ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Nashville, TN
April 6, 2017

TABLE OF CONTENTS

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 6, 2017
Nashville, Tennessee

Discussion Agenda

1. Greetings and introductions. (Judge Ikuta)

2. Approval of minutes of Washington D.C. meeting of November 14, 2016. (Judge Ikuta)

   Tab 2: Draft minutes.

3. Oral reports on meetings of other committees:

   (A) June 3, 2017 meeting of the Committee on Rules of Practice and Procedure. (Judge Ikuta, Professor Gibson, Professor Harner)

   Tab 3A: Draft minutes of Standing Committee meeting.

   (B) Meeting of the Advisory Committee on Civil Rules. (Judge Goldgar)

   No report. Next meeting scheduled for April 25-26, 2017.

   (C) Meeting of the Advisory Committee on Appellate Rules. (Judge Pepper)

   No report. Next meeting scheduled for May 2, 2017.

   (D) January 2017 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Bernstein, Judge Smith)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Goldgar, Professor Gibson, Professor Harner)

   (A) Recommendation concerning Proposed Amendments to Rule 5005(a)(2) (*Electronic Filing and Signing*). (Judge Goldgar and Professor Harner)

   Tab 4A: Memo of March 10, 2017, by Professor Harner

(B) Recommendation concerning Proposed Amendments to Rule 3002.1(b) and (e) (*Notice of Payment Changes*). (Judge Goldgar and Professor Gibson)

Tab 4B: Memo of March 12, 2017, by Professor Gibson

(C) Recommendation regarding Suggestion 16-BK-D from Judge Goldgar for possible amendment to Rule 4001(c) (*Obtaining Credit*) that would simplify notice requirements for obtaining credit in Chapter 13 cases. (Judge Goldgar and Professor Harner)

Tab 4C: Memo of March 9, 2017, by Professor Harner

(D) Recommendations regarding Suggestion 12-BK-B from Bankruptcy Clerk Matthew Loughney proposing amendment to Rule 2002(f)(7) to require notice of an order confirming a chapter 13 plan, and Suggestion 12-BK-M from Chief Judge Scott Dales, proposing amendments to Bankruptcy Rule 2002(h) to include Chapter 13 (Judge Goldgar and Professor Harner)

Tab 4D: Memo of March 9, 2017, 2017, by Professor Harner

5. Report by the Subcommittee on Business Issues. (Judge Bernstein, Professor Gibson, Professor Harner)

(A) Recommendations concerning Electronic Notice and Service (Judge Bernstein and Professor Harner)

Tab 5A: Memo of March 10, 2017, by Professor Harner

(B) Report on Suggestion 16-BK-C regarding Rule 6007 and notice of abandonment of estate property. (Judge Bernstein and Professor Harner)

Tab 5B: Memo of March 10, 2017, by Professor Harner

(C) Report and Recommendation Concerning Proposed Amendments to Official Forms 309(f), 425A, 425B, 425C, and 426. (Judge Bernstein and Professor Harner, Professor Gibson)

Tab 5C1: Memo of March 10, 2017, Regarding Official Forms 425A, 425B, 425C, and 426 by Professor Harner

Tab 5C2: Memo of March 12, 2017, Regarding Official Form 309(f) by Professor Gibson

6. Report by the Subcommittee on Privacy, Public Access, and Appeals. (Judge Ambro, Professor Gibson)

(A) Review comments in Rules 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8022, 8023 and new Rule 8018.1. *(Combine two sets of amendments to Rule 8011– see item 6C below)*.

Tab 6A: Memo of March 13, 2017, by Professor Gibson

(B) Consider possible amendments to rules 7062, 8007, 8010, 8021, and 9025 to address published amendments to Civil Rule 62 and 65.1, and FRAP 8(a)(1)(B), (b); 11(g); and 39(e) regarding the term "supersedeas bonds" and the period during which a judgment is automatically stayed after entry.

Tab 6B: Memo of March 13, 2017, by Professor Gibson

(C) Recommendation to revise Rule 8011 to incorporate pending changes regarding electronic filing and notice across the rules committees.

Tab 6C: Memo of March 13, 2017, by Professor Gibson

(D) Oral Report on feedback to the Appellate Rules Committee in response to a request for comment on a proposed amendment to Appellate Rule 26.1 (Corporate Disclosure Statement) that address recusal matters in bankruptcy appeals. **Gibson**

Information Items

7. Items Retained for Further Consideration.

The matters listed below are part of the noticing project and will be considered at a later date in light of final approval of electronic noticing rules already under consideration

(A) Suggestion 15-BK-H (Judge Janice M. Karlin – BJAG -- Proposing an amendment to Bankruptcy Rule 9036 that would mandate electronic noticing in certain circumstances.

(B) Suggestion 14-BK-E (Richard Levin – Chair, NBC -- Proposing an amendment to Bankruptcy Rule 3001 to require a corporate creditor to specify address and authorized recipient information and the promulgation of a new rule to create a database for preferred creditor addresses under section 347. In addition, the Suggestion discusses the value to requiring electronic noticing and service on large creditors in bankruptcy cases for all purposes (other than process under Bankruptcy Rule 7004)).

(C) Comment 12-BK-040 (BCAG -- This Suggestion was submitted as a comment in response to proposed revisions to Rule 9027. It suggested that the reference to "mail" in Rule 9027(e)(3) be changed to "transmit." Because the comment did not implicate the part of Rule 9027 being amended, the comment was retained as suggestion for further consideration at a later time).

(D) Comments 12-BK-005, 12-BK-008, 12-BK-026, 12-BK-040 submitted separately by Judge Robert J. Kressel, the National Conference of Bankruptcy Judges, Judge S. Martin Teel, Jr., and the Bankruptcy Clerks Advisory Group. The comments were made response to pending amendments to Rule 8003(c)(1), and have been retained as suggestions for further consideration. They recommend that the obligation to serve a notice of appeal rest with the appellant or be permitted by electronic means.

(E) Suggestion/Comment BK-2014-0001-0062 (Chief Judge Robert E. Nugent, U.S. Bankruptcy Court for the District of Kansas, on behalf of the NCBJ -- Proposing amendments regarding service of entities under Bankruptcy Rule 7004(b) and, in turn, Bankruptcy Rules 4003(d) and 9014(b)).

(F) Informal Suggestion (David Lander, former committee member) -- Proposing rule in context of electronic noticing that would require particular notice to, or service on, a party when a motion or pleading is adverse to that party, as opposed to that party just receiving the general e-notice of a filing in the case.

8. Coordination Items.

Tab 8: Memo of March 14, 2017, by Mr. Myers.

9. Future meetings: The fall 2017 meeting will be in Washington DC, on September 26-27. *(Members are invited to suggest possible dates for the spring 2018 meeting).*

10. New business.

11. Adjourn.

Proposed Consent Agenda

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting**. Absent any objection, all recommendations will be approved by acclamation at the meeting.** Any of these matters may be moved to the Discussion Agenda if a member or liaison feels that discussion or debate is required prior to Committee action. Requests to move an item to the Discussion Agenda must be brought to attention of the Chair by noon, Eastern Time, on **Thursday, April 30, 2017**

1. Subcommittee on Consumer Issues.

Revisions to Spring 2016 Recommendation for amendment to Rule 9037(h) (*Privacy Protection for Filings Made with the Court*), in response to Suggestion 14-BK-B from CACM (Judge Goldgar and Professor Gibson)

Tab Consent 1: Memo of March 12, 2017, by Professor Gibson

2. Subcommittee on Business Issues.

Recommendation of no action on possible amendments to bankruptcy corporate ownership rules to parallel pending amendments to Criminal Rule 12.4.

Tab Consent 2: Memo of March 12, 2017 by Professor Gibson.

3. Subcommittee on Privacy, Public Access, and Appeals.

Recommendation of no action regarding possible rule amendments to address situation of remand of a bankruptcy appeal from a court of appeals to the district court, and time frame for district court to determine whether the district or bankruptcy court is responsible for the case. *(Previously discussed at fall 2016 meeting in the context of consideration of Suggestion 16-BK-E).*

Tab Consent 3: Memo of March 13, 2017, by Professor Gibson

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Sandra Segal Ikuta** United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621
Reporter, Advisory Committee on Bankruptcy Rules	**Professor S. Elizabeth Gibson** Burton Craige Professor of Law University of North Carolina at Chapel Hill 5073 Van Hecke-Wettach Hall C.B. #3380 Chapel Hill, NC 27599-3380
Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Michelle M. Harner** Francis King Carey Professor of Law Director, Business Law Program University of Maryland Francis King Carey School of Law 500 West Baltimore Street Baltimore, MD 21201
Members, Advisory Committee on Bankruptcy Rules	**Honorable Thomas L. Ambro** United States Court of Appeals J. Caleb Boggs Federal Building 844 North King Street, Unit 32 Wilmington, DE 19801-3519 **Honorable Stuart M. Bernstein** United States Bankruptcy Court Alexander Hamilton Custom House One Bowling Green, Room 729 New York, NY 10004-1408 **Honorable Dennis R. Dow** United States Bankruptcy Court Charles Evans Whittaker United States Courthouse 400 East Ninth Street, Room 6562 Kansas City, MO 64106 **Honorable A. Benjamin Goldgar** United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 638 Chicago, IL 60604

Members, Advisory Committee on Bankruptcy Rules *(cont'd)*	**Honorable Jean C. Hamilton** United States District Court Thomas F. Eagleton United States Courthouse 111 South Tenth Street, Room 16N St. Louis, MO 63102-1116 **Jeffery J. Hartley, Esq.** Helmsing Leach Post Office Box 2767 Mobile, AL 36652 **Honorable Melvin S. Hoffman** Chief Judge United States Bankruptcy Court John W. McCormack Post Office and Court House 5 Post Office Square, Room 1150 Boston, MA 02109-3945 **Honorable David A. Hubbert** Acting Assistant Attorney General, Tax Division (ex officio) United States Department of Justice 950 Pennsylvania Avenue N.W. Room 4141 Washington, D.C. 20530 **Richardo I. Kilpatrick, Esq.** Kilpatrick & Associates, P.C. 903 N. Opdyke Road, Suite C Auburn Hills, MI 48326 **Thomas Moers Mayer, Esq.** Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 **Jill A. Michaux, Esq.** Neis & Michaux, P.A. 534 S. Kansas Avenue, Suite 825 Topeka, KS 66603-3446

Members, Advisory Committee on Bankruptcy Rules (*cont'd)*	**Honorable Pamela Pepper** United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202 **Professor David Arthur Skeel** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104 **Honorable Amul R. Thapar** United States District Court United States Courthouse 35 West Fifth Street, Suite 473 Covington, KY 41011
Clerk of Court Representative, Advisory Committee on Bankruptcy Rules	**Kenneth S. Gardner** Clerk, United States Bankruptcy Court United States Custom House 721 19th Street, Room 116 Denver, CO 80202-2508
Consultants, Advisory Committee on Bankruptcy Rules	**Patricia S. Ketchum, Esq.** 113 Richdale Avenue #35 Cambridge, MA 02140 **James H. Wannamaker, Esq.** 330 St. Dunstans Road Baltimore, MD 21212
Liaison Member, United States Department of Justice, Executive Office for U.S. Trustees	**Ramona D. Elliott, Esq.** Deputy Director/General Counsel Executive Office for the U.S. Trustees 20 Massachusetts Avenue, N.W. - Suite 8100 Washington, DC 20530
Liaison Member, Advisory Committee on Bankruptcy Rules	**Honorable Susan P. Graber** *(Standing)* United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204
Liaison Member, Committee on the Administration of the Bankruptcy System	**Honorable Erithe A. Smith** United States Bankruptcy Court Ronald Reagan Federal Building and United States Courthouse 411 West Fourth Street, Room 5040 Santa Ana, CA 92701

Secretary, Standing Committee and Rules Committee Officer	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820; Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
	Judge Pamela Pepper	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge Susan P. Graber**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Judge A. Benjamin Goldgar**	***(Bankruptcy)***
	Peter D. Keisler, Esq.	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
	Judge Solomon Oliver, Jr.	***(Civil)***
	Judge Richard C. Wesley	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820 Fax 202-502-1755
Rebecca_Womeldorf@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678 Fax 202-502-1755
Julie_Wilson@ao.uscourts.gov

Scott Myers
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1913 Fax 202-502-1755
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-240
Washington, DC 20544
Phone 202-502-1313 Fax 202-502-1755
Bridget_Healy@ao.uscourts.gov

Shelly Cox
Administrative Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-4487 Fax 202-502-1755
Shelly_Cox@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945 Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Tim Reagan *(Rules of Practice & Procedure)* Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Timothy T. Lau** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov

TAB 2

Meeting of the Advisory Committee on Bankruptcy Rules
November 14, 2016, Washington D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Thomas L. Ambro
District Judge Pamela Pepper
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Thomas Moers Mayer, Esquire
Jill Michaux, Esquire
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Circuit Judge Susan P. Graber, liaison from the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Erithe Smith
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge David Sims Crawford
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees

I. Introductions

Judge Sandra Ikuta welcomed the new members to the Advisory Committee on Bankruptcy Rules (the Committee). She also introduced Judge David Campbell, the new chair of the Standing Committee, and Judge Susan Graber, the new liaison from the Standing Committee.

II. Minutes from April 2016 Meeting

The minutes from the minutes of the April 2016 meeting of the Bankruptcy Rules Committee were approved.

III. Report from the June 2016 meeting of the Standing Committee

Professor Michelle Harner reported that all of the Committee's action items were approved. In addition, there were two information items reported, including several technical changes to the bankruptcy forms.

IV. Report on the November 2016 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar reported on the items discussed at the Civil Rules Committee meeting that were of interest to the Committee. First, the Civil Rules Committee is studying the method of serving subpoenas (service by mail versus in person). Second, the Civil Rules Committee is considering possible changes to Rule 30(b)(6) for depositions of corporate representatives. Third, the Civil Rules Committee decided not to go forward at this time with possible amendments to Rule 5.2, although the amendments may be reconsidered. The Civil Rules Committee did not find the same issues with personal identifiers in civil cases as may occur in bankruptcy cases. The other rules committees have also considered similar amendments, and each committee decided not to proceed. Judge Goldgar will monitor developments on proposed amendments to Civil Rules 45(b)(1) and 30(b)(5).

