b) Settlement Agreements Entered Into By All Participating Partners or No Objection by Participating Partners:

(1) After expiration of the time within which to file a notice of election to intervene or to participate under Rule 4(a) or (b), the United States shall move for entry of decision, and shall submit a proposed form of decision with such motion, if:

(A) all of the participating partners have entered into a settlement agreement with the defendant, or all of such partners do not object to the granting of the defendant's motion for entry of decision, and

(B) the tax matters partner (if a participating partner) agrees to the proposed decision in the case but does not certify that no party objects to the granting of the defendant's motion for entry of decision.

(2) Within 3 days from the date on which the defendant's motion for entry of decision is filed the court, the defendant shall serve on the tax matters partner a certificate showing the date on which the defendant's motion was filed with the court.

(3) Within 3 days after receiving the defendant's certificate, the tax matters partner shall serve on all other parties to the action, other than the participating partners, a copy of the defendant's motion for entry of decision, a copy of the proposed decision, a copy of the defendant's certificate showing the date on which the defendant's motion was filed with the court, and a copy of this paragraph of Rule 7.

(4) If any party objects to the granting of the defendant's motion for entry of decision, then that party shall, within 60 days from the date on which the defendant's motion was filed with the court, file a motion for leave to file a notice of election to intervene or to participate, accompanied by a separate notice of election to intervene or to participate, as the case may be. If no such motion is filed with the court within such period, or if the court should deny such motion, then the court may enter the

proposed decision as its decision in the partnership action. See Code Sections 6226(f) and 6228(a)(5).

(c) Other Settlement Agreements: If a settlement agreement is not within the scope of subdivision (b) of this Rule, then:

(1) in the case of a participating partner, the defendant shall promptly file with the court a notice of settlement agreement that identifies the participating partner or partners who have entered into the settlement agreement; and

(2) in the case of any partner who enters into a settlement agreement, the defendant shall, within 7 days after the settlement agreement is executed by both the partner and the defendant, serve on the tax matters partner a statement which sets forth:

(A) the identity of the party or parties to the settlement agreement and the date of the agreement;

(B) the year or years to which the settlement agreement relates; and

(C) the terms of settlement as to each partnership item and the allocation of such items among the partners.

Within 7 days after receiving the statement required by this subdivision, the tax matters partner shall serve a copy of the statement on all parties to the action.

Rule 8. Action For Adjustment of Partnership Items Treated As Action For Readjustment of Partnership Items

(a) Amendment of complaint: If, after the filing of a complaint for adjustment of partnership items (see Code Section 6228(a)) and Rule 2(a) above, but before hearing of such complaint, the Commissioner mails to the tax matters partner a notice of final partnership administrative adjustment for the partnership taxable year to which the complaint relates, such complaint shall be treated as a complaint in an action for readjustment of the partnership items to which such notice relates. The complainant, within 90 days after the date on which the notice of final partnership administrative adjustment is mailed to the tax matters partner, shall file an amendment to the complaint, setting forth every error which the complainant alleges to have been committed by the Commissioner in the notice of final partnership administrative adjustment, and the facts on which the complainant bases the assignments of error. A copy of the notice of final partnership administrative adjustment shall be appended to the amendment to the complaint. On or before the day the amendment to the complaint is delivered to the court, or, if the amendment is mailed to the court, on or before the day of mailing, the tax matters partner shall serve notice of the filing of the amendment to complaint on each partner in the partnership as required by Code Section 6223(g).

(b) Participation: Any partner who has filed a timely notice of election to participate in the action for adjustment of partnership items shall be deemed to have elected to participate in the action for readjustment of partnership items and need not file another notice of election to do so. Any other partner may participate in the action by filing a notice of election to participate with 45 days from the date of filing of the amendment to complaint. See Rule 4 above.

Rule 9. Appointment and Removal of the Tax Matters Partner

(a) Appointment of Tax Matters Partner: If, at the time of commencement of a partnership action by a partner other than the tax matters partner, the tax matters partner is not identified in the complaint, the court will take such action as may be necessary to establish the identity of the tax matters partner or to effect the appointment of a tax matters partner.

(b) Removal of Tax Matters Partner: After notice and opportunity to be heard, the court may for cause remove a partner as the tax matters partner. If the tax matters partner is removed by the court, or if a partner's status as the tax matters partner is terminated for reason other than removal by the court, the court may appoint another partner as the tax matters partner if the partnership fails to designate a successor tax matters partner within such period as the court may direct.

10. Decisions

A decision entered by the court in a partnership action shall be binding on all parties. For the definition of parties, see Rule 6 above.

Rules Committee Note

Section 6226 of the Internal Revenue Code grants this court jurisdiction, along with the United States Tax Court and the United States district courts, to consider petitions for readjustment of partnership items as set forth in a final partnership administrative adjustment. Appendix F provides the procedural rules for such cases. In the interests of uniformity, the rules contained in Appendix F parallel the rules applicable to these cases in the United States Tax Court.

APPENDIX G
PROCEDURE IN INDIAN CLAIMS COMMISSION CASES

Attorneys claiming fees and expenses in cases transferred to the former United States Court of Claims from the Indian Claims Commission pursuant to 25 U.S.C. §70v (1976) (amended 1977), and thereafter assigned to this court pursuant to P.L. No. 97-164, §149, 96 Stat. 25, 46, wherein money judgments are entered shall file the appropriate motion or motions within 30 days of the entry of the money judgment. Defendant shall file its response within 28 days and a reply may be filed within 14 days. Absent the filing of such a timely motion, a docket entry will be made closing the case. Said motions shall state that copies thereof have been provided to the tribal counsel, other head officer of the plaintiff, if there be one, or if there is neither of the foregoing, then to the agency superintendent under whose jurisdiction the plaintiff may be.

Rules Committee Note

Appendix G formerly appeared in these rules as General Order No. 4 issued December 29, 1982. Although Appendix G remains the same in substance as General Order No. 4, some of the earlier language was deleted as unnecessary.