V. Report on the October 2016 Meeting of the Advisory Committee on Appellate Rules

Judge Pamela Pepper advised that the majority of the discussion at the Appellate Rules Committee meeting was unrelated to bankruptcy. Many of the potential amendments under consideration relate to electronic filing and service. The Appellate Rules Committee is continuing to discuss the proper language for bonds and security instruments in several rules. Also, they discussed potential changes to the civil class action rules and whether any Appellate Rule amendments were needed as a result. The Appellate Rules Committee discussed a suggestion to require additional disclosures in bankruptcy appeals, and asked that the Committee work with the Appellate Rules Committee on the issue. The Committee agreed to work with the Appellate Rules Committee, and the matter was assigned to the Privacy, Public Access, and Appeals Subcommittee.

VI. Report on the June 2016 Meeting of the Committee on the Administration of the Bankruptcy System

Judge Erithe Smith reported that the Bankruptcy Administration Committee considered several issues related to fees at the meeting, concurring with fee proposals submitted by the Committee on Court Administration and Case Management (CACM). Also, the judgeship vacancy pilot project is moving forward. Under the project, one judge has been sworn in to the District of South Dakota and will sit in the Middle District of Florida for five years, and another judge has been sworn in to the Northern District of Iowa and will sit in the Eastern District of Michigan. In addition, the horizontal coordination pilot project was approved by the Judicial Conference earlier this year, and the Bankruptcy Administration Committee is working on finding districts to participate in the project. Judge Stuart Bernstein added that there is concern regarding temporary judgeships, as most temporary judgeship positions will expire in May 2017 without action from Congress.

Judge Ikuta advised of the letter from the Committee to the Bankruptcy Administration Committee regarding the suggestion for a Notice of Change of Address form, and Judge

Smith advised that it will be considered at the Bankruptcy Administration Committee's December 2016 meeting.

VII. Business Subcommittee Report

Professor Harner provided the report of the subcommittee's review of noticing issues. She explained that the review focuses on formal noticing suggestions submitted to the Committee over the years, with several concerning the mode of noticing and ways to better utilize technology, electronic filing, and service. Although research is ongoing, Professor Harner noted that the many of the materials reviewed by the subcommittee suggest inefficiencies in the system and the high burden and cost associated with noticing under the Bankruptcy Rules. With the proposed amendments to Rule 5005 there is a movement toward default electronic filing, but this does not include noticing. The subcommittee generally agreed that permitting broader use of electronic noticing and service may be warranted, but that it needed to analyze further certain issues relating to non-individual parties who are not represented in bankruptcy cases.

The Committee discussed various issues relating to the suggestions regarding electronic noticing and service. One member advised that some creditors would prefer to receive notices by mail because they lack the ability to process everything electronically, or they have systems set up to accept bankruptcy notices that are not electronic. The Committee discussed the potential value to phasing in any changes to the mode of noticing and service through an opt-in mechanism. The Committee also noted the need to consider the potential impact of Civil Rule 5(b).

Professor Harner then explained two other issues identified in the noticing project. First, a few suggestions raise issues with the special service of process requirements for certain entities under Rules 7004(b)(3) and (h). The Committee discussed the need for, and challenges to, any amendments to the service of process rules. It also recognized the need to coordinate with other rules committees and other groups within the bankruptcy community before proposing any changes. Second, the noticing project considered certain issues involving claims objections. The proposed amendment to Rule 3007(a) clarifies that service of an objection may be made upon the creditor by first-class mail at the address set forth in the proof of claim. There is a question as to whether this procedure should be extended to claims for which no proof of claim is required.

Although the noticing project is ongoing, the Committee decided to focus on one issue at this time. Specifically, the Committee is exploring an amendment to the bankruptcy rules that would allow businesses, financial institutions, and other non-individual parties that hold claims against the debtor, but that are not registered users of CM/ECF, to opt into electronic noticing and service in bankruptcy cases. The Committee would ensure that any such amendment is consistent with 11 U.S.C. § 342(e) and (f), which gives certain creditors the right to designate a particular service address.

VIII. Subcommittee on Privacy, Public Access, and Appeals

A. Conforming technical amendments to Rule 8011

Professor Elizabeth Gibson reported that the amendments to Rule 8011 conform to the proposed amendments to Federal Rule of Appellate Procedure 25 (currently out for publication). The proposed amendments would also be consistent with the proposed

amendments to Rule 5005, Civil Rule 5, and Criminal Rule 49 (currently out for publication). Rule 8011 currently does not specifically address electronic filing, but the recent amendments to the Part VIII rules generally favored electronic transmission by and to represented parties. Professor Gibson noted that minor changes to the proposed amendments (to Rule 8011) may be required depending on the comments received on the published proposed amendments to Appellate Rule 25. Any changes will be presented at the spring 2017 meeting. The Committee discussed service requirements. Local rules often require additional service, although this practice could continue, even with a rule amendment. In addition, the Committee agreed that, because the proposed amendments mirror the pending amendments to the appellate rules on electronic service and proof of service, publication of the proposed amendments to Rule 8011 would serve no additional purpose. It also noted the value to having the amendments to Rule 8011 approved on the same timetable as those being made to Appellate Rule 25, Rule 5005, Civil Rule 5, and Criminal Rule 49. A motion was made and approved to move forward with the proposed amendments, subject to any minor amendments or corrections based on comments received during the publication period, and to request that the Standing Committee approve the proposed amendments without prior publication.

B. Suggestion 16-BK-E (Mandate Procedure in Bankruptcy Appeals)

Professor Gibson provided the report, explaining that the suggestion is to require a mandate in bankruptcy appeals to clarify when authority revests with the bankruptcy court. The subcommittee previously chose not to pursue the issue, but now recommended that it be considered for further study. Current Rule 8024(b) does not require a mandate, unlike Federal Rule of Appellate Procedure 41(c). The subcommittee intends to survey bankruptcy judges and practitioners to determine if the lack of a mandate causes problems.

Professor Gibson advised the group that a number of bankruptcy appellate panels have local rules regarding mandates from bankruptcy appeals. Also, the mandate under Appellate Rule 41(c) can be withdrawn under certain circumstances and district courts can take actions without the mandate. Some members questioned whether a rule is necessary, suggesting that a better solution may be to encourage communication between the courts to prevent potential issues. The subcommittee will consider whether to propose a rule that when the Court of Appeals remands an action to the district court, the court would have a certain amount of time (30 or 60 days) to hold a status conference to determine whether the district court or bankruptcy court should move forward with the case. The Committee discussed that such a rule would likely not be necessary when a district court enters a judgment.

IX. Information Items

Professor Harner explained that there are four items under consideration. The Business Subcommittee initially considered all of the items. The first suggestion relates to noticing of plans under Rule 2002(f)(7), and whether chapter 13 plans should be added to that rule. The suggestion was considered and rejected in the past, but the grounds for rejection are unclear. The Consumer Subcommittee will look at this issue. The second suggestion relates to the parties entitled to receive notices in chapter 13 cases under Rule 2002. The Business Subcommittee referred this suggestion to the Consumer Subcommittee. The third issue is a suggestion regarding disclosures under Rule 4001(c). The Business Subcommittee also referred this suggestion to the Consumer Subcommittee. The final issue concerns service of a motion to compel abandonment under Rule 6007(b) and whether such requirements should mirror the service required for a trustee's notice of abandonment under Rule 6007(a). The

Business Subcommittee will present additional information on this suggestion at the spring meeting.

X. Coordination Issues

Scott Myers provided some background regarding the need for coordination between the rules committees. There are often conforming amendments needed to retain uniformity within the federal rules. He noted that most of the issues included in his memo (in the agenda materials) were already discussed, but highlighted that certain amendments will be needed if the Appellate Rules Committee decides to amend its rules regarding supersedes bonds. Also, the Criminal Rules Committee proposed an amendment to its disclosure rule (Rule 12.4) and the Appellate Rules Committee is considering similar amendments. The Privacy, Public Access, and Appeals Subcommittee will consider whether any changes are needed to the bankruptcy disclosure rules and report at the spring 2017 meeting.

XI. Forms Subcommittee

Judge Dennis Dow provided an overview of the subcommittee's work on amended Rule 3015 and new Rule 3015.1. The rules were published for comment in August 2015. Several comments were submitted and a hearing was held in September 2016. There was general support for the approach in the proposed rules, although there was some opposition. There were specific suggestions for edits to the proposed amendments. The subcommittee considered all of the comments.

He advised that the subcommittee determined that proposed Rules 3015 and 3015.1 permit the Committee to achieve the goals of uniformity while still permitting local variations where necessary. Districts will have only one plan form; even if it is not the national form, it will be a local form with more national uniformity. The proposed form plan and related rules are procedural rather than substantive.

Judge Dow detailed the comments and testimony. Some of the opposition focused on specific disputes regarding substantive chapter 13 issues rather than those that could be resolved by a form or procedural rule. Noticing was an issue raised in some of the comments, and these issues are being considered as part of the noticing project. Several commenters voiced concerns about the automatic stay provisions, but the subcommittee determined not to make any changes to the rule, although some explanatory language will be added to the Committee Note in response to one of these comments. Several other changes to the Committee Notes were made in response to comments, and there was one minor edit to proposed Rule 3015.1(d)(4) to add relevant statutory references.

The subcommittee also made stylistic edits to Form 113, including conforming the header and signature lines to the remainder of the modernized forms and standardizing references throughout the form. In addition, a few minor edits were made to the Committee Note for the form. The Committee approved a motion to approve Rule 3015, Rule 3015.1, the revised version of Form 113, and the Committee Note for Form 113. Professor Gibson reminded the group that the Director's Form for adequate protection needs to be issued by December 2017.

XII. Referral to Other Committees

Professor Gibson reported on an item referred to CACM regarding redaction of personally identifiable information. For redaction, the issue is with third party services that provide

court dockets to paid users and the potential for protected information to appear on those dockets. CACM thanked the Bankruptcy Rules Committee for the information. Professor Gibson also reported that the suggestion regarding a Notice of Change of Address form was forwarded to the Bankruptcy Administration Committee. Letters regarding both issues were included in the agenda materials.

XIII. Five-Year Review Questionnaire

Judge Ikuta explained that the Committee is asked to respond to the questionnaire, and that the responses from 2007 and 2012 are included in the agenda materials. She advised that she would like to include a few sentences regarding the Committee's coordination efforts, and made the suggestion that current liaison positions be entitled to vote. Finally, she added her support for the idea that Committee members have some bankruptcy experience prior to being part of the Committee. Committee members voiced support for these suggestions. Judge Campbell will coordinate responses from all Advisory Committees.

XIV. Consent Agenda

The consent agenda, reproduced below, was approved by motion by the Committee. The consent agenda materials, as well as other supporting agenda materials, are also available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-bankruptcy-procedure-november-2016.

1. Not assigned to a subcommittee

(A) Recommendation of no action regarding Suggestion 13-BK-J to require that the Rule 2016(b) statement (Disclosure of Compensation Paid or Promised to Attorney for Debtor) be filed with the petition instead of within 14 days after the petition is filed.

(B) Recommendation to approve Suggestion 14-BK-F for technical amendment to Rule 7004(a)(1).

2. Subcommittee on Consumer Issues

(A) Recommendation of no action regarding Suggestion 15-BK-I concerning various suggestions in dealing with pro se filers and redaction of social security numbers.

(B) Recommendation to approve Suggestion 16-BK-B to amend question number 11 on Official Form 101 (Individual Debtor Petition) with proposed December 1, 2017 effective date.

3. Subcommittee on Business Issues.

(A) Recommendation of no action regarding Suggestion 16-BK-G that Rule 7004(e) to provide at least 14 days for service of summons and complaint.

4. Subcommittee on Privacy, Public Access, and Appeals

(A) Recommendation of no action regarding Suggestion 16-BK-F to eliminate the requirement of a request for permission to take a direct appeal when the court certifies the appeal.

XVII. Conclusion

The spring 2017 meeting will be held in Nashville, Tennessee on April 7, 2017. The meeting was adjourned at 1:40 PM.

Respectfully submitted,

Michelle Harner, associate reporter

DRAFT

TAB 3

TAB 3A

THIS PAGE INTENTIONALLY BLANK

The Draft Minutes of the January 2017 Meeting of the Committee on Rules of Practice and Procedure will be distributed separately.

TAB 3B

Agenda E-19 (Summary)
Rules
March 2017

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2–3

2. a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8

3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

NOTICE

NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: "No additional fee is required to file an amended notice." The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that "[c]urrently, every district's plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district." The States' Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court's then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that "[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee's recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a "form chapter 13 plan," whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee's report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a "user's manual" to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a "user's manual" and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee's agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand "[i]f the state law *did* not require an express demand" (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand. Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing "does" with "did" created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee's agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a "complex case" and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party "*may* submit a reply . . . within a time period fixed by the judge" (emphasis added). The conflict involves the use of the word "may." Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee's suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

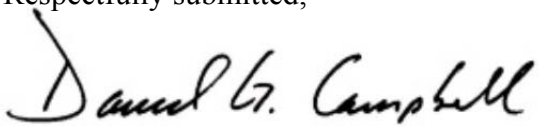
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Susan P. Graber	Sally Q. Yates
Frank M. Hull	Robert P. Young, Jr.
Peter D. Keisler	Jack Zouhary
William K. Kelley	

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms
Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure

TAB 4

TAB 4A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: COMMENTS ON RULE 5005(a)(2)

DATE: MARCH 10, 2017

At its Spring 2016 meeting, the Advisory Committee approved proposed amendments to Rule 5005(a)(2) regarding electronic filing in bankruptcy cases for submission to the Standing Committee. As further explained below, the proposed amendments generally align the substance of Rule 5005(a)(2) with similar electronic filing procedures proposed by the appellate, civil, and criminal rules committees. The Standing Committee approved the proposed amendments to Rule 5005(a)(2), together with the proposed amendments to the appellate, civil, and criminal rules, for publication and comment at its June 2016 meeting.

The Advisory Committee received six public comments on the proposed amendments to Rule 5005(a)(2). Each of these comments is summarized below. The Subcommittee on Consumer Issues considered these comments during its conference call on February 27, 2017. In addition, the reporters for each of the rules committees have been working to identify common issues in, and responses to, the public comments on the proposed rules on electronic filing and service. This Memorandum explains the recommended responses to the comments and sets forth a revised version of the proposed amendments to Rule 5005(a)(2) for consideration.

Relevant Background on Rule 5005(a)(2)

Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee's suggestion that the rules committees work

collaboratively on electronic filing and service issues, the Advisory Committee has been working with the other rules committees on matters relating to Rule 5005(a)(2). The coordination of any changes to the civil and bankruptcy rules is particularly warranted because Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically would apply in adversary proceedings unless the Advisory Committee amended Rule 7005 to provide otherwise. The bankruptcy rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005's incorporation of any amendments to Civil Rule 5(d)(3), the Advisory Committee proposed to amend Rule 5005(a)(2) in a similar manner.

The Advisory Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and its March 2016 meetings. The Advisory Committee reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. The Advisory Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5, as made applicable to adversary proceedings by Rule 7005. At its March 2016 meeting, the Advisory Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to Civil Rule 5(d)(3).

The Standing Committee approved the proposed amendments to Rule 5005(a)(2), and the other committees' electronic filing and service rules, at its June 2016 meeting. The rules were published for public comment from August 12, 2016 through February 15, 2017. The following section summarizes the public comments submitted to Rule 5005(a)(2).

Summary of Comments on Rule 5005(a)(2)

The Advisory Committee received six public comments on the proposed amendments to Rule 5005(a)(2). Notably, the majority of these comments concern the language of Rule 5005(a)(2)(C), which reads:

> (C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Several comments, as identified below, suggest that this language is confusing and does not clearly state who can file the document, who can sign the document, or the information required on the signature bock. The other rules committees received similar comments on their proposed amendments akin to the language of Rule 5005(a)(2)(C). In addition, the Advisory Committee received one comment (also submitted to the other rules committees) regarding the default rule that pro se parties cannot file electronically. Each of the comments is summarized below:

- ***Carolyn Buffington.*** This comment raises the Rule 5005(a)(2)(C) issue discussed above.
- ***Heather Dixon.*** This comment raises the Rule 5005(a)(2)(C) issue discussed above.
- ***National Conference of Bankruptcy Judges.*** This comment raises the Rule 5005(a)(2)(C) issue discussed above.
- ***New York City Bar Association.*** This comment raises the Rule 5005(a)(2)(C) issue discussed above. It also requests that the following language, which appears in the Committee Note to the proposed amendments to Civil Rule 5, be added to the Committee Note to Rule 5005(a)(2): "Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant."
- ***Pennsylvania Bar Association.*** This comment generally supports the proposed amendments to Rule 5005(a)(2), but also incorporates by reference comments to Civil Rule 5, which raise the Rule 5005(a)(2)(C) issue discussed above.
- ***Sai.*** This comment urges the appellate, bankruptcy, civil, and criminal rules committees to consider flipping the default rule for pro se parties so that the rule would require pro se parties to file electronically, unless the court ordered otherwise. It posits that requiring pro se parties to file manually imposes

additional costs and burdens on these parties and that pro se parties would rather file electronically.

Proposed Responses to Comments

The reporters to the rules committees corresponded by email to review and discuss the various comments received to the proposed electronic filing and service amendments. All of the reporters agreed that the rules should incorporate language clarifying the requirements for electronic signature (i.e., the Rule 5005(a)(2)(C) issue). That proposed language and a subsequent proposal are set forth below for the Advisory Committee's consideration.

The reporters also discussed Sai's comments regarding the optimal default rule for pro se parties. The reporters generally acknowledged the valuable points raised by the comment, particularly in the context of sophisticated pro se parties who readily have the ability and capacity to file electronically. The reporters were concerned, however, about the many pro se parties who may not have access or the ability to file electronically; they discussed the potential burdens imposed by a default rule requiring electronic filing for such parties. On balance, the reporters agreed that they would recommend maintaining the existing language of the electronic filing and service rules, which would allow a pro se party to request permission to file electronically and allow courts to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

Based on the foregoing, the reporters to the Advisory Committee recommended that the Subcommittee consider the following revision to the language of Rule 5005(a)(2)(C) during its conference call on February 27, 2017:

> (C) *Signing.* Filing with the user name and password of an attorney of record, together with the attorney's name on the signature block, serves as the attorney's signature.[1]

In addition, the reporters to the Advisory Committee recommended adding the language requested by the New York City Bar Association to the Committee Note for the proposed amendments to Rule 5005(a)(2), as well as the sentence that proceeds such language in the Committee Note to Civil Rule 5(d).[2] The additional language in the Committee Note to Rule 5005(a) would thus read:

> Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

The Subcommittee's Deliberations

The Subcommittee discussed each of the comments submitted on the proposed amendments to Rule 5005(a). The Subcommittee first considered the comments concerning the electronic signature provision of subdivision (a)(2)(C) and the language proposed by the reporters to address these comments. Members raised issues concerning the meaning of "user name and password" and whether that language needed further definition for purposes of the rule. They also analyzed the implications of the reference to "attorney of record" and whether it was too restrictive or would be hard to determine. Some members observed that this language

[1] The changes to the original language of Rule 5005(a)(2)(C) are marked below:

> (C) *Signing*. ~~The~~**Filing with the** user name and password of an attorney of record, together with the attorney's name on ~~a~~**the** signature block, serves as the attorney's signature.

[2] The additional sentence explains the language in the rule that permits courts to adopt local rules that require electronic filing by pro se parties, provided that any such rules contain reasonable exceptions. This language speaks to some of the issues raised in Sai's comment.

differed from how authorized filers submit pleadings on behalf of attorneys and did not account for non-attorneys who may be authorized to file under the pro se rules.

In reviewing these issues, members also discussed the proposed changes to subdivision (a)(2)(C) in light of existing practices and what constitutes an electronic signature for filing documents through PACER. One member explained that PACER currently states, "[T]he use of a CM/ECF login and password assigned for the purposes of electronic filing a document shall constitute the CM/ECF user's signature on the document." Members asked the Associate Reporter to discuss these issues further with the reporters for the other rules committees. As a result of those discussions, the following language was offered for the Advisory Committee to consider: "An authorized filing through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature." The Subcommittee is continuing to review this language and potential alternatives, and it will provide additional information to the Advisory Committee at, or prior to, the spring meeting.

In addition, the Subcommittee reviewed the comments to add language to the Committee Note and issues surrounding the ability of pro se parties to file electronically. Some members agreed with the concerns identified in the comment suggesting that the default rule for pro se parties should be the same as for all other parties—i.e., a mandate to file electronically unless otherwise directed by the court. Other members were concerned that such a default rule would pose challenges for some pro se parties and create unnecessary barriers to accessing the court. One member noted that these latter concerns aligned with the New York City Bar Association's comment to add cautionary language to the Committee Note regarding court orders and local rules on pro se filings. On balance, and after much discussion, the Subcommittee agreed to add

the suggested language to the Committee Note and maintain the default rule on pro se parties, particularly given that courts can vary that default rule with reasonable exceptions.

Appendix A sets forth the proposed amendments to Rule 5005(a)(2)(C) and the Committee Note with the changes discussed in this Memorandum. As noted above, the Subcommittee is continuing to review these proposed revisions.

THIS PAGE INTENTIONALLY BLANK

Appendix A

[Separate Attachment: Proposed Amendments to Rule 5005(a)(2)]

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing.*

(A) *By a Represented Entity – Generally Required; Exceptions.* All filings by an entity represented by an attorney shall be made electronically. But nonelectronic filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *By an Unrepresented Individual – When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* An authorized filing through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

(2) *Electronic Filing and Signing* ~~*by Electronic Means*~~.

(A) *By a Represented Entity – Generally Required; Exceptions.* ~~A court may by local rule permit or require documents 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.~~ All filings by an entity represented by an attorney shall be made electronically.~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ But nonelectronic filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *By an Unrepresented Individual – When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* An authorized filing through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paperdocument filed electronicallyby electronic means in compliance with a local rule constitutes is a written paper for the purposes of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions

must be included in a local rule that requires electronic filing by a pro se litigant.

An authorized filing through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

Changes Made After Publication and Comment

- Subdivision (a)(2)(C) was revised to clarify its application to an authorized filing and what information must appear on the signature block.
- Language was added to the end of the second paragraph of the Committee Note concerning orders and local rules on pro se filings.

1

TAB 4B

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: COMMENTS SUBMITTED ON AMENDMENTS TO RULE 3002.1

DATE: MARCH 12, 2017

In August 2016, the Standing Committee published for public comment proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). The proposed amendments to subdivision (b) would create a procedure for objecting to a notice of payment change and would allow the court to modify the notice requirement for holders of home equity lines of credit. The amendment to subdivision (e) would authorize a party in interest, rather than just the debtor or trustee, to challenge the assessment of postpetition fees, expenses, or charges for which notice had been given by the holder of the claim.

The rule as published reads as follows:

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the

new amount is due. For a claim arising from a home-equity line of credit, this requirement may be modified by court order. A party in interest that objects to the payment change shall file a motion to determine whether the change in the payment amount is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed within 21 days after service of the notice, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest ~~the debtor or trustee~~ filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

29 * * * * *

Comments

Three comments were submitted in response to the publication: BK-2016-0003-0006 (Aderant CompuLaw); BK-2016-0003-0007 (National Conference of Bankruptcy Judges); and BK-2016-0003-0008 (Pennsylvania Bar Association). The Bar Association stated that it supports adoption of the amendments to Rule 3002.1(b) and (e). The other two commenters expressed support for these amendments but made some wording suggestions.

NCBJ. It suggested that the word "that" in line 13 be changed to "who" and that a paragraph break be inserted in line 13 preceding "A party in interest." It suggested the latter change in order to make clearer that the authority to object is not limited to home equity lines of credit obligations.

In drafting rules, the Committee usually uses "that" or "which" rather than "who" in order to include non-human entities. In the case of this rule, however, the objector will almost always be a real person—chapter 13 debtor, trustee, or U.S. trustee, so "who" is probably more appropriate. There are many instances of the use of "who" in the Bankruptcy Rules, so **the Subcommittee recommends that this change be made**.

The Subcommittee concluded that breaking subdivision (b) into two paragraphs as NCBJ suggests makes sense grammatically because the first part of the provision relates to the notice of

payment changes and the second relates to objections. It was drafted as one paragraph, however, in order to avoid renumbering (or relettering) the rule. Making the change NCBJ suggests would require having a (b)(1) and (b)(2) and adding captions for them. Thus it might be changed as follows:

> (b) NOTICE OF PAYMENT CHANGES; OBJECTION.
>
> (1) *Notice*. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. For a claim arising from a home-equity line of credit, this requirement may be modified by court order.
>
> (2) *Objection*. A party in interest who objects to the payment change shall file a motion to determine whether the change in the payment amount is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed within 21 days after service of the notice, the change goes into effect, unless the court orders otherwise.

The Subcommittee concluded that splitting subdivision (b) into two paragraphs makes the provision clearer. **It therefore recommends that the change be made.**

Aderant. Its comment was more substantive than NCBJ's. Aderant points out that if a notice of a payment change is served by mail, Rule 9006(f) would give an objector three extra days to file a motion that would keep the change from going into effect. As a result, a timely objection could be filed on or after the effective date of the payment change. For example, if the notice were served by mail 21 days before the payment due date, an objector would have 24 days to file its motion in order to stop the change that was scheduled to take effect three days earlier from going into effect. Aderant suggests that to avoid this confusion, the rule should require a motion that would stop the payment change from taking effect to be filed "by the day prior to the date the new amount is due."

The Subcommittee agreed that Aderant has identified a potential problem with the current wording of the provision, and its solution may be the best one. There might be a concern that uncoupling the filing of the objection from the time the notice is served would allow the creditor to reduce the time for objecting by filing the notice late (fewer than 21 days before the date the change takes effect). But in that case, the notice would be ineffective due to its untimeliness, and any attempt to enforce the payment change could be resisted. *See* Rule 3002.1(f).

The Subcommittee also considered an alternative solution that would take the 3-day rule into account in specifying the time for objecting and stopping the payment change from taking effect. Instead of 21 days after service of the notice, the last sentence could provide: "If no motion is filed within 18 days after service of the notice, the change goes into effect, unless the court orders otherwise." The problem with that solution is that time periods of fewer than 30 days in the federal rules are generally supposed to be multiples of seven. It would also reduce by three days the period that an objector who is served in person or electronically has for filing the motion.

The Subcommittee agreed with Aderant's solution, but with some changes to its proposed language. **It recommends that the last sentence of what will now be Rule 3002.1(b)(2) be revised as follows**: "If no motion is filed on or before the day before the new amount is due ~~within 21 days after service of the notice~~, the change goes into effect, unless the court orders otherwise."

TAB 4C

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: OBTAINING CREDIT IN CHAPTER 13 CASES

DATE: MARCH 9, 2017

The Advisory Committee received a suggestion from the Honorable A. Benjamin Goldgar [1] concerning Bankruptcy Rule 4001(c) (Obtaining Credit) and its application to chapter 13 cases.[2] Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The rule requires the movant to file a motion, in accordance with Rule 9014 (governing contested matters), that contains specific disclosures and information. The suggestion posits that many of the required disclosures are unnecessary in, and that the Rule 4001(c) process is unduly burdensome for, most chapter 13 cases. The suggestion recommends minimizing the impact of Rule 4001(c) on chapter 13 cases by subjecting those cases to only the requirements of Rule 4001(c)(1)(A).

The Subcommittee on Consumer Issues considered this suggestion during its conference call on February 27, 2017. This Memorandum summarizes (i) the justifications and scope of the suggestion's proposal; (ii) the Subcommittee's deliberations concerning the suggestion; and (iii) the Subcommittee's recommendation to carve out chapter 13 cases from Rule 4001(c) and allow courts to address such matters by order or local rules as needed.[3]

[1] *See* Suggestion 16-BK-D. Judge Goldgar is a member of the Advisory Committee.
[2] This suggestion initially was assigned to the Subcommittee on Business Issues in connection with the Noticing Project. After deliberations during its fall meeting, the Subcommittee on Business Issues referred the suggestion to this Subcommittee.
[3] As described below, that practice currently exists as courts have differing views of the application of Rule 4003(c) to the chapter 13 context.