APPENDIX H
PROCEDURE FOR ALTERNATIVE DISPUTE RESOLUTION

1. General. The United States Court of Federal Claims recognizes a variety of voluntary, non-binding alternative dispute resolution (ADR) tools for use in appropriate cases. ADR techniques include but are not limited to mediation, mini-trials, early neutral evaluation, and non-binding arbitration. These processes may be conducted either by a settlement judge or a third party neutral.

2. Terms.

(a) Settlement Judge: A judge of the court, other than the presiding judge. Appointment of a settlement judge permits the parties to engage in a frank, in-depth discussion of the strengths and weaknesses of each party's case before a judicial officer without the inhibitions that might exist before the presiding judge. A settlement judge may act both as a mediator and as a neutral evaluator. This process should be employed early enough in the litigation to avoid needless expense and delay. Use of a settlement judge permits the parties to gain the benefit of a judicial perspective without jeopardizing their ability to gain a resolution of their case by the presiding judge should settlement efforts fail.

(b) Presiding Judge. The judge regularly assigned to the case.

(c) Third-party Neutrals. In consultation with the bar, the court will maintain a list of qualified individuals who have indicated their willingness and demonstrated their ability to serve as neutral evaluators and mediators. Parties may select neutrals who are not on the court's list.

(d) Mediation. A flexible and voluntary dispute-resolution procedure in which a settlement judge or a third-party neutral, the mediator, facilitates negotiations to reach a mutually agreeable resolution. The mediation process involves one or more sessions in which counsel, litigants, and the mediator participate, and may continue over a period of time. The mediator can help the parties improve communication, clarify interests, and probe the strengths and weaknesses of their own and their opponents' positions. The mediator can also identify areas of agreement and help generate options that lead to a settlement.

(e) Early neutral evaluation. Using the services of a third-party neutral or settlement judge knowledgeable in the subject-matter of the litigation to assess the strengths and weaknesses of the parties' positions. In this manner, the parties may gain a more realistic view of their prospects for success, thus narrowing the issues and facilitating settlement.

(f) Mini-trials. A flexible, abbreviated procedure in which the parties present their case, or a portion of it, to a third-party neutral or settlement judge.

3. Procedures. RCFC 16 and Appendix A paragraphs 3 and 4(i) set out the parties' obligations with respect to consideration of ADR. At any point in the litigation, however, the parties can notify the court of their desire to pursue ADR. There is no single format for ADR. Any procedures agreed to by the parties and adopted by the settlement judge or third

party neutral may be used. Certain basic ground rules will be observed, however, as follows:

(a) ADR is voluntary. A party's good faith determination that ADR is not appropriate in a particular case should be respected by other parties and the court.

(b) When the parties have indicated their agreement to ADR to the presiding judge, the presiding judge, if in agreement, will forward the request to the Clerk of the Court for assignment to a settlement judge or third-party neutral as selected by the parties.

(c) In the event the parties agree to use ADR, the settlement judge or third party neutral and the parties will develop procedures appropriate to that case. The settlement judge or third-party neutral and the parties will develop a written statement, to be executed by the settlement judge or neutral, outlining the terms of the settlement process, including an indication of assent to confidentiality by all parties. Neither this statement nor any other materials developed for use solely within the ADR process will be filed with the court.

(d) There will be no transcript of any ADR proceeding. All ADR proceedings, including documents generated solely for the proceedings and communications within the scope of the proceedings, are confidential and will not be provided to a judge of the court who is not the settlement judge in the dispute. Information which is otherwise discoverable or admissible does not lose that characteristic merely because of its use in the ADR proceedings.

(e) Participation in ADR constitutes agreement by the parties not to subpoena or seek in any way the testimony of the settlement judge in any subsequent proceeding.

(~~f~~5) During the ADR process, the matter will remain on the docket of the presiding judge. At the conclusion of the ADR process, the settlement judge or the third party neutral will notify the presiding judge and the clerk of the court only of the outcome, i.e., whether the matter has been settled.

Rules Committee Note

Appendix H "Procedure For Alternate Dispute Resolution," revises and replaces the alternate dispute resolution procedures first adopted by the court in General Order No. 13, dated April 15, 1987 and later amended through Amended General Order No. 13, dated November 8, 1996. The adoption of Appendix H as a permanent part of the court's rules reflects the court's recognition of the increasing usefulness of alternative dispute resolution procedures in the resolution of claims against the United States.

APPENDIX OF FORMS

FORM 1
ADMISSION INSTRUCTIONS

The accompanying form shall be used in applying for admission to the bar of this court pursuant to RCFC 83.1. This form should be duly executed and returned to the Clerk of the Court accompanied by the following items:

(1) a current **(not more than three months old)** *original* certificate from the Clerk of the Supreme Court of the United States, or, the clerk of the highest court of your state, territory, possession or the District of Columbia, or the United States Court of Appeals for the Federal Circuit attesting to your admission to the bar of that court and your good standing therein **(Note: a letter from the bar of your state is <u>NOT</u> acceptable)**;

(2) two letters or signed statements from attorneys stating the following:

a. they are members of the bar of this court, or the bar of the Supreme Court of the United States;
b. they are not related to you;
c. you are personally known to them;
d. you possess all the qualifications required for admission here;
e. they have examined your application; and
f. they affirm that your personal and professional character and standing are good;

(3) a check, made payable to "Clerk, U.S. Court of Federal Claims," in the amount of $30.00 to cover the required fee.

Applications (including letters and fee) are to be complete when submitted; ***incomplete applications will be returned.***

Admission under this procedure does not require your appearance in person. A certificate will be forwarded to you upon approval of your application.

_____
Margaret M. Earnest, Clerk
U.S. Court of Federal Claims
717 Madison Pl., N.W.
Washington, DC 20005-1011
(202) 219-9561

IN THE MATTER OF THE PETITION OF

_____

(Please print/type your full name on the above line)

FOR ADMISSION TO PRACTICE IN
THE UNITED STATES COURT OF FEDERAL CLAIMS

***TO THE CHIEF JUDGE AND JUDGES OF THE UNITED STATES COURT OF FEDERAL CLAIMS*:**

The petitioner,_____, respectfully shows this court:

That he/she is a resident of the city of_____, the state of_____, and that petitioner on the date of_____was duly licensed and admitted to practice as an attorney at law in the _____(highest state court), and is now a member of the bar thereof and in good standing.