Overview of Issue

A request to obtain postpetition credit impacts the bankruptcy estate and creditors. For this reason, the Bankruptcy Code and the bankruptcy rules contain detailed provisions governing when such credit is permissible in a bankruptcy case. Section 364 of the Bankruptcy Code sets forth the circumstances under which the trustee or debtor in possession may obtain postpetition credit in- and outside of the ordinary course of business.[4] Rule 4001(c), in turn, governs the process for the trustee or debtor in possession to request approval of postpetition credit outside of the ordinary course of business. For example, Rule 4001(c) states:

> The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2).[5]

The rule then continues to outline eleven different elements of postpetition financing that must be explained in both the motion and concise statement—e.g., the granting of a lien or adequate protection or the determination of "the validity, enforceability, priority, or amount of" a prepetition claim.[6]

Notably, section 364 of the Bankruptcy Code does not permit the debtor to request authority to obtain postpetition credit. As noted above, section 364 speaks only of the "trustee," which incorporates a debtor in possession under sections 1203 and 1107 of the Bankruptcy

[4] 11 U.S.C. § 364.
[5] FED. R. BANKR. P. 4001(c).
[6] *Id.*

Code.[7] Nevertheless, section 1304(a) of the Bankruptcy Code provides, "A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business."[8] That section also grants such a chapter 13 debtor the ability to incur postpetition credit on the terms and subject to the conditions of a trustee under section 364.[9] Section 1304 does not, however, address a chapter 13 debtor who is not engaged in business and wants to obtain postpetition credit to, for example, purchase a new car.

Courts' Approaches to Rule 4001(c)

Courts have taken different approaches to the application of section 364 and Rule 4001(c) to chapter 13 debtors. If a chapter 13 debtor is engaged in business under section 1304, courts generally apply section 364 and Rule 4001, including the disclosure requirements set forth in Rule 4001(c). If a chapter 13 debtor is not engaged in business, courts generally either: (i) fail to discuss that distinction and apply section 364 and Rule 4001(c); (ii) follow a local rule that often specifies the procedure for a chapter 13 debtor to request postpetition credit; (iii) determine that the potential impact of postpetition credit on property of the estate and the debtor's creditors warrants court approval, either as a general matter or as a request to use estate property under section 363 of the Bankruptcy Code; or (iv) recognize the potential impact on the estate, but defer to the procedures set forth in section 1305 of the Bankruptcy Code, which requires at least trustee approval of certain extensions of postpetition consumer credit.[10] The latter two

[7] 11 U.S.C. § 364. For example, subsection (b) of section 364 states, "The court, after notice and a hearing, may authorize the *trustee* to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section,…." *Id.* (emphasis added).
[8] 11 U.S.C. § 1304(a).
[9] 11 U.S.C. § 1304(b).
[10] This last approach is based upon the fact that the Bankruptcy Code is silent on whether a chapter 13 non-business debtor needs court approval to obtain postpetition credit other than in the context of the postpetition creditor wanting to assert a claim against the estate. In that instance, section 1305(c) of the

approaches are explained thoroughly by two recent decisions: *In re Ward*, 546 B.R. 667 (Bankr. N.D. Tex. 2016) and *In re Fields*, 551 B.R. 424 (Bankr. D. Minn. 2016).

In *Ward*, the chapter 13 debtor allowed her insurance to lapse on the car she owned at the beginning of her case, thereby requiring her to find another vehicle. The debtor sought approval to obtain credit to purchase another car from a dealer who, according to the court, targeted chapter 13 debtors and charged an excessive interest rate. The court denied both the debtor's original motion and her motion to reconsider.[11] In so doing, Judge Jernigan analyzed the law governing a chapter 13 debtor's request for approval of postpetition credit. She first noted the limited application of section 364 to debtors engaged in business.[12] She then considered the minimum notice required to the trustee pursuant to section 1305, as the debtor in the *Ward* case was not engaged in business (as defined by section 1304).[13] She also analyzed section 1303 of the Bankruptcy Code, which gives a chapter 13 debtor the rights and powers of a trustee under, among others, section 363(b) of the Bankruptcy Code. If the debtor was using estate property, sections 1303 and 363(b) of the Bankruptcy Code might require court approval. Judge Jernigan noted, however, that in the case before her, the debtor's postpetition earnings likely revested in the debtor under section 1327(b), thereby making section 363(b) inapplicable.[14]

Judge Jernigan ultimately read the Code as discouraging chapter 13 debtors from incurring postpetition debt "unless it is for 'property or services necessary for the debtor's

---

Bankruptcy Code suggests that a trustee must approve any such postpetition extensions of credit. Notably, any modification to the chapter 13 plan to incorporate the creditor's claim may implicate section 1329 of the Bankruptcy Code, which would require court approval of the proposed plan modification, if not the extension of credit itself. In addition, some courts have adopted an approach focused on trustee approval through their local rules. *See, e.g.*, Appendix A.

[11] *Ward*, 546 B.R. at 670.

[12] *Id.* at 677-678.

[13] *Id.*

[14] *Id.* at 678.

performance under the plan.'"[15] If it is necessary, section 1305 requires, at a minimum, the trustee's approval of the request. Judge Jernigan further determined that, "notice and court approval are nevertheless necessary whenever significant postpetition debt is incurred by a debtor, ***if for no other reason than because of the possible impact on the debtor's plan and the debtor's prospects for rehabilitation.***"[16]

The court in *Fields* took a different approach. Judge Ridgway acknowledged the limitation of sections 364 and 1304, as well as Judge Jernigan's decision in *Ward*. Judge Ridgway did not, however, find the *Ward* decision persuasive on the issue of court approval.[17] Rather, he focused more on the structural placement of section 1305, and found that section to be the guiding post for requests to obtain postpetition credit by chapter 13 debtors not engaged in business.[18] According to Judge Ridgway, section 1305 (as supplemented by sections 1325 and 1329 governing plan modifications) governs such requests and that "such route is devoid of any language requiring court authorization."[19]

In addition, some jurisdictions have addressed the process for obtaining postpetition credit in chapter 13 cases by local rule or standing order.[20] These jurisdictions generally provide

---

[15] *Id.*
[16] *Id.* (emphasis in original).
[17] *Fields*, 551 B.R. at 427. Judge Taddonio reached a similar conclusion regarding the necessity of filing a motion in *In re Slaughter* based, in part, on the notion "that 'postpetition earnings are the backbone of funding for the confirmed plan' and that therefore 'subsequent credit transactions are subject to scrutiny by the Trustee and the Court.'" 2014 WL 4960881, at *5 (Bankr. W.D. Pa. Oct. 1, 2014) (citing *In re Brown*, 170 B.R. 362, 364 (Bankr. S.D. Ohio 1994)).
[18] *Fields*, 551 B.R. at 427-428.
[19] *Id.* at 428. Judge Ridgway also devotes a lengthy footnote to explaining why the plan modification process pursuant to sections 1325 and 1329 of the Bankruptcy Code adequately address the monitoring and rehabilitation concerns expressed by Judge Jernigan in *Ward*. *Id.* at 427 n.5.
[20] *See, e.g.*, *Slaughter*, 2014 WL 4960881, at *5 ("To that end, before approving postpetition financing for chapter 13 debtors, this Court requires the filing of a motion that specifically sets forth, among other things, how the postpetition loan will impact other creditors.") (citing W. PA. LBR 4001–4(d)(8)). *See also* ***Appendix A***.

for a chapter 13 debtor to obtain a nominal amount of postpetition credit without any approval, but then require either trustee or court approval for all other requests. Several of these rules express a preference for trustee approval by situating court approval only in the event that the trustee denies the debtor's request. They also often specify the procedures for postpetition vehicle financing. A representative sample of such local rules and standing orders is attached collectively at ***Appendix A***.

Analysis of Proposed Amendment to Rule 4001(c)

In the suggestion, Judge Goldgar posits that "the requirements if Rule 4001(c) make no sense in chapter 13 cases."[21] The suggestion notes that the extensive disclosure and 14-day notice requirements may impede a chapter 13 debtor's ability to obtain necessary postpetition credit. He also explains that, in chapter 13 cases, "[t]he dollar amounts are small, especially with cars. The loan agreements are conventional, the terms easily discerned."[22] Accordingly, Judge Goldgar suggests subjecting a chapter 13 debtor's motion for postpetition credit only to Rule 4001(c)(1)(A), which requires the filing of a motion with a copy of the credit agreement. He also recommends shortening the 14-day notice provision currently imposed by Rule 4001(c)(2).

As explained in the previous section, Judge Goldgar's suggestion highlights an area of uncertainty in chapter 13 practice. Although some jurisdictions have tried to create more certainty through local rules or standing orders, the processes vary and do not necessarily distinguish between a request for postpetition credit made by a chapter 13 debtor engaged in business and one who is not. A local rule or practice that mandates court approval for all

[21] *See* Suggestion 16-BK-D.
[22] *Id.*

requests concerning postpetition credit made by chapter 13 debtors also may impose a condition not present in the Bankruptcy Code itself. As Judge Ridgway observed in *Fields*, "[T]he absence of an expression in the Bankruptcy Code is not the same as the presence of an expression requiring court authorization for those debtors, such as the Fieldses [i.e., debtors not engaged in business], to incur post-petition debt and to obtain post-petition credit."[23]

A simple reading of sections 364, 1304, and 1305 of the Bankruptcy Code suggests that both Judge Jernigan and Judge Ridgway were correct in recognizing that the Code requires notice and a hearing only for requests to obtain postpetition credit by chapter 13 debtors engaged in business. This area of consensus may be sufficient for purposes of the Advisory Committee's consideration of the suggestion. For example, if Rule 4001(c) is applicable only to motions seeking court approval to obtain postpetition credit, that rule should not apply to requests by chapter 13 debtors not engaged in business. Arguably, no motion is required for those requests; the debtor only needs to seek the trustee's approval and only if she or the creditor seeks to have the claim allowed in the bankruptcy case under section 1305 of the Bankruptcy Code.[24]

That said, Rule 4001(c) still applies to chapter 13 debtors who are engaged in business under section 1304, as well as any chapter 13 debtor who may be required or permitted by local rule to seek court approval of a postpetition credit request. Judge Goldgar's comments concerning the burdensome disclosures and process imposed by Rule 4001(c) warrant consideration in these contexts. The history of Rule 4001(c) indicates that chapter 11 was the focus of, and motivation behind, the amendments in 2007 that enhanced the disclosure and notice elements of the rule. Specifically, the amendments emerged from a Joint Advisory Committee

[23] *Fields*, 551 B.R. at 428.
[24] *See supra* note 10.

on Venue[25] that "studied various issues that may have some impact on the selection of venue in large chapter 11 cases."[26] The Joint Advisory Committee's memorandum accompanying the proposed amendments explained,

> Other significant proposals from the Joint Committee are the proposed amendment to Rule 4001, and a new rule, Rule 6003, which will both place new limits on the scope of orders the court may enter at the earliest stages of a case. The ability to obtain "first day orders" is often cited as a reason for selecting a particular venue. In addition, the Joint Advisory Committee had concerns about the ability of the court, creditors, and other parties in interest to evaluate effectively the often voluminous requests for relief at the initiation of the case. Amended Rule 4001 would impose new disclosure requirements with respect to motions to obtain debtor in possession financing and to use cash collateral.[27]

Judge Goldgar similarly acknowledges the benefits of the rule in the suggestion, observing, "Requests from a chapter 11 debtor-in-possession (or a chapter 7 trustee) will likely involve a large loan and a custom agreement with complex terms. It makes sense to demand full disclosure of all the terms and 14-days notice to all creditors of the motion."[28]

But what is the appropriate level of disclosure for chapter 13 debtors? Judge Goldgar suggests that a motion and a copy of the credit agreement would suffice. Judge Fulton has suggested that slightly more information is required. In his 2007 decision in *In re Clemons*, Judge Fulton noted that he would need at least: "(1) the terms of the credit agreement; (2) what alternatives to the proposed credit agreement were considered; (3) a description of the automobile that the debtor seeks to purchase, detailing the make, model, mileage, condition, and value—taking into account its reasonable market value, *e.g.*, as assessed by Kelly Bluebook,

[25] The Joint Subcommittee on Venue was a collaborative effort between the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee.
[26] MEMORANDUM OF REPORTER JEFF MORRIS RE REPORT OF JOINT SUBCOMMITTEE ON VENUE AND RELATED MATTERS IN CHAPTER 11 CASES, dated January 29, 2005, at 1 (in the March 2015 AGENDA BOOK OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, at 133).
[27] *Id.* at 2 (in the March 2015 AGENDA BOOK OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES, at 134).
[28] *See* Suggestion 16-BK-D.

Edmunds, N.A.D.A., to name only a few; and (4) a copy of a current budget that includes the proposed credit payments."[29] Moreover, Judge Jernigan and others have raised concerns regarding the potential abuse of chapter 13 debtors by lenders who target debtors and impose excessive interest rates under the agreements they offer. These concerns may justify the requirement of specific disclosures in any chapter 13 motion to obtain postpetition credit.

The Advisory Committee could take several different approaches to address the suggestion. For example:

- As discussed above, the limited contexts in which a motion is required for requests to obtain postpetition credit by chapter 13 debtors may suggest no action is necessary.

- Alternatively, the Advisory Committee could seek to mitigate some of the concerns addressed in the suggestion and the case law by recommending an amendment to Rule 4001(c) to recognize expressly a court's ability, by order or local rule, to modify the disclosures and notice required by the rule in the chapter 13 context.

- Similarly, the Advisory Committee could incorporate a separate subdivision in the rule that specifies certain baseline disclosures and notice for chapter 13 cases—when either a motion is required by a debtor engaged in business or otherwise permitted for a debtor not engaged in business—and allow courts to supplement those requirements by order or local rule.