WHEREFORE, said petitioner herein prays that he/she may be admitted to practice in the United States Court of Federal Claims in accordance with the laws and rules applicable thereto.

I, _____ DO SOLEMNLY SWEAR (OR AFFIRM) THAT I WILL SUPPORT THE CONSTITUTION OF THE UNITED STATES AND THAT I WILL DEMEAN MYSELF IN AN UPRIGHT MANNER AS AN ATTORNEY OF THE UNITED STATES COURT OF FEDERAL CLAIMS.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date) _____. (28 U.S.C. §1746)

_____
Signature

Address (including firm if applicable):

_____
_____
_____
_____

Phone: _____ Fax: _____
E-mail address: _____

FORM 2
COVER SHEET

In The United States Court of Federal Claims

Cover Sheet

Plaintiff(s) or Petitioner(s)

_____

_____

If this is a multi-plaintiff case, pursuant to RCFC 20(a), please attach an alphabetized, numbered list of all plaintiffs.

Name of the attorney of record (See RCFC 83.1(c)): _____

Firm Name: _____

Post Office Box: _____

Street Address: _____

City-State-Zip: _____

Telephone & Facsimile Numbers: _____

Is the attorney of record admitted to the Court of Federal Claims Bar? _____

If **NO**, please call (202) 219-9630 for admission papers and instructions.

Nature of Suit Code: 9 9 9

Select only one (three digit) nature of suit code from attached sheet and if numbers 118, 134, 226, 312, 356, or 528 are used, please explain.

Agency Identification Code: 9 9 9

See attached sheet for three digit codes.

Amount Claimed: $_____

Use estimate if specific amount is not pleaded..

Vaccination Date (vaccine cases only) _____

If this is case directly related to any pending or previous case, you are required to file a separate notice of directly related case(s). See RCFC 40.2.

Natures of Suit Codes for General Jurisdiction Cases

100 Contract - Construction -(CDA)
102 Contract - Fail to Award - (CDA)
104 Contract - Lease - (CDA)
106 Contract - Maintenance - (CDA)
108 Contract - Renovation - (CDA)
110 Contract - Repair - (CDA)
112 Contract - Sale - (CDA)
114 Contract - Service - (CDA)
116 Contract - Supply - (CDA)
118 Contract - Other - (CDA)

120 Contract - Bailment
122 Contract - Bid Preparation Costs
124 Contract - Medicare Act
126 Contract - Realty Sale
128 Contract - Subsidy
130 Contract - Surety
132 Contract - Timber Sale
134 Contract - Other

136 Contract - Other - Wunderlich

138 Contract - Injunctions(Pre Award)
140 Contract - Injunction (Post Award)

200 Tax - Allowance of Interest
202 Tax - Declaratory Judgment - 28:1507
204 Tax - Estate
206 Tax - Excise
208 Tax - Gift
210 Tax - Income, Corporate
212 Tax - Income, Individual
214 Tax - Informer's Fees
216 Tax - Preparer's Penalty
218 Tax - Railroad Retirement/Unemployment Tax Act
220 Tax - TEFRA Partnership - 28:1508
222 Tax - Windfall Profit Overpayment - Interest
224 Tax - 100% Penalty - 26:6672 - Withholding
226 Tax - Other

300 Civilian Pay - Back Pay
302 Civilian Pay - COLA
303 Civilian Pay - Disability Annuity
304 Civilian Pay - FLSA
306 Civilian Pay - Overtime Compensation
308 Civilian Pay - Relocation Expenses
310 Civilian Pay - Suggestion Award
312 Civilian Pay - Other

340 Military Pay - Back Pay
342 Military Pay - CHAMPUS
344 Military Pay - Correct records
346 Military Pay - Correct/Reinstate
348 Military Pay - Reinstatement
350 Military Pay - Relocation Expenses
352 Military Pay - Retirement
354 Military Pay - SBP
356 Military Pay - Other

500 Common Carrier - transportation
502 Copyright
504 Native American
506 Oil Spill Clean Up
508 Patent
510 Taking - Personalty
511 Taking - FIRREA
512 Taking - Realty
514 Taking - Other
516 Miscellaneous - Damages
518 Miscellaneous - Lease
520 Miscellaneous - Mineral Leasing Act
522 Miscellaneous - Oyster Growers Damages
524 Miscellaneous - Safety Off. Ben. Act
526 Miscellaneous - Royalty/Penalty Gas Production
528 Miscellaneous - Other
529 TRIS
532 CLA Review - Japanese Internment
534 Indian Claims Commission
535 Informer's Reward

Natures of Suit Codes for Vaccine Cases

456 Injury - DPT & Polio
457 Injury - D/T
458 Injury - DTP/DPT
459 Injury - Measles
460 Injury - M/M/R
461 Injury - Measles/Rubella
462 Injury - Mumps
463 Injury - Pertussis
464 Injury - Polio - inactive
465 Injury - Polio - other
466 Injury - Rubella
467 Injury - Tetanus & Diphtheria
468 Injury - Tetanus & Tox.
469 Injury - Other
484 Injury - Hepatitis B
485 Injury - Hemophilus influenzae
486 Injury - Varicella
490 Injury - Rotavirus
470 Death - DPT & Polio
471 Death - D/T
472 Death - DTP/DPT
473 Death - Measles
474 Death - M/M/R
475 Death - Measles/Rubella
476 Death - Mumps
477 Death - Pertussis
478 Death - Polio - inactive
479 Death - Polio - other
480 Death - Rubella
481 Death - Tetanus & Diptheria
482 Death - Tetanus & Tox.
483 Death - Other
487 Death - Hepatitus B
488 Death - Hemophilus influenzae
489 Death - Varicella
491 Death - Rotavirus

October 5, 2001

FORM 3A
REPORTER FORMS

In The United States Court of Federal Claims

No. _____

John Doe, Plaintiff
v.
The United States, Defendant

_____ , 20____

Testimony for Plaintiff (or Defendant)

The parties met, pursuant to notice of the court, at the time above stated, in

Present: counsel for plaintiff; and counsel for defendant.

Testimony on behalf of the plaintiff (or defendant) was taken as follows:

Richard Roe, a witness produced on behalf of the plaintiff (or defendant), having first been duly sworn by said court, was examined, and in answer to interrogatories testified as follows:

Q. State your name, etc.

A. _____.

Q. Have you, etc.?

A. _____.

FORM 3B
CERTIFICATE OF REPORTER

Certificate of Reporter

I, _____, reporter, hereby certify that at the time and place, aforesaid, I did cause to be taken down and transcribed the proceedings in this case, including the questions propounded to and the answers given by said witnesses so called by plaintiff (or defendant), and that the foregoing record is a correct transcript of the proceedings and testimony so had therein.

In witness whereof I have hereunto set my hand this _____ day of _____,20____.

Signature:_____

Address:_____

FORM 4
BILL OF COSTS

In The United States Court of Federal Claims

BILL OF COSTS

_____ No._____

vs.

THE UNITED STATES

Judgment with costs having been entered in the above-entitled action on the__ day of ____, 200_, against _____, the clerk is requested to tax the following as costs:

Fees of the clerk ..... $_____

Fees of the reporter for all or any part of the trial or hearing transcript necessarily obtained for use in the case..... _____

Fees for witnesses; for statutory fees, see 28 U.S.C. §1821 (attach itemized listing)..... _____

Costs for certification or duplication of papers necessarily obtained for use in case, provide number of copies, total pages and cost per page *.... _____

Costs incident to taking of depositions (if not of record, then attach statement as to need)..... _____

Costs pursuant to FRAP39(e)..... _____

Other costs (itemize on attachment)..... _____

Total ..... $_____

*Allowable duplication costs are restricted to briefs on dispositive matters for a total of 5 copies; additional copies allowable where third parties are present.

CERTIFICATION

State/District of _____.
County of _____.

I certify under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed and that a copy hereof was this day mailed to _____ with postage fully prepaid thereon. Executed on (Date). (28 U.S.C. §1746)

_____
(Signature of Attorney of Record)

_____

_____
(Address)

FORM 5
EAJA FORM

APPLICATION
FOR FEES AND OTHER EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT
Title 28 U.S.C. §2412(d), Title II of Public Law 96-481, 94 STAT 2325

1. COURT United States Court of Federal Claims	2. DATE FILED	3. DOCKET NO.
4. NAME OF APPLICANT (One per form)	5. GOVERNMENT AGENCY INVOLVED IN CLAIM (Use agency code on reverse side)	
6. NATURE OF APPLICATION A. ☐ Original application under 28 U.S.C. §2412(d)(1)(A) after judgment in civil action against U.S. B. ☐ Appeal of fees and expenses awarded by Lower Court (If Item 6B is checked go to Item 7.) C. ☐ Original application under 28 U.S.C. §2412(d)(3) after review of agency decision. D. ☐ Petition for leave to appeal an administrative agency fee determination under 5 U.S.C. §504(c)(2).	7. APPEAL FROM: ☐ DISTRICT COURT ☐BANKRUPTCY COURT ☐ OTHER:_____ **7A. DATE FILED IN LOWER COURT**	**7B. DOCKET NO.**

8. ADMINISTRATIVE AGENCY DOCKET NO. 9. DATE FILED IN ADMINISTRATIVE AGENCY

10. SHOWING OF "PREVAILING PARTY" STATUS (28 U.S.C. §2412(d)(1)(B)):

Is agency order, court order, or other relevant document attached? ☐ YES ☐ NO

11. SHOWING OF ELIGIBILITY (28 U.S.C. §2412(d)(2)(B)):

Is net worth information attached? ☐ YES ☐ NO

12. ENTER ALLEGATION THAT GOVERNMENT POSITION WAS NOT SUBSTANTIALLY JUSTIFIED (28 U.S.C. §2412(d)(1)(B)):

13. FOR EACH AMOUNT CLAIMED, PLEASE ATTACH ITEMIZATION INDICATING SERVICE PROVIDED, DATE, HOURS, AND RATE (28 U.S.C. §2412(d)(2)(A)):

AMOUNT CLAIMED

A. ATTORNEY FEES..... $_____
B. STUDY..... $_____
C. ANALYSIS..... $_____
D. ENGINEERING REPORT..... $_____
E. TEST..... $_____
F. PROJECT..... $_____
G. EXPERT WITNESS FEES..... $_____
H. OTHER FEES AND EXPENSES - SPECIFY
(1)_____ $_____
(2)_____ $_____
(3)_____ $_____

I. TOTAL FEES AND EXPENSES..... $_____

14. SIGNATURE	15. DATE

NOTE: THIS FORM SHOULD ACCOMPANY YOUR CLAIM WHEN FILED WITH THE CLERK OF COURT

EAJA ADMINISTRATIVE AGENCY CODES

(Use the following abbreviations for the U.S. Government Agency involved in claim (Item 5))