- Finally, given the history of Rule 4001(c) and the fact that many courts have adopted their own disclosure rules for obtaining credit in chapter 13 cases, the Advisory Committee could propose an amendment to Rule 4001(c) that would exclude chapter 13 cases from the rule's coverage. Such a amendment could add a new section (4) to Rule 4001(c) as follows: "(4) This subdivision (c) does not apply in chapter 13 cases." A broad carve out would avoid questions about the potential application of the Rule 4001(c) disclosures to requests to obtain credit in chapter 13 cases not initiated through a formal motion. Alternatively, the Advisory Committee could adopt tighter language such as, "This subdivision (c) does not apply to a motion to obtain credit filed in chapter 13 case." In either case, courts then could continue to use their existing local rules, or adopt a new local

[29] 358 B.R. 714, 716 (2007). Again, this decision and others addressing a request by a chapter 13 debtor to obtain credit to purchase a vehicle may not involve a debtor engaged in business and thus may not require court approval.

> rule, to address the process for, and the disclosures required in connection with, requests to obtain credit in chapter 13 cases. This kind of carve-out approach also avoids addressing an area of apparent uncertainty under the Bankruptcy Code—i.e., whether the Code requires court approval of postpetition extensions of credit to chapter 13 debtors not engaged in business.[30]

Notably, the approaches set forth in the last three bullets would have the advantage of clarifying that chapter 13 cases are different both in terms of the kinds of postpetition credit at issue and when a motion to approve postpetition credit is required. They also would likely enable jurisdictions to preserve some aspects of current local rules or practice, to the extent they address requests to obtain postpetition credit in chapter 13 cases. On balance, the final bullet recommending a carve-out for chapter 13 cases appears to address the immediate concerns with burdensome and potentially unnecessary disclosures in chapter 13 cases, while still allowing courts to establish appropriate procedures in their respective jurisdictions.

The Subcommittee's Deliberations

The Subcommittee discussed the issues identified by the suggestion in great detail. It began with a general analysis of a debtor's ability to request postpetition credit in chapter 13 cases under section 364 of the Bankruptcy Code. Members debated the various interpretations of sections 1302, 1303, and 1304 concerning the allocation of powers between a trustee and the debtor in a chapter 13 case. They acknowledged the lack of expressed authority for a chapter 13 debtor, other than a debtor engaged in business under section 1304, to request approval of postpetition credit under section 364; the Bankruptcy Code appears to place this power solely in the hands of a trustee or a debtor engaged in business. The members discussed whether these sections suggested that a chapter 13 debtor has no authority to obtain postpetition credit or, rather,

[30] To the extent a motion is required by, for example, section 1304 of the Bankruptcy Code (governing requests for credit by a debtor engaged in business), Rule 9013 would govern such motion.

can do so without court approval. In the end, the members agreed that this was a substantive issue that could not be resolved by the bankruptcy rules. Accordingly, the Subcommittee next considered whether Rule 4001(c) should apply in the chapter 13 context, regardless of whether a motion to request postpetition credit by a debtor was required, permissible, or not applicable.

The Subcommittee reviewed the history to Rule 4001(c) and how the rule was designed to address issues particular to chapter 11 cases. Most members agreed that, regardless of whether a motion was required under section 364 in a chapter 13 case, Rule 4001(c) did not readily address issues pertinent to chapter 13 cases.[31] They also recognized the burdens, time, and cost imposed by the rule in the chapter 13 context, which was addressed in the suggestion as well. Several members raised the point that, because of these factors, many courts have adopted local rules or issued orders to address requests for credit in chapter 13 cases. Members also discussed the potential implications of any change to limit or tailor the requirements of Rule 4001(c) to chapter 13 cases. On balance, the Subcommittee determined that chapter 13 cases should be excluded from Rule 4001(c). Notably, the Subcommittee's decision to carve out chapter 13 cases does not speak to the underlying substantive issue of whether the Bankruptcy Code requires or permits a chapter 13 debtor not engaged in business to request approval of postpetition credit. If such a motion is required or permissible, Rule 9013 would govern, perhaps supplemented by complementary local rules. If not, no rule is necessary.

Accordingly, the Subcommittee recommends that the Advisory Committee approve the following proposed amendment to Rule 4001(c):

[31] The Subcommittee considered whether the same substantive and procedural issues exist for chapter 12 cases. Although not researched extensively for purposes of this suggestion and Memorandum, section 1203 gives a chapter 12 debtor the power to use section 364, and chapter 13 has no comparable provision giving that power to a chapter 13 (non-business) debtor. That factor may mitigate the issues discussed in this Memorandum in the chapter 12 context.

(4) This subdivision (c) does not apply in chapter 13 cases.

Committee Note

Subdivision (c) of the rule is amended to exclude chapter 13 cases from that subdivision.

The Subcommittee believes that this amendment will produce efficiencies in chapter 13 cases that require or permit motions for postpetition credit, as it alleviates the need for the debtor to comply with requirements of Rule 4001(c), which were designed for chapter 11 cases.

Appendix A

VT. LBR 4001-5. Obtaining Credit

(a) Generally. Except for *Chapter 13* debtors seeking to borrow funds to purchase motor vehicles, see paragraph (b), below, or for extraordinary expenditures to support health and general welfare, see paragraph (c), below, parties seeking to obtain credit must follow the procedure set forth in **Vt. LBR 4001-4**.

(b) Purchase of a Motor Vehicle During a *Chapter 13* Case. During the pendency of a *Chapter 13* Plan, a debtor may borrow funds to purchase a motor vehicle only with approval of the *Chapter 13* trustee or the Court, in accordance with the following procedure(s):

(1) Request for $15,000 or Less. The debtor must seek the *Chapter 13* trustee's approval, using a loan approval request (*Vt. LB Appendix VII*). The debtor and the debtor's attorney, if any, must sign the request form. If the *Chapter 13* trustee determines the request will not involve a material modification of the debtor's budget and is in the best interest of the debtor and the bankruptcy estate, the *Chapter 13* trustee may approve the request and file the approved request form with the Clerk. No notice to creditors is required if the *Chapter 13* trustee approves the request.

(2) Request for More than $15,000 or Where the *Chapter 13* Trustee Declines to Approve Borrowing. The debtor must file a motion seeking the Court's approval where the debtor seeks to borrow more than $15,000 or where the *Chapter 13* trustee has declined to approve the debtor's borrowing request. The motion must include:

(A) a description of the motor vehicle the debtor seeks to purchase (i.e., make, model, year, VIN);

(B) the motor vehicle's purchase price and name of seller;

(C) the proposed lender of the funds;

(D) the terms of financing;

(E) a description of how the debtor proposes to make any down payment on the purchase of the motor vehicle; and

(F) if the *Chapter 13* trustee has not approved the requested borrowing, a copy of the denied request form.

The debtor must serve notice of the motion for Court approval on the *Chapter 13* trustee, the Office of the United States Trustee, and all creditors, and may notice the motion under the Court's default procedure. See **Vt. LBR 9013-4(b)**.

(c) Extraordinary Expenditure to Support Health and General Welfare During a *Chapter 13* Case. During the pendency of a *Chapter 13* case, a debtor may borrow and/or spend funds for an extraordinary, but necessary and reasonable, expense in order to maintain the health and general welfare of the debtor (and/or the debtor's dependents), but only with approval of the *Chapter 13* trustee or the Court, in accordance with the following procedure(s):

(1) Request for $5,000 or Less. The debtor must seek the *Chapter 13* trustee's approval, using a loan approval request (*Vt. LB Appendix VII*) if the request is for $5,000 or less. The debtor and the debtor's attorney, if any, must sign the request form. If the *Chapter 13* trustee determines the request will not involve a material modification of the debtor's

budget, and is in the best interest of the debtor and the bankruptcy estate, the *Chapter 13* trustee may approve the request and file the approved request form with the Clerk. The debtor is not required to serve any notice of this request on creditors if using this procedure.

(2) Request for Greater than $5,000 or Where the *Chapter 13* Trustee Declines to Approve Borrowing. The debtor must file a motion seeking the Court's approval where the debtor seeks to borrow more than $5,000 or where the *Chapter 13* trustee has declined to approve the debtor's borrowing request. The motion must set forth with specificity the nature of the expenditure, explaining why the debtor believes it is necessary and reasonable for the health and general welfare of the debtor and/or the debtor's dependents. If the *Chapter 13* trustee has not approved the requested borrowing, the debtor must also file a copy of the denied request form with the motion. The debtor must serve notice of this motion on the *Chapter 13* trustee, the Office of the United States Trustee, and all creditors, and may notice this motion under the Court's default procedure. See **Vt. LBR 9013-4(b)**.

W.D. La. L.B.R. Standing Order Adopting Procedure for Obtaining Credit in Chapter 13 Cases Assigned to Judge Jeffrey P. Norman

IT IS HEREBY ORDERED that, effective September 1, 2015, the following procedures and instructions adopted for use by all *Chapter 13* debtors to obtain credit.

IT IS FURTHER ORDERED that a debtor may not incur non-emergency consumer debt in excess of one thousand dollars ($1,000.00), including the refinancing of real property debt, without written approval of the *Chapter 13* Trustee or a court order under the procedure set forth herein.

(A) *Application Directed to Trustee*. The debtor shall first request approval to incur debt by written application to the *Chapter 13* Trustee. Such application shall include the items in section (C) below. Such application shall not be filed with the Court. If approved, the *Chapter 13* Trustee shall file the application and the approval with the Court, and the debtor may incur the debt in accordance with the terms and conditions therein without Court order pursuant to **11 U.S.C. § 1305(c)**.

(B) *Motion Directed to Court.* If the *Chapter 13* Trustee does not approve the debtor's application, the debtor may file a motion to incur such debt. The motion shall contain a copy of the trustee's denial of the application.

(C) *Contents of Application or Motion*. Any motion filed under *Rule 4001(c)*, including any application or motion pursuant to sections (A) and (B) above, shall contain the following:

(1) a statement in support of the feasibility of the request:

(2) a description of the item to be purchased or the collateral affected by the credit to be obtained;

(3) a description of the interest held by any other entity in any collateral affected by the

credit;
(4) the reasons the debtor needs the credit;
(5) the terms of any financing involved, including the interest rate;
(6) a description of any method or proposal by which an interest held by any other entity in the collateral affected by the credit may be protected; and
(7) copies of all documents by which the interest of all entities in the collateral affected by the credit was created or perfected, or, if any of those documents are unavailable, the reason for the unavailability. The debtor shall make its best effort to obtain and file any documents which are unavailable as soon as possible after the motion is filed.

(D) ***Hearing*****.** If the debtor asserts an immediate need for obtaining credit, the Court may schedule a hearing on the motion after notice has been provided to the *Chapter 13* Trustee and any entity claiming an interest in the collateral affected by the credit to be obtained. Notice provided may be by telephone, facsimile (fax) or email, if time does not permit notification by mail. Objections shall be filed at least one day prior to the hearing date.
Applications or motions that appear to the Court to meet all statutory tests for approval, and to which no objections have been filed, may be granted without actual presentation.
This Standing Order shall only apply to those *Chapter 13* cases assigned to Judge Jeffrey P. Norman.

S.D. Ind. Bankr. B-4001-3. OBTAINING CREDIT IN *CHAPTER 13* CASES

(a) Dollar Limits
(1) $1000 or Less. —
The Debtor may incur non-emergency consumer debt up to one thousand dollars ($1,000.00), including the refinancing of real property debt, without written approval of the trustee or order of the Court.
(2) Greater than $1000. —
The debtor must seek approval of the trustee or an order from the Court before incurring non-emergency consumer debt of more than one thousand dollars ($1,000) using the procedures set out in subparagraphs (b) through (d) of this Rule.

W.D. Wash. LBR Gen. Order 2014-2 (Adopting Revised Local Rules of Bankruptcy Procedure, W.D. Washington)

(k) Direct Plan Payments. Unless the court orders otherwise after the debtor justifies an exception, all payments to creditors, including pre-confirmation adequate protection payments made pursuant to **11 U.S.C. § 1326(a)(1)(C)**, shall be disbursed by the trustee, provided, however, that the debtor may make direct payments on the following obligations: domestic support obligation payments made by an assignment from a debtor's wages, leases of real and personal property, and deeds of trust/mortgages that are in a current status as of the date of the petition for relief.

In a *chapter 13* case, a debtor may make a written request directly to the *chapter 13* trustee for authority to incur post-confirmation debt for the purpose of financing the purchase of a motor vehicle. A debtor receiving the *chapter 13* trustee's approval to incur post-confirmation debt under this section does not need to also obtain a court order authorizing the debt. If the *chapter 13* trustee denies the debtor's request to incur post-confirmation debt under this section, the debtor is not precluded from submitting the request to the court pursuant to, and in the manner provided by, **Fed. R. Bankr. P. 4001(c)**, including noting the motion for hearing pursuant to Local Bankruptcy Rule 9013-1(d)(2)(E).

TAB 4D

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: CHAPTER 13 NOTICING ISSUES

DATE: MARCH 9, 2017

The Advisory Committee received two different suggestions relating to noticing matters particular to chapter 13 cases. These suggestions are: (i) Suggestion 12-BK-B, filed by Matthew T. Loughney (Chair, Bankruptcy Noticing Working Group), concerning Bankruptcy Rule 2002(f)(7) (Other Notices) and the absence of an order confirming a chapter 13 plan from this rule; and (ii) Suggestion 12-BK-M, filed by the Honorable Scott W. Dales, concerning Bankruptcy Rule 2002(h) (Notices to Creditors Whose Claims Are Filed) and the absence of creditors in chapter 13 cases from this rule.[1] In each instance, the applicable rule includes other, arguably similar situations under other chapters of the Bankruptcy Code, but not those arising under chapter 13. For example, Rule 2002(f)(7) specifies the process for serving notices of orders confirming plans under chapters 9, 11, and 12, but not under chapter 13. Likewise, Rule 2002(h) permits the court to limit notices under Rule 2002(a) to, among others, creditors holding allowed claims in chapter 7 cases, but it does not give the court this kind of discretion in chapter 13 cases.