BENEFITS REVIEW BOARD . . . . . (BRB)
CIVIL AERONAUTICS BOARD . . . . . (CAB)
CIVIL SERVICE COMMISSION (U.S.) . . . . . (CSC)
CONSUMER PRODUCTS SAFETY COMMISSION . . . . . (CPSC)
COPYRIGHT ROYALTY TRIBUNAL . . . . . (CRT)
DEPARTMENT OF AGRICULTURE . . . . . (AGRI)
DEPARTMENT OF COMMERCE . . . . . (COMM)
DEPARTMENT OF DEFENSE . . . . . (DOD)
DEPARTMENT OF EDUCATION . . . . . (EDUC)
DEPARTMENT OF ENERGY . . . . . (DOE)
DEPARTMENT OF HEALTH, EDUCATION & WELFARE . . . . . (HEW)
DEPARTMENT OF HEALTH & HUMAN SERVICES . . . . . (HHS)
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT . . . . . (HUD)
DEPARTMENT OF INTERIOR . . . . . (DOI)
DEPARTMENT OF JUSTICE . . . . . (DOJ)
DEPARTMENT OF LABOR (Except OSHA) . . . . . (LABR)
DEPARTMENT OF TRANSPORTATION SAFETY BOARD . . . . . (TRAN)
DEPARTMENT OF THE TREASURY (Except IRS) . . . . . (TREA)
DRUG ENFORCEMENT AGENCY . . . . . (DEA)
ENVIRONMENTAL PROTECTION AGENCY . . . . . (EPA)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION . . . . . (EEOC)
FEDERAL AVIATION AGENCY . . . . . (FAA)
FEDERAL COAL MINE SAFETY BOARD . . . . . (FCMS)
FEDERAL COMMUNICATIONS COMMISSION . . . . . (FCC)
FEDERAL DEPOSIT INSURANCE CORPORATION . . . . . (FDIC)
FEDERAL ELECTION COMMISSION . . . . . (FEC)
FEDERAL ENERGY AGENCY . . . . . (FEA)
FEDERAL ENERGY REGULATORY COMMISSION . . . . . (FERC)
FEDERAL HOME LOAN BANK BOARD . . . . . (FHLB)
FEDERAL LABOR RELATIONS AUTHORITY . . . . . (FLRA)
FEDERAL MARITIME BOARD . . . . . (FMBD)
FEDERAL MARITIME COMMISSION . . . . . (FMC)
FEDERAL MINE SAFETY & HEALTH ADMINISTRATION . . . . . (MSHA)
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION . . . . . (MSHR)
FEDERAL RESERVE SYSTEM . . . . . (FRS)
FEDERAL TRADE COMMISSION . . . . . (FTC)
FOOD & DRUG ADMINISTRATION . . . . . (FDA)
GENERAL SERVICES ADMINISTRATION . . . . . (GSA)
IMMIGRATION & NATURALIZATION SERVICE . . . . . (INS)
INTERNAL REVENUE SERVICE (Except TAX COURT) . . . . . (IRS)
INTERSTATE COMMERCE COMMISSION . . . . . (ICC)
MERIT SYSTEMS PROTECTION BOARD . . . . . (MSPB)
NATIONAL LABOR RELATIONS BOARD . . . . . (NLRB)
NUCLEAR REGULATORY COMMISSION . . . . . (NRC)
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION . . . . . (OSHA)
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION . . . . . (OSHC)
OFFICE OF MANAGEMENT & BUDGET . . . . . (OMB)
OFFICE OF PERSONNEL MANAGEMENT . . . . . (OPM)
OFFICE OF WORKERS COMPENSATION PROGRAM . . . . . (OWCP)
PATENT OFFICE . . . . . (PATO)
POSTAL RATE COMMISSION (U.S.) . . . . . (PRC)
POSTAL SERVICE (U.S.) . . . . . (USPS)
RR RETIREMENT BOARD . . . . . (RRRB)
SECURITIES & EXCHANGE COMMISSION . . . . . (SEC)
SMALL BUSINESS ADMINISTRATION . . . . . (SBA)
TAX COURT, INTERNAL REVENUE SERVICE . . . . . (TXC)

FORM 6
SUBPOENA

United States Court of Federal Claims

_____
_____
_____

vs. ***No.*** _____

THE UNITED STATES **SUBPOENA**

To:_____
_____
_____

1. YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the above case.
   Place of Testimony:_____
   Date and Time:_____
2. YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.
   *Place of Deposition:*_____
   *Date and Time:*_____
3. YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):
   *Place:*_____
   *Date and Time:*_____
4. YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.
   *Premises:*_____
   *Date and Time:*_____

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

_____
ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE

_____
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

NOTE - If the place of travel is more than 100 miles (by the shortest usual means of travel) from the place where the subpoena is served, or if the place of the deposition is more than 100 miles from the place where the deponent resides, is employed or transacts business in person, the person served may regard the command as optional unless there is attached to the subpoena an order of the court requiring his/her appearance, notwithstanding the distance of travel. In any event, response to the subpoena will entitle the person to the fees and mileage allowed by law. (28 U.S.C. §1821)

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME) MANNER OF SERVICE

9 Fees tendered for one day's attendance and mileage allowed by law. (Fees and mileage need not be tendered when the subpoena is issued on behalf of the United States or an officer or agency thereof.)

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ _____

DATE SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

RCFC 45.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim

FORM 7
CAPTION OF ALL FILINGS IN VACCINE CASES

United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

* *		
_____,	*	
Petitioner[s],	*	No. _____V
v.	*	Special Master _____
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

[TITLE OF FILING]

FORM 7A
SUBPOENA IN VACCINE CASES

United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

_____,	*	
Petitioner[s],	*	No. _____V
v.	*	Special Master _____
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

SUBPOENA

To:_____
_____
_____

1. YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the above case.
   Place of Testimony:_____
   Date and Time:_____
2. YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.
   *Place of Deposition:*_____
   *Date and Time:*_____
3. YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):
   *Place:*_____
   *Date and Time:*_____
4. YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.
   *Premises:*_____
   *Date and Time:*_____

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

_____
ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE

_____
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

NOTE - If the place of travel is more than 100 miles (by the shortest usual means of travel) from the place where the subpoena is served, or if the place of the deposition is more than 100 miles from the place where the deponent resides, is employed or transacts business in person, the person served may regard the command as optional unless there is attached to the subpoena an order of the court requiring his/her appearance, notwithstanding the distance of travel. In any event, response to the subpoena will entitle the

person to the fees and mileage allowed by law. (28 U.S.C. §1821)

PROOF OF SERVICE

DATE	PLACE
SERVED	
SERVED ON (PRINT NAME)	MANNER OF SERVICE

9 Fees tendered for one day's attendance and mileage allowed by law. (Fees and mileage need not be tendered when the subpoena is issued on behalf of the United States or an officer or agency thereof.)

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ _____

DATE SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

RCFC 45.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or.

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim

FORM 8
PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES

United States Court of Federal Claims

* * * * * * * * * * * * * * * * * * * *

_____,
Plaintiff, No. _____

v.

THE UNITED STATES, Judge _____

Defendant.

* * * * * * * * * * * * * * * * * * * *

PROTECTIVE ORDER

The court has determined that certain information that may necessarily be disclosed orally or in writing during this action may be competition sensitive (*e.g.*, source selection information), proprietary, confidential, or otherwise protectable. To address these concerns, it is ordered that protected information, provided formally or informally during the course of this action, shall be disclosed by the parties only as follows:

1. "Protected information" as used herein means:
   (a) Information, the protection of which is necessary to safeguard the competition process, including source selection information, and proprietary or confidential information contained in any document (including any pleading, motion, brief, notice, or discovery request or response) produced, filed, or served by any party to this litigation that is designated as protected by a party (See paragraph 3); and
   (b) Information, the protection of which is necessary to safeguard the competitive process, including source selection information, and any proprietary or confidential information contained in any deposition, testimony, affidavit taken or provided during this litigation that is designated as protected by a party (See paragraph 3).

2. Protected information shall be used by private parties solely for the purposes of this litigation and shall not be given, shown, made available, discussed, or otherwise communicated in any form except as provided herein.
   (a) Except as provided in paragraphs 2(d) and (e), the only persons who may be given access to protected information are (i) legal counsel for a party and (ii) independent consultants and experts assisting such counsel in connection with the litigation.
   (b) To be granted access to protected information, any such person shall first read this Protective Order and, if an attorney, execute a copy of the Application for Access

to Information Under Protective Order by Inside or Outside Counsel (Form 9) or, if a consultant or expert, execute a copy of the Application for Access to Information Under Protective Order by a Consultant or Expert (Form 10). The party seeking to have such person granted access shall then provide a copy of the executed Application to each other party. Such person shall, without further action by the court, be permitted access to protected information at the close of the second business day after the other parties have received the application, unless, in the interim, any party informs the requesting party of an objection. If the parties are unable to reach agreement regarding an objection, the party seeking access may present the matter to the court. Such person shall not be given access unless and until the court authorizes such access.

(c) Paralegal, clerical and administrative support personnel assisting any counsel who has been admitted under this Protective Order may be given access to protected information if such personnel have first been informed by such counsel of the obligations imposed by this Protective Order.

(d) Court, procuring agency and Department of Justice personnel are automatically subject to the terms of this Protective Order and are entitled to access to protected information, without further action.

3. Protected information of any kind may be provided only to the court and to individuals authorized by this Protective Order, and must be in a sealed parcel containing the legend **"PROTECTED INFORMATION ENCLOSED"** conspicuously placed on the outside of the parcel containing the information. A copy of the certificate of service identifying the document being filed should be attached to the front of each parcel.

(a) The first page of each document containing protected information is to be clearly marked as follows:

Protected Information to be Disclosed Only in Accordance with
U.S. Court of Federal Claims Protective Order

The party claiming protection must identify the specific portion of the information for which it is claiming protection.

(b) Any courtesy copies of protected information that are filed with the court for use by the judge should be marked as such.

(c) The court will maintain properly marked protected pleadings or information under seal.

4. A party that files a pleading in accordance with paragraph 3 hereof shall promptly serve on each other party a proposed redacted copy of the pleading with the claimed protected information deleted and clearly marked "Proposed Redacted Copy" in the upper right-hand corner of the first page.

(a) Within two business days after their receipt of the proposed redacted copy, other parties shall advise the party originating the pleading of any additional redactions they require. The originating party shall promptly provide each party with a copy of the pleading from which all information that any party has requested be redacted has been redacted and clearly marked "Agreed-Upon Redacted Copy – May Be Made Public" in the upper right-hand corner of the page. During the two-day period, the proposed redacted copy shall be treated as protected. At the expiration of the two-day period, or when agreement is reached, the agreed-upon redacted copy shall be filed with the court by the originating party.

(b) Any party at any time may serve on the other parties a proposed redacted copy of any documents (other than a pleading, to which paragraphs 4(a) and (b) apply) filed with the court or of any document produced or generated in discovery whether or not filed with the court and shall clearly mark the document in the manner provided in paragraph 4(a). The other parties shall respond promptly, advising the serving party of any additional redactions they require. The serving party shall proceed as provided in the last sentence of paragraph 4(b).

5. Any party may at any time object to another party's designation of particular information as protected. If the parties are unable to resolve the matter by agreement, counsel for the objecting party may submit the matter to the court for resolution. Until the court resolves this matter, the disputed information shall be treated as protected.

6. Without the consent of the other parties, no private party may make more than three (3) copies of any document containing protected information received from another party. Private parties may make additional copies for filing with the court, service on the parties or use in discovery and may also incorporate limited amounts of protected information in their pleadings. All copies of such documents and of pleadings referring to protected information shall be clearly labeled in the manner required by paragraph 3 of this Protective Order.

7. Each person covered by this Protective Order shall take all necessary precautions to prevent disclosure of protected information, including but not limited to physically securing, safeguarding and restricting access to the protected information. The confidentiality of information learned pursuant to this Protective Order shall be maintained in perpetuity.

8. Within thirty (30) days after the conclusion of this action (including any and all appeals and remands), counsel for each private party shall (i) destroy all protected information and certify in writing to all parties that such destruction has occurred and/or (ii) return the protected information to the parties from which the information was received.

Provided the documents are marked protected and are properly secured, counsel for each party may retain one copy of the unredacted pleadings.

9. Any party whose information has been designated as protected may at any time waive the protection of this Protective Order with respect to any and all such information by so advising counsel for all parties in writing, identifying with specificity the information to which this Protective Order shall no longer apply.

10. Nothing contained in this Protective Order shall preclude a party from seeking relief from this Protective Order through the filing of an appropriate motion with the court that sets forth the basis for the relief sought.