The Subcommittee on Consumer Issues considered these suggestions during its conference call on February 27, 2017. This Memorandum analyzes each of these suggestions in turn, providing relevant background on the pertinent issues and analyzing the reasons for and

[1] These two suggestions initially were assigned to the Subcommittee on Business Issues in connection with the Noticing Project. After deliberations during its fall meeting, the Subcommittee on Business Issues referred the suggestions to this Subcommittee.

against excluding chapter 13 cases from these rules. It then summarizes the Subcommittee's deliberations on the suggestions and its recommendation to amend Rule 2002(f)(7) and Rule 2002(h) to add chapter 13 cases.

Suggestion Relating to Rule 2002(f)(7)

A. *Overview of Issue*

Bankruptcy Rule 2002 generally addresses the noticing of matters in bankruptcy cases. Bankruptcy Rule 2002(f), in turn, specifies the parties entitled to receive notice of certain key events in bankruptcy cases. One of these events is an order confirming a plan. Rule 2002(f)(7) provides:

> (f) Other Notices. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:
>
> …
>
> (7) entry of an order confirming a chapter 9, 11, or 12 plan;[2]

Noticeably absent from the language of Rule 2002(f)(7) is an order confirming a plan under chapter 13.

Suggestion 12-BK-B recommends adding chapter 13 to the other plan chapters listed in Rule 2002(f)(7). The suggestion observes, "There is not a rule specifically addressing the notice of entry of an order confirming a chapter 13 plan, and no reason is identified in the Committee note for this omission."[3] Additional research uncovered a proposed amendment to Rule 2002(f) that would have made the rule applicable to any plan chapter, but the Advisory Committee, without comment, rejected that amendment. This history is discussed further below. In addition,

[2] FED. R. BANKR. P. 2002(f)(7).
[3] *See* Suggestion 12-BK-B.

the Advisory Committee should consider the potential advantages and disadvantages to adding chapter 13 to Rule 2002(f)(7), as well as the need for any such an amendment.

B. *Analysis of Rule 2002(f)(7) and Chapter 13 Plan Confirmation Orders*

In 1988, the Advisory Committee considered a package of amendments to the bankruptcy rules to address chapter 12 of the Bankruptcy Code, which was added to the Code by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. The Reporter's memorandum to the Advisory Committee observed that "[t]he interim rules [on chapter 12] properly recognize that the procedural aspects of chapter 12 and chapter 13 are similar."[4] The Reporter further recommended amending Rule 2002(f)(7) to read: "[T]he clerk, or some other person as the court may direct, shall give the debtor, all creditors, and the indenture trustees notice by mail of … (7) entry of an order confirming a plan."[5] The proposed Committee Note to this amendment stated, "Subdivision (f)(2) … is amended to include entry of an order confirming a chapter 12 or 13 plan, as well as a chapter 9 or 11 plan."[6] The Reporter's Comments explained,

> Subdivision (f)(8), renumbered (f)(7), is changed so that notice of the entry of an order confirming a plan will be given to the debtor and all creditors in chapter 12 and chapter 13 cases, as well as in chapter 9 and 11 cases. *I do not know why chapter 13 was not included in the existing rule.*[7]

As noted above, the Advisory Committee did not accept this proposed amendment to Rule 2002(f). The materials that I was able to locate, however, did not explain the reasons for the Advisory Committee's actions.[8] The minutes of the Advisory Committee meeting only state,

[4] MEMORANDUM OF REPORTER ALAN N. RESNICK RE PROPOSED AMENDMENTS RELATING TO CHAPTER 12, dated September 2, 1988, at 1.
[5] *Id.* at 8-9.
[6] *Id.* at 9.
[7] *Id.* at 10 (emphasis added).
[8] Several of these materials were accessed with the assistance of Scott Myers and Bridget Healy.

> Rule 2002(f). The Committee approved, with two opposed, restoring the previously deleted phrase "chapter 9 or 11" and the addition of chapter 12 to the list of confirmation orders the entry of which docket must be noticed.[9]

Under the current rule, as recognized by the suggestion, courts can serve the notice of a chapter 13 confirmation order pursuant to Rule 9022. That rule provides, in relevant part, "Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) F.R.Civ.P. on the contesting parties and on other entities as the court directs…. Service of the notice shall be noted in the docket."[10] Nevertheless, the suggestion comments that "it would be helpful to have a rule that specifically addresses this notice in chapter 13 cases in order that it be made clear who should receive it."[11]

C. *Potential Responses to the Suggestion*

Based upon the materials available, it is difficult to discern a justification for excluding chapter 13 from Rule 2002(f). Admittedly, the Advisory Committee previously considered this omission and declined to remedy it. But the lack of explanation for this action, and the Reporter's note that he did "not know why chapter 13 was not included in the existing rule," leave room for the Advisory Committee to consider the issue anew. Indeed, this fresh consideration of the issue is likely warranted given the change in chapter 13 practice since 1988 and the Advisory Committee's pending consideration of electronic noticing in bankruptcy cases.

One could surmise that the Advisory Committee rejected the addition of chapter 13 to Rule 2002(f) because of the amount of additional noticing that might be imposed upon the clerk by adding chapter 13 to the rule. Indeed, a comment submitted by William R. Parker in 1989 asked the Advisory Committee to limit notices of discharge in chapter 13 cases because,

[9] MINUTES OF THE MEETING OF NOVEMBER 4-5, 1988, ADVISORY COMMITTEE ON BANKRUPTCY RULES, at 13.
[10] FED. R. BANKR. P. 9022(a).
[11] *See* Suggestion 12-BK-B.

according to the comment, "[t]here [was] universal agreement by the clerks contacted that the notice of discharge should be eliminated. Instead, a notice would be given only if a discharge is waived, denied, or revoked."[12] This comment suggests some concern with the extent of noticing in chapter 13 cases. Such a concern could have influenced the Advisory Committee's action on Rule 2002(f).

The burden imposed on the clerk's office by the extensive noticing requirements of the bankruptcy rules has not changed much since 1988, other than perhaps to have intensified given the increase in the number of cases and parties involved in those cases since that time. The number and quantity of required notices in bankruptcy cases underlies, in part, the Advisory Committee's recent consideration of electronic filing, noticing, and service issues. The Advisory Committee has published for public comment an amendment to Rule 5005 that would require electronic filing by all represented parties, subject to limited exceptions. Likewise, the Advisory Committee is considering potential amendments to the bankruptcy rules that would permit broader use of electronic means to provide notice and service to parties in bankruptcy cases. Moreover, the Advisory Committee on Civil Rules already has published for public comment such an amendment to Civil Rule 5(b), which is incorporated by reference into certain bankruptcy rules, including Rule 9022 discussed above.

Based on the research to date, the justifications for excluding chapter 13 cases from Rule 2002(f) are relatively weak. Adding chapter 13 confirmation orders to Rule 2002(f) would, as suggested by Mr. Loughney, provide clarity to courts regarding the expected service of such orders.[13] It also would bring chapter 13 procedures in line with the other plan chapters.

[12] BANKRUPTCY RULE COMMENTS SUBMITTED BY WILLIAM R. PARKER, dated July 13, 1989, at 3.
[13] *See* Suggestion 12-BK-B.

Suggestion Relating to Rule 2002(h)

A. *Overview of Issue*

Bankruptcy Rule 2002(h) provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the court) to give "the debtor, the trustee, all creditors and indenture trustees" at least 21 days' notice by mail of certain matters in bankruptcy cases.[14] Rule 2002(h), in turn, provides:

> (h) Notices to Creditors Whose Claims are Filed. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under §341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.[15]

Suggestion 12-BK-M recommends adding chapter 13 cases to Rule 2002(h) in order to allow courts to limit notice in such cases when appropriate under the circumstances. The suggestion notes the time and cost associated with providing extensive notice in chapter 13 cases, and lawyers' desire to mitigate these expenses to the extent possible. Judge Dales explains, "For practical reasons I have been receptive to [the lawyers'] arguments, but have felt constrained by the Bankruptcy Rules as presently drafted to require notice that in many instances increases expense without increasing participation or improving decisions on the merit."[16]

[14] FED. R. BANKR. P. 2002(a).
[15] FED. R. BANKR. P. 2002(h).
[16] *See* Suggestion 12-BK-M.

B. *Analysis of Rule 2002(h) and Chapter 13 Cases*

The Committee Note to Rule 2002(h) explains, "After the time for filing claims has expired in a chapter 7 case, creditors who have not filed their claims in accordance with Rule 3002(c) are not entitled to share in the estate except as they may come within the special provisions of §726 of the Code or Rule 3002(c)(6)."[17] As the suggestion notes, this language of the Committee Note is "equally applicable across all chapters."[18] The Committee Note does not indicate why the rule is limited to chapter 7 cases.

In a chapter 13 case, as in a chapter 7 case, a creditor must file a proof of claim in order to have an allowed claim against the bankruptcy estate.[19] Moreover, Rule 3002(c), which applies to chapter 7, 12, and 13 cases, requires a creditor to file a proof of claim, "not later than 90 days after the first date set for the meeting of creditors."[20] Rule 3002(c) does include several exceptions to the filing deadline, but the current language of Rule 2002(h) accounts for at least two of these exceptions. Specifically, Rule 2002(h) provides, in relevant part, "the court may direct that all notices required by subdivision (a) of this rule be mailed only to … creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2)."[21] Moreover, any limitation under Rule 2002(h) is discretionary with the court, which allows the court to consider the circumstances of any given case.

C. *Potential Responses to the Suggestion*

The suggestion to limit notices in chapter 13 cases under Rule 2002(h) is consistent with several other suggestions submitted to the Advisory Committee that focus on the purpose of

[17] FED. R. BANKR. P. 2002(h), Committee Note.
[18] *See* Suggestion 12-BK-M.
[19] FED. R. BANKR. P. 3002(a).
[20] FED. R. BANKR. P. 3002(c).
[21] FED. R. BANKR. P. 2002(h).

notices in bankruptcy cases, the interests of parties required to be served with notices, and the costs associated with that service.[22] As referenced above, permitting the clerk and other parties to serve papers, including notices, in bankruptcy cases electronically would likely mitigate significantly the costs imposed by bankruptcy noticing. This would include the notices required by Rule 2002(a). Accordingly, the Advisory Committee could defer action, or take no action, on Rule 2002(h) on the grounds that potential action by the Advisory Committee to endorse broader use of electronic notices will ease costs and burdens associated with noticing multiple parties in chapter 13 cases.

Alternatively, the Advisory Committee may still find value in allowing courts to limit notice in chapter 13 cases under Rule 2002(h), particularly if the Advisory Committee recommends adding chapter 13 confirmation orders to Rule 2002(f)(7). If chapter 13 is added to Rule 2002(f)(7), all creditors would receive not only the notice of the confirmation hearing under Rule 2002(b), but also notice of the confirmation order under Rule 2002(f)(7). These notices, in addition to the notice of the section 341 meeting under Rule 2002(a), arguably provide creditors who do not file proofs of claim adequate notice of the bankruptcy case and an opportunity to be heard in the case.[23] The amendment of Rule 2002(f)(7) and Rule 2002(h) to add chapter 13 cases may work together to enhance efficiency in chapter 13 noticing.

The Subcommittee's Deliberations

The Subcommittee reviewed the language of Rule 2002(f)(7) and the Advisory Committee's previous consideration of this particular issue. Members tried to identify potential justifications for excluding chapter 13 cases from the provision identifying the parties to receive

[22] *See generally* Noticing Memorandum.
[23] The limitation imposed by Rule 2002(h) applies only to notices under Rule 2002(a) and only to notices under that rule transmitted after the section 341 meeting and the deadline for filing proofs of claim.

notice of a confirmation order. They were not able to articulate any meaningful grounds for continuing the exclusion and agreed that chapter 13 cases should be included in the language of Rule 2002(f)(7).

The Subcommittee then considered the potential application of Rule 2002(h) to chapter 13 cases. Members walked through the various scenarios that might occur in a chapter 13 case after the claims bar date or confirmation order that would warrant notice to all creditors, even those not holding allowed claims. Members generally agreed that most instances would be covered by the notices under Rules 2002(b), (e), and (f), which are served on all creditors and not limited by Rule 2002(h). They also recognized that Rule 2002(h) provides for exceptions relating to the filing of the claim itself. On balance, the Subcommittee determined that the cost and time savings generated by limiting notices under Rule 2002(h) in both chapter 7 and chapter 13 cases supported an amendment.

In discussing this potential amendment to Rule 2002(h), the Subcommittee highlighted the need to amend that section once the pending amendments to Rule 3002 (Filing of Proof of Claim or Interest) become effective. The Subcommittee agreed that the amendments discussed in this Memorandum to Rule 2002 should be proposed with an amendment addressing the changes necessitated by amended Rule 3002. Accordingly, the Subcommittee recommends that the Advisory Committee approve the following amendments to Rule 2002, but hold these amendments until amended Rule 3002 becomes effective:[24]

[24] A marked version of Rule 2002, with the proposed amendments, is attached at Appendix A.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief Is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

***

(f) Other notices

Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

***

(7) entry of an order confirming a chapter 9, 11, 12, or 13 plan;

***

(h) Notices to creditors whose claims are filed

In a voluntary chapter 7 case or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order of conversion to a case under chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to clause (7).

Subdivision (h) is amended to add cases under chapter 13 of the Bankruptcy Code

and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief Is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

***

(f) Other notices

Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

***

(7) entry of an order confirming a chapter 9, 11, 12, or ~~12~~13 plan;

***

(h) Notices to creditors whose claims are filed

~~In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code~~In a voluntary chapter 7 case or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order of conversion to a case under chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

TAB 5

TAB 5A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: REQUIRED AND OPTIONAL ELECTRONIC SERVICE

DATE: MARCH 10, 2017

At the November 2016 Advisory Committee meeting, the Subcommittee on Business Issues provided an overview of its ongoing work on the Noticing Project. That report identified five separate categories of issues, and it explained the general scope of, and potential approaches to, each category. The Subcommittee then recommended, and the Advisory Committee approved, a step-by-step approach to addressing some of the issues identified with notice and service in bankruptcy cases. The first step is to (i) align the bankruptcy rules with the proposed electronic service rules of Civil Rule 5(b), and (ii) enhance the application of that amendment in bankruptcy cases by requiring non-registered users to either opt in to, or opt out of, electronic notice and service. The Subcommittee will continue to study the remaining issues discussed in the October 2016 Memorandum, but it is not formulating any proposals on those issues at this time.[1]

The Subcommittee considered the first step in the Noticing Project during its conference call on March 3, 2017. This Memorandum summarizes (i) the different means to implement the first step in the Noticing Project, which seeks to mitigate some of the problems identified as Issue One and Issue Two in the Subcommittee's Memorandum to the Advisory Committee, dated October 21, 2016; (ii) the Subcommittee's deliberations on this aspect of the project; and

[1] In addition, the Subcommittee has recommended that no action be taken on Issue Five discussed in the October 2016 Memorandum, as those issues are governed by the amendments to chapter 8 of the bankruptcy rules.