11. If a party determines that a previously produced document inadvertently was not identified as containing protected information, the producing party shall give notice in writing that the document is to be treated as proprietary, and thereafter the designated document shall be treated in accordance with this Protective Order.

12. Counsel for the parties shall promptly report any breach of the provisions of this Protective Order to counsel for the opposing party(ies). Upon discovery of any breach, plaintiff's, defendant's, or intervenor's attorneys shall immediately take appropriate action to cure the violation and retrieve any protected information that may have been disclosed to persons not covered by this Protective Order. The parties shall reasonably cooperate in determining the reasons for any such breach.

_____

Judge

FORM 9
APPLICATION FOR ACCESS TO INFORMATION UNDER PROTECTIVE ORDER BY OUTSIDE OR INSIDE COUNSEL

United States Court of Federal Claims

* * * * * * * * * * * * * * * * * * * *

_____,

Plaintiff, No. _____

v.

THE UNITED STATES, Judge _____

Defendant.

* *

APPLICATION FOR ACCESS TO INFORMATION UNDER
PROTECTIVE ORDER BY OUTSIDE OR INSIDE COUNSEL

1. I, _____, hereby apply for access to protected information covered by the Protective Order issued in connection with this proceeding.

2. a. I [outside counsel only] am an attorney with the law firm of _____ and have been retained to represent _____, a party to this proceeding.

b. I [inside counsel] am in-house counsel (my title is: _____) for _____ a party to this proceeding.

3. I am [ ] am not [ ] a member of the bar of the United States Court of Federal Claims (the court).

4. My professional relationship with the party I represent in this proceeding and its personnel is strictly one of legal counsel. I am not involved in competitive decision making as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this proceeding, or any other firm that might gain a competitive advantage from access to the information disclosed under the Protective Order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning, or participate in decisions about, marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected information could provide a competitive advantage.

5. I [outside counsel only] identify here (by writing “none” or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the proceeding or with any other firm that might gain a competitive advantage from access to the information disclosed under the Protective Order.

_____

_____

7. I identify here (by writing "none" or identifying the name of the forum, case number, date and circumstances) instances in which I have been denied admission to a protective order, had admission revoked or been found to have violated a protective order issued by any administrative or judicial tribunal:

_____

_____

8. I [inside counsel] have attached a detailed narrative providing the following information:

a. my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;

b. the person(s) to whom I report and their position(s) and responsibilities;

c. the number of in-house counsel at the office in which I work and their involvement, if any, in competitive decision making and in providing advice in procurement-related matters.

d. my relationship to the nearest person involved in competitive decision making (both in terms of physical proximity and corporate structure); and

e. measures taken to isolate me from competitive decision making and to protect against the inadvertent disclosure of protected information to persons not admitted under the Protective Order.

9. I have read the Protective Order issued by the court in this proceeding. I will comply in all respects with that order and will abide by its terms and conditions in handling any protected information produced in connection with the proceeding.

10. I acknowledge that a violation of the terms of the Protective Order may result in the imposition of such sanctions as may be deemed appropriate by the court and in possible civil and criminal liability.

* * *

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct.

_____ _____

Signature Date Executed

_____

Typed Name and Title

_____

Telephone Number

_____

Fax Number

_____ _____

Signature of Attorney of Record Date Executed

_____

Typed Name and Title

_____

Telephone Number

_____

Fax Number

FORM 10
APPLICATION FOR ACCESS TO INFORMATION UNDER PROTECTIVE ORDER BY EXPERT CONSULTANT OR WITNESS

United States Court of Federal Claims

* *

_____,
Plaintiff, No. _____

v.

THE UNITED STATES, Judge _____
Defendant.

* *

APPLICATION FOR ACCESS TO INFORMATION UNDER
PROTECTIVE ORDER BY EXPERT CONSULTANT OR WITNESS

1. I, the undersigned, am a _____ with _____ and hereby apply for access to protected information covered by the protective order issued in connection with this proceeding.

2. I have been retained by _____ and will, under the direction and control of _____, assist in the representation of _____in this proceeding.

3. I hereby certify that I am not involved in competitive decision making as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of any party to this proceeding or any other firm that might gain a competitive advantage from access to the information disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning, or participates in decisions about, marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected information could provide a competitive advance.

4. My professional relationship with the party for whom I am retained in this proceeding and its personnel is strictly as a consultant on issues relevant to the proceeding. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this proceeding or in any competitor or potential competitor of a party.

5. I have attached the following information:

   a. a current resume describing my education and employment experience to date;
   b. a list of all clients for whom I have performed work within the two years prior to the date of this application and a brief description of the work performed;
   c. a list of all clients for whom I have performed work within the two years prior to

the date of this application and for whom the use of protected information could provide a competitive advantage and a brief description of the work performed;

d. a statement of the services I am expected to perform in connection with this proceeding;

e. a description of the financial interests that I, my spouse, and/or my family has in any entity that is an interested party in this proceeding or whose protected information will be reviewed; if none, I have so stated;

f. a list identifying by name of forum, case number, date and circumstances all instances in which I have been granted admission or been denied admission to a protective order, had a protective order admission revoked or been found to have violated a protective order issued by an administrative or judicial tribunal; if none, I have so stated; and

g. a list of the professional associations to which I belong, including my identification numbers.

6. I have read a copy of the protective order issued by the court in this proceeding. I will comply in all respects with all terms and conditions of that order in handling any protected information produced in connection with the proceeding. I will not disclose any protected information to any individual who has not been admitted under the protective order by the court.

7. For a period of two years after the date this application is granted, I will not engage nor assist in the preparation of a proposal to be submitted to any agency of the United States Government for _____ when I know or have reason to know that any party to this proceeding, or any successor entity, will be a competitor, subcontractor or teaming member.

8. For a period of two years after the date this application is granted, I will not engage nor assist in the preparation of a proposal or submission to_____ nor will I have any personal involvement in any such activity.

9. I acknowledge that a violation of the terms of the protective order may result in the imposition of such sanctions as may be deemed appropriate by the court and in possible civil and criminal liability.

* * *

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct.