(iii) the Subcommittee's recommendation on implementation. Specifically, the Subcommittee supports a process that would allow electronic notice and service on registered users and on other parties in interest with their consent. The Subcommittee proposes to facilitate this process through amendments to Rules 2002(g) and 9036 and by adding an election to receive notices and papers by email to the proof of claim form.

Overview of Issues One and Two

The bankruptcy rules govern, among other things, the noticing of parties in federal bankruptcy cases. These rules include the service of notices, pleadings, and other papers in bankruptcy cases, which often impact the substantive rights of potentially hundreds of parties. Noticing thus not only is important to ensure the service of justice in bankruptcy cases, but it also can be time-consuming, cumbersome, and expensive. These latter concerns underlie the problems identified in Issue One and Issue Two of the October 2016 Memorandum:

- *Issue One* considers the potential utility of broader application of electronic notice and service.[2]

- *Issue Two* focuses on the costs imposed by large filers in bankruptcy cases (e.g., financial institutions, landlords, credit card companies, utilities, etc.) who are not registered users in the court's electronic-filing system[3] and thus may not be subject to electronic notice and service, even if permitted for registered users.[4]

[2] *See* Suggestion 15-BK-H (BJAG); Suggestion 14-BK-E (NBC).
[3] *See id.* The Suggestions indicate that large filers may receive more than 100 notices or other papers form the court in a specified period of time, e.g., one month or one year.
[4] As explained further below, Bankruptcy Rule 9036 allows the clerk to notice parties electronically if "the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission." FED. R. BANKR. P. 9036. The registered user agreements for the courts' electronic-filing system all require that the register user consent to electronic notice from the Court. These agreements do not, however, allow parties other than the court to serve or notice electronically. They also do not apply to non-registered or limited registered users.

Unlike many civil or criminal matters, a single bankruptcy case may involve hundreds of parties, and the bankruptcy rules require the clerk (or some other party as the court may direct) to notice or serve certain papers on all of these parties on numerous occasions. For example, under Rule 2002(a), the clerk or some party as the court may direct must serve *by mail* the listed notices on the debtor, the trustee, all creditors, indenture trustees, any committees, the U.S. Trustee, and maybe equity security holders. Additionally, attorneys may file notices of appearance, and attorneys and parties may file requests for service, in cases that enlarge the recipient pool. This approach takes time and is expensive; notably, either the judiciary or, increasingly more so, the bankruptcy estate must pay for this kind of notice. For example, the clerk's office pays $0.05 for each notice sent electronically,[5] but pays $0.30 for each notice sent by mail. The BJAG's suggestion quantifies these costs as follows, "As of June 30, 2015, electronic noticing accounted for 38.4% of all notices sent through the BNC, and it yielded the judiciary a postage savings of close to $10 million in fiscal year 2014."[6]

Relevant Background on Issues One and Two

A number of relevant factors have changed since the adoption of the bankruptcy rules in 1983. Technology has advanced, making electronic transmission more reliable and more widely used than many other modes of communication. The judicial system likewise has adopted electronic-filing systems, including the CM/ECF system and the Electronic Bankruptcy Noticing (EBN) Program sponsored by the U.S. Court's Bankruptcy Noticing Center (BNC). Parties are increasingly more familiar and comfortable with electronic transmissions in judicial matters.

[5] This cost is paid by the clerks to the Bankruptcy Noticing Center to facilitate the electronic transmission.
[6] *See* Suggestion 15-BK-H (BJAG).

These developments have already fostered changes to judicial rules. Most recently, the appellate, bankruptcy, civil, and criminal advisory committees have proposed amendments to their respective rules governing electronic filing and, in some cases, electronic service. For example, the Advisory Committee's pending amendment to Rule 5005 provides, among other things:

> **(a) Filing**.
>
> *****
>
> (2) *Electronic Filing and Signing~~by Electronic Means.~~*
>
> (A) *By a Represented Entity—Generally Required; Exceptions.*~~A court may by local rule permit or require documents 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.~~ An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~

Likewise, the pending amendment to Civil Rule 5(b) reads,

> **(b) Service: How Made**.
>
> **(2)** *Service in General.* A paper is served under this
>
> rule by:
>
> **(A)** handing it to the person;
>
> *****
>
> **(E)** sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~that the person consented to in writing—in either of which events service is complete upon ~~transmission~~filing or sending, but is not effective if the ~~serving party~~filer or sender learns that it did not reach the person to be served; or

The Committee Note to the pending amendment to Civil Rule 5(b) explains, "Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means

was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons not represented by an attorney."[7]

Although the Advisory Committee did not address electronic service in its proposed amendment to Rule 5005, the proposed amendment to Civil Rule 5(b) will apply in adversary proceedings and contested matters under Bankruptcy Rule 7005. Moreover, Bankruptcy Rule 9036, which was amended in 1993, allows the clerk to send notices electronically if the recipient provides written consent. The clerk often facilitates this written consent through the registered user agreement associated with the court's electronic-filing system. For example, the registered user form for the U.S. Bankruptcy Court for the District of Colorado states, in pertinent part:

> By this registration, applicant agrees to adhere to General Procedure Order No. 2001-8 and the Administrative Procedures for Electronic Case Files attached thereto and referenced therein, including consenting to the electronic service of pleadings and other papers from the Court as set forth in paragraphs II.C.3. therein. Applicant further understands and agrees that upon entering an appearance as an Electronic Filer in a case or proceeding, such appearance does not constitute consent to receive notice and service by electronic means from other attorneys unless he or she files a specific consent for service by electronic means within such case or proceeding. Applicant further understands that upon notification of an error, omission, or other deficiency in a document filed electronically, the Electronic Filer shall correct said deficiency no later than the next court day, failing which said deficient document shall be deemed stricken.[8]

This consent, however, does not authorize parties other than the clerk to notice or serve by electronic means, and it does not capture parties who are not registered users.

The Subcommittee and the Advisory Committee considered these developments in evaluating Issues One and Two. The increasing use of electronic delivery in the judicial system, as well as in the legal profession and everyday communications more generally, supports a

[7] FED. R. CIV. P. 5(b), Committee Note to proposed amendments, published for public comment, August 2016.
[8] Electronic Case Filing (ECF) System, Electronic Filer Registration Form, U.S. Bankruptcy Court District of Colorado.

greater use of electronic notice and service in bankruptcy cases, particularly given the potential cost savings and efficiencies in process. The Subcommittee and the Advisory Committee, however, both agreed to proceed cautiously. The Bankruptcy Code and the bankruptcy rules are an integrated set of principles that have served the bankruptcy system well for many years. Courts and parties generally understand the rules, as well as their rights and obligations under the rules. Moreover, many courts and practitioners have structured their noticing practices to comply with the existing rules, and any changes to the parties to be served or the methods of service could require significant revisions to those practices.

In this context, the Subcommittee and the Advisory Committee discussed the systems used by parties to receive and track notices and other papers from the court and other parties in bankruptcy cases. Although lawyers have generally implemented systems to receive and monitor electronic notices, many creditors have established systems based on mail receipt. Such a system allows the creditor to identify a particular mailing address and person to receive notices and other papers, which may ease the burdens associated with tracking and responding to such documents. In fact, section 342 of the Bankruptcy Code enables a creditor to request notice at a particular address in certain chapter 7 or 13 cases or all such cases before that court.[9] The Subcommittee and the Advisory Committee gave significant consideration to the fact that

[9] Section 342(e) of the Bankruptcy Code allows a creditor to request notice at a specific address in a particular chapter 7 or 13 case by notifying the debtor and the court of such address.[9] Section 342(f) then provides the following option for creditors appearing in multiple cases,

> An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

Once a creditor files a notice under section 342(e) or (f), the debtor and the court in the context of section 342(e), and the court in the context of section 342(f), must notice the creditor at the specified address.

creditors may have relied on this section of the Bankruptcy Code in establishing their internal procedures, as well as the fact that the bankruptcy rules must account for the rights of parties under the Bankruptcy Code.

Potential Approaches to Issues One and Two

Based on the Subcommittee's research and its prior deliberations with the Advisory Committee regarding Issues One and Two, some enhanced use of electronic notice and service appears warranted. The Subcommittee discussed mandating electronic notice and service for all parties (other than pro se individuals), but that approach potentially conflicts with section 342 of the Bankruptcy Code and could prove very disruptive given courts' and parties' established practices and procedures.[10] Phasing in electronic noting and service would allow courts and parties to adjust to the new procedures while allowing both to start utilizing certain of the anticipated time and cost savings associated with electronic notice and service. Such an approach also would allow the Subcommittee and the Advisory Committee to monitor and evaluate the advantages and disadvantages to the increased use of electronic delivery.

The Subcommittee previously discussed using the proof of claim form to allow parties to opt in to, or out of, electronic notice and service.[11] The proof of claim form is one of the forms frequently used by non-registered users in bankruptcy cases, including the large filers discussed above. It is filed both electronically and manually, so it would capture most creditors who participate in bankruptcy cases.[12] The proof of claim form also already requests that the creditor

[10] These same problems exist in the context of mandating electronic notice and service for large filers.
[11] Bankruptcy Rule 2002(g) permits a creditor and other parties in interest to file a notice of address in any particular case. If no specific request is made, Rule 2002(g) allows the proof of claim or interest to serve as the designation of address for that party in that case. FED. R. BANKR. P. 2002(g).
[12] In some circumstances, a creditor is not required to file a proof of claim form. The Subcommittee could consider a separate form that allows any party in interest in a bankruptcy case to opt in to electronic

provide an email address. As such, adding language to apprise the creditor of its ability to opt in to, or out of, electronic notice and service would flow somewhat naturally from the existing form. One potential downside to using the proof of claim form is that not every creditor or party in interest in a bankruptcy case files that form.[13]

If the Advisory Committee is inclined to recommend an amendment to the proof of claim form, it also must determine whether to suggest an "opt in" or "opt out" approach. An opt-in approach is akin to the written consent required currently under the rules for a party to receive papers electronically. It would require the party to take an extra step to acknowledge that it agrees to receive notices and papers electronically. It also is a more gradual move toward electronic notice and service. An opt-out approach arguably would be more inclusive, bringing more parties into electronic notice and service. It also may be administratively easier to implement. Under either approach, the language on the proof of claim form could explain the consequences of the choice.[14]

Notably, a change to the proof of claim form alone likely is not sufficient to implement electronic notice and service on registered users and consenting parties by the clerk and other parties serving papers in bankruptcy cases. As discussed above, Rule 5005 does not address service, and Rule 9036 (as well as registered user agreements) limit the use of electronic notice and service to the clerk or such other person as directed by the court. This latter limitation

---

notice and service. Such a form would capture parties who are not creditors or who are not required to file proofs of claim.

[13] *See supra* note 11.

[14] Notably, the BNC already facilitates noticing by email, explaining "In lieu of registering a preferred mailing address [in accordance with section 342 of the Bankruptcy Code], an entity may register to receive notices electronically through the Electronic Bankruptcy Noticing (EBN) program."[14] The BNC and bankruptcy courts use the preferred creditor register and the EBN program to serve notices in bankruptcy cases. Parties outside of the court, however, do not have access to these databases.

means that a party filing a pleading in a case may not serve that pleading electronically absent the recipient's consent or a case management order providing otherwise.

To address these limitations and supplement any change to the proof of claim form (as well as the pending amendment to Civil Rule 5(b)), the Advisory Committee could recommend (i) a new subsection of Rule 5005 that incorporates Civil Rule 5(b), as amended, and an amendment to Rule 9036;[15] or (ii) more general amendments covering both electronic notice and service in Rule 2002(g) and Rule 9036. The former approach would align the structure of the bankruptcy rules more closely to the civil rules. For example:

> **Rule 5005:**
>
> (b) **Service: How Made**.
>
> (1) *General.* Any paper required to be served under these rules shall be served in the manner provided by Rule 5(b) F.R. CIV. P.
>
> (2) *Written Consent.* When these rules require written consent to receive notice or other papers by electronic means, such written consent may be given through any form, pleading, or other paper signed by the party and filed with the court.
>
> (3) *Service of Process.* This rule does not apply to any complaint or motion required to be served in accordance with Rule 7004.
>
> **Rule 9036:**
>
> Whenever the clerk or some other person as directed by the court is required by these rules to send notice by mail, ~~and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission~~ the clerk or such other person may send the notice to a registered user by filing it with the court's electronic-filing system or to any person by sending it by other electronic means that the person consented to in

[15] Although an amendment to Rule 5005 would follow more closely the structure of the civil rules, it would not necessarily address the section 342 designation issue and would continue to suggest different notice and service rules for the clerks and other parties in the case.

writing[16]—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served.[17]

Alternatively, the Advisory Committee could recommend a targeted amendment to Rule 2002(g) to allow for email, as well as mailing addresses, and then an accompanying more general amendment to Rule 9036:

(g) Addressing notices[18]

(1) Notices required to be mailed or otherwise delivered under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case.[19] For the purposes of this subdivision—[20]

(A) a proof of claim filed by a creditor or indenture trustee that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive notices ~~to~~at that address, unless a notice of no dividend has been given under Rule 2002(e) and a

[16] Although this language generally tracks the language of the proposed amendment on electronic service in Civil Rule 5(b)(2)(E), it changes the language slightly to clarify that the phrase "sending it by other electronic means that the person consented to in writing" refers not only to registered users, but also to other parties who consent to electronic transmission. If the Subcommittee adopts this approach, it could justify the change in language in light of the significant number of non-registered users and limited registered users that participate in bankruptcy cases. As such, there would be a bankruptcy-specific reason to support the change in language.