_____ _____

Signature Date Executed

_____

Typed Name and Title

_____
Telephone Number

_____
Fax Number

_____ _____
Signature of Attorney of Record Date Executed

_____
Typed Name and Title

_____
Telephone Number

_____
Fax Number

FORM 11
SURETY BOND
FOR TEMPORARY RESTRAINING ORDER
OR
PRELIMINARY INJUNCTION

United States Court of Federal Claims

* *

_____,
Plaintiff, No. _____
v.

THE UNITED STATES,

Defendant.
* *

SURETY BOND
FOR TEMPORARY RESTRAINING ORDER
OR
PRELIMINARY INJUNCTION

Recitals

1. _____[name of plaintiff] has obtained from the United States Court of Federal Claims a [Temporary Restraining Order or Preliminary Injunction] against the United States.

2. The _____[Temporary Restraining Order or Preliminary Injunction] was issued on condition that _____[name of plaintiff] execute and file a good and sufficient bond in the amount of $_____ for the payment of any costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Promise to Pay

As a result of the facts just recited:

_____[name of plaintiff] and _____[names(s) of corporate surety or sureties], which has an office and usual place of business at _____[street address], _____[city,

state, zip code], each undertakes and promises to pay up to the sum of $_____ for any damages incurred as a result of the _____[Temporary Restraining Order or Preliminary Injunction] if it is determined that defendant was wrongfully enjoined or restrained. Plaintiff and surety(ies) stipulate that the damages may be ascertained in such manner as the court shall direct. See RCFC 65.1.

Dated:_____

For the principal:

_____[signature of plaintiff]

_____[typed name of plaintiff]

For the _____ [surety or sureties]:

_____[typed or printed name of surety]

By _____[signature]
_____[typed name of signer]
_____[title of signer]
_____[street address]
_____[city, state, zip code]

[Repeat signature block for each additional surety]

APPROVED: _____, 20___

_____, Clerk, U.S. Court of Federal Claims

FORM 12
SUPERSEDEAS BOND (SURETY)

United States Court of Federal Claims

* *

_____,
Plaintiff, No. _____
v.

THE UNITED STATES,
Defendant.
* *

SUPERSEDEAS BOND (SURETY)

Recitals

1. A judgment was entered in the above entitled action on _____ [date] in the United States Court of Federal Claims against Appellant, _____ [name of appellant] and in favor of _____ [name(s) of appellee(s)].

2. _____[name of appellant] has filed a timely notice of appeal of this judgment to the United States Court of Appeals for the Federal Circuit and desires to suspend enforcement of the judgment pending determination of the appeal.

Promise to Pay

As a result of the facts just recited:

_____[name of appellant] and _____[name of corporate surety], which has an office and usual place of business at _____[street address], _____[city, state, zip code], each undertakes and promises to pay to _____[name(s) of appellee(s)] all damages, costs, and interest that may be awarded to _____[him or her or it or them] following the appeal of this matter up to the sum of $_____ if:

a. The judgment so appealed from is affirmed:

b. The appeal is dismissed; or

c. _____[name of appellant] fails to pay promptly all sums awarded against _____[him or her or it] in or following the appeal in this action, including any costs that the court

of appeals may award if the judgment is modified.

If _____[name of appellant] fulfills the obligations on appeal set forth above, then this obligation will become void. Otherwise, the obligation will remain in full force and effect.

Dated:_____

For the principal: _____[signature of plaintiff]
_____[typed name of plaintiff]

For the _____ [surety or sureties]:

_____[typed or printed name of surety]

By _____[signature]
_____[typed name of signer]
_____[title of signer]
_____[street address]
_____[city, state, zip code]

[Repeat signature block for each additional surety]

APPROVED: _____, 20___

_____, Clerk, U.S. Court of Federal Claims

FORM 13
BOND WITH COLLATERAL FOR
TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

United States Court of Federal Claims

* * * * * * * * * * * * * * * * * * * *

_____,
Plaintiff, No. _____
v.

THE UNITED STATES,
Defendant.
* * * * * * * * * * * * * * * * * * * *

BOND WITH COLLATERAL FOR
TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Recitals

1. The above-named plaintiff(s) has commenced an action in the above-entitled court against the defendant and has made application to the court for a Temporary Restraining Order or Preliminary Injunction against the defendant, enjoining and restraining the defendant, as well as the defendant's agents or employees, from the commission of certain acts, particularly set forth and described in the complaint, and

2. The plaintiff(s) desires to give an undertaking in an amount deemed proper by the court, that is, $_____, to secure the payment of any costs and damages, including reasonable attorney's fees to be fixed by the court that may be incurred or suffered by the defendant if the restraining order or preliminary injunction should prove to have been improvidently issued.

Promise to Pay

The undersigned surety (jointly and severally if more than one) obligates itself to the defendant as provided in Rules 65 and 65.1 of the Rules of the United States Court of Federal Claims, in the sum of $_____ on the condition that if the defendant ultimately prevails in this action and suffers damages on account of the Temporary Restraining Order or preliminary injunction, they will pay those damages up to and including the maximum amount of this Bond if the court determines that the Temporary Restraining Order or Preliminary Injunction was improperly or improvidently

granted, or the defendant was improperly or wrongfully restrained by that Order. The undersigned stipulates that the damages may be ascertained in such manner as the court shall direct, and that, on dissolving the injunction, the court may give judgment thereon against the plaintiff for said damages in the order dissolving the injunction, or in a further order after ascertainment of the amount of said damages.

The above-named plaintiff(s) as security for the bond, hereby deposits with the clerk of said court, the sum of _____ dollars ($_____) (either cash or certified check made payable to the U.S. Treasury)[1], which sum may be utilized in payment of any damages which by court order may be levied against the plaintiff in this action.

DATED:_____, 20__

By: _____[SEAL]

_____[SEAL]

(Plaintiffs)

APPROVED: _____, 20__

_____, Clerk, U.S. Court of Federal Claims

[1]Marketable public securities of the U.S. payable to the bearer may also be utilized as collateral, but the bond must be accompanied by the appropriate power of attorney.