[17] Another approach would be to tweak the language of existing Rule 9036:

> Whenever the clerk or some other person as directed by the court is required by these rules to send notice by mail and the entity is a registered user in the court's electronic-filing system or the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.

[18] Rule 2002(g) was amended in 2001 to address the rights of creditors to designate addresses for receipt of notices in a particular case under section 342(e). The comment to that amendment explains:

> **Subdivision (g)** has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

[19] The comment to any amendment to Rule 2002(g) should explain that the rule contemplates an election by a creditor to opt in or out of electronic notice by providing its email address on the proof of claim form.

[20] The reference to "mailed" in this opening paragraph of Rule 2002(g) is necessary to capture the other subdivisions of Rule 2002 that require notice by mail. The proposed amendment to Rule 9036 then, in turn, permits electronic delivery in lieu of mail.

later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive notices ~~to~~at that address.

Rule 9036. Notice or Service Generally~~by Electronic Transmission~~

Whenever these rules require or permit the sending of a notice or the service of a paper by mail, the clerk or other party may send or serve the notice or paper to a registered user by filing it with the court's electronic-filing system or to any person by sending it by other electronic means that the person consented to in writing[21]—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served. This rule does not apply to any complaint or motion required to be served in accordance with Rule 7004.~~the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.~~

One potential advantage to this latter approach is that it addresses the designation issue raised by section 342(e) in the particular case in which the proof of claim is filed. It also facilitates future innovations in consent to electronic noticing by expanding the scope of Rule 9036, which is generally applicable in bankruptcy cases.

The Subcommittee's Deliberations

The Subcommittee reviewed the potential alternatives for facilitating electronic notice and service on an expanded pool of recipients that includes registered users, as well as non-registered or limited users. With respect to non-registered users, members discussed the advantages and disadvantages to an opt-in versus an opt-out approach to obtain the recipient's consent to electronic notice and service. Most members believed that an opt-in approach aligned more closely with affirmative consent, though they recognized that an opt-out approach might

[21] *See supra* note 15.

generate a larger pool of recipients. They also discussed the rights of creditors under section 342 of the Bankruptcy Code, with most members again favoring an opt-in approach to avoid creditors inadvertently waiving, or consenting to procedures different than, a previous election under that section. Accordingly, the Subcommittee agreed to propose an opt-in approach to facilitate consent to electronic notice and service on the proof of claim form.

The Subcommittee also discussed necessary amendments to the bankruptcy rules to allow the clerk and parties in the case to notice and serve by electronic means on both registered users and non-registered or limited users who consent to such procedures. Members reviewed both approaches discussed above and determined that amendments to Rule 2002(g) and Rule 9036 presented a more flexible approach that likely would accommodate innovations in electronic delivery modes. *The Subcommittee thus agreed to recommend the following package of proposed changes to the Advisory Committee:*

Amendment to Official Form 410

Add the language highlighted in red to Section 3 of the proof of claim form, after the listing of the creditor's email address:[22]

Contact phone _____

Contact email _____
❑ Check this box if you would like to receive all notices and papers by email instead of by regular mail.

Committee Note

The form is amended to allow the creditor to elect to receive all notices and other papers in the bankruptcy case by email. A creditor who makes this election consents to receiving notices and papers by electronic means in the particular case.

[22] The revised proof of claim form is attached at Appendix A.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief Is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

***

(g) Addressing notices

(2) Notices required to be mailed or otherwise delivered under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision—

(C) a proof of claim filed by a creditor or indenture trustee that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive notices ~~to~~at that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(D) a proof of interest filed by an equity security holder that designates ~~a mailing~~an address constitutes a filed request to ~~mail~~receive notices ~~to~~at that address.

Committee Note

Subdivision (g) of the rule is amended to allow a creditor to elect to receive notices by email.

Rule 9036. Notice or Service Generally~~by Electronic Transmission~~

Whenever these rules require or permit the sending of a notice or the service of a paper by mail, the clerk or other party may send or serve the notice or paper to a registered user by filing it with the court's electronic-filing system or to any person by sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served. This rule does not apply to any complaint or motion required to be served in accordance with Rule 7004.~~the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the~~

~~information by such electronic transmission. Notice by electronic means is complete on transmission.~~

Committee Note[23]

The rule is amended to permit both notice and service by electronic means. The use and reliability of electronic delivery has increased since the rule was first adopted. The amendments recognize the increased utility of electronic delivery, with appropriate safeguards for parties not filing an appearance in the case through the court's electronic-filing system.

The amended rule permits electronic notice or service on a registered user who has appeared in the case by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

[23] The language of this note largely tracks the Committee Note to Civil Rule 5, as amended.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410

Proof of Claim

12/18

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
_____ Name	_____ Name
_____ Number Street	_____ Number Street
_____ City State ZIP Code	_____ City State ZIP Code
Contact phone _____	Contact phone _____
Contact email _____	Contact email _____
❑ Check this box if you would like to receive all notices and papers by email instead of by regular mail.	

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

   __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ❑ No
   - ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
   - ❑ No
   - ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

   Limit disclosing information that is entitled to privacy, such as health care information.

   _____

9. **Is all or part of the claim secured?**
   - ❑ No
   - ❑ Yes. The claim is secured by a lien on property.

     Nature of property:
     - ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
     - ❑ Motor vehicle
     - ❑ Other. Describe: _____

     Basis for perfection: _____

     Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

     Value of property: $_____

     Amount of the claim that is secured: $_____

     Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

     Amount necessary to cure any default as of the date of the petition: $_____

     Annual Interest Rate (when case was filed)_____%
     - ❑ Fixed
     - ❑ Variable

10. **Is this claim based on a lease?**
    - ❑ No
    - ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ❑ No
    - ❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.

❑ I am the creditor's attorney or authorized agent.

❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

TAB 5B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: ABANDONMENT AND BANKRUPTCY RULE 6007

DATE: MARCH 10, 2017

The Advisory Committee received a suggestion from the Honorable A. Benjamin Goldgar[1] concerning the process for abandoning estate property under section 554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent treatment afforded notices to abandon property filed by the bankruptcy trustee and motions to compel the trustee to abandon property filed by parties in interest. Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest's motion to compel abandonment. Presumably, Bankruptcy Rules 9013 and 9014 supplement the service requirements for motions filed pursuant to section 554(b) of the Bankruptcy Code and Rule 6007(b), but that process still allows for variance in abandonment procedures and, as described below, has caused some confusion in the case law.[2]

The Subcommittee on Business Issues considered this suggestion during its conference call on March 3, 2017. This Memorandum summarizes (i) the issues raised by the suggestion; (ii) the Subcommittee's deliberations on the suggestion; and (iii) the Subcommittee's

[1] *See* Suggestion 16-BK-C. Judge Goldgar is a member of the Advisory Committee.

[2] In addition, Rule 9014 itself creates some uncertainty as to when a motion constitutes a "contested matter," thus invoking the requirements of Rule 9014. *See, e.g.*, Dave Baddley, *Are You Paying "Attention" When Serving Contested Matters Under Bankruptcy Rule 7004(b)(3)?*, AM. BANKR. INST. J., March 2005, at 46, http://www.abi.org/abi-journal/are-you-paying-attention-when-serving-contested-matters-under-bankruptcy-rule-7004b3#7. *See also infra* note 15.

recommendation that the Advisory Committee propose an amendment to Rule 6007(b) to clarify the parties to receive notice when a third party files a motion to compel abandonment.

Overview of Issue

Section 554 of the Bankruptcy Code authorizes the trustee, after notice and hearing, to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[3] Section 554 also provides that "[o]n the request of a party in interest and after notice and hearing, the court may order the trustee to abandon any property of the estate" that could be abandoned under subsection (a) of that section.[4] Courts interpreting these two sections have determined, among other things, that only the trustee has standing to abandon property of the estate,[5] and that a hearing is not mandatory under either subsection if the notice or motion provides sufficient information concerning the proposed abandonment, is properly served, and neither the trustee, debtor, nor any other party in interest objects to the notice or motion.[6] Consequently, the content and service of a notice to abandon, or a motion to compel the abandonment of, estate property is critically important to the resolution of the matter.

Bankruptcy Rule 6007 addresses the service of abandonment pleadings. Subsection (a) of the rule applies only to notices to abandon property filed by the trustee, and it is very detailed, providing:

[3] 11 U.S.C. § 554(a). The "trustee" under this section includes a "debtor in possession" pursuant to section 1107 of the Bankruptcy Code. 11 U.S.C. § 1107.
[4] 11 U.S.C. § 554(b). The "debtor" typically considered a party in interest for purposes of abandonment and must follow the procedures of section 554(b) and Rule 6007(b) in order to compel the trustee to abandon estate property. *See, e.g.*, *Wissman v. Pittsburgh Nat. Bank*, 942 F. 2d 867, 873 (4th Cir. 1991); *In re Martino*, 2012 WL 1439091, at *5 (Bankr. D. Colo. Apr. 26, 2012).
[5] *See, e.g., In re Wideman*, 84 B.R. 97, 101 (Bankr.W.D.Tex.1988); *In re Gantt*, 98 B.R. 770, 771 (Bankr. S.D. Ohio 1989); *In re Preston*, 82 B.R. 28, 30 (Bankr.W.D.Va.1987).
[6] *See* 11 U.S.C. § 102(1). *See also In re Cook*, 520 Fed. Appx. 697 (10th Cir. 2013) (explaining that although section 102(1) authorizes "'an act without an actual hearing,'" including in the abandonment context, such section was not applicable in the case before the court because notice was not proper).

> Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.[7]

Subsection (b), on the other hand, applies to motions to compel abandonment, and it states only, "A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate." Several courts have observed the different nature of the two subsections of Rule 6007.[8] In addition, at least one court and *Collier on Bankruptcy*[9] have noted the potential confusion created by the Committee Note to the rule, which provides, "*Subdivision (b)* implements §554(b) which specifies that a party in interest may request an order that the trustee abandon property. The rule specifies that the request be by motion and, pursuant to the Code, lists the parties who should receive notice."[10]

Courts' Approaches to Rule 6007(b)

The abandonment of property—whether voluntarily by the trustee or upon the request of a party in interest—removes that property from the estate and the reach of the debtor's general unsecured creditors. As such, courts scrutinize both the content and service of notices and motions to abandon property. Given the different nature of the two subsections of Rule 6007, courts have developed different approaches to assessing the adequacy of service by a party in interest of its motion to compel abandonment under Rule 6007(b). These approaches generally

[7] FED. R. BANKR. P. 6007(a).
[8] *See, e.g.*, *In re HIE of Effingham, LLC*, 2014 WL 1304641 at *5 (S.D. Ill. Mar. 28, 2014) (noting the different service standards set forth in Rule 6007(a) and (b) and observing that Rule 6007(b) "is silent on the issue of whom is to be given notice of such motions"). *See also Dunlap v. Independence Bank*, 2007 WL 2827649 (W.D. Ky. 2007); *In re Caron*, 50 B.R. 27 (Bankr.N.D.Ga.1984).
[9] *See HIE of Effingham*, 2014 WL 1304641 at *5 (citing COLLIER ON BANKRUPTCY ¶ 6007.02[2][B]).
[10] FED. R. BANKR. P. 6007(b), 1983 Committee Note.

include reading subsection (b) as incorporating the service requirements of subsection (a); using the service requirements imposed by Rules 9013 and 9014 for motions filed in the bankruptcy case; or specifying by order or local rule the parties required to be served under Rule 6007(b). For example, the local rules for the U.S. Bankruptcy Court for the Western District of Kentucky provide:

> **(a) Notice of Abandonment Contained in 341 Meeting Notice.** The section 341 meeting notice states that the trustee, upon the filing a report of no distribution with the Court, proposes to abandon all property which is of no value to the estate. All property of the estate will, therefore, be deemed abandoned if:
> (1) A report of no distribution is filed by the trustee; and
> (2) No objections are filed within thirty (30) days from the section 341 meeting.
>
> **(b) Creditor Motion for Abandonment.** When the above two conditions are not met and a creditor wishes to move for abandonment of property, these procedures shall be followed:
> (1) *Service.* A motion for a proposed abandonment by a party in interest shall be served on:
> (A) the trustee;
> (B) the debtor or debtor-in-possession;
> (C) debtor's or debtor-in-possession's attorney;
> (D) members of any creditor's committee and its attorney;
> (E) any person or entity claiming an interest in or lien against the property to be abandoned; and
> (F) any creditor requesting specific notice of proposed abandonments.[11]

Those courts reading subsections (a) and (b) of Rule 6007 as creating parallel noticing requirements reason that the purpose of service under the two subsections is identical and that little, if any, reason exists to treat them differently. As Judge William Norton explained in *In re Caron:*

> There is no less reason that all parties in interest should receive notification of the Rule 6007(b) motion of a party in interest to require the trustee to abandon property than there is for all parties in interest to receive notification of the

[11] U.S. BANKR. CT. RULES W.D. KY., L.B.R. 6007-1. It should be noted that not all local rules take this approach. Some speak only to a party in interest serving "notice" of a motion to compel abandonment. *See, e.g.,* U.S. BANKR. CT. RULES D. ARIZ., L.B.R. 6007-1. Others limit the parties entitled to service, even under Rule 6007(a). *See, e.g.,* U.S. BANKR. CT. RULES N.D. GA., L.B.R. 6007-1.

> Rule 6007(a) notice of the trustee to abandon property. The purpose of the notification to parties in interest is to provide an opportunity for any potential opposition to the abandonment of such property to file objections and be heard by the Court.[12]

Other courts reach a similar result by invoking Rule 9013 and directing the movant to serve all parties in interest. Rule 9013 provides, "The moving party shall serve the motion on: (a) the trustee or debtor in possession and on those entities specified by these rules; or (b) the entities the court directs if these rules do not require service or specify the entities to be served."[13] As Chief Judge Herndon explained in *HIE of Effingham*, "Where the rules are silent…, Rule 9013 provides for the service on parties as directed by the court. Courts generally require service on all creditors, indenture trustees, committees, and the United States trustee, i.e., the same parties entitled to notices of intent to abandon under Rule 6007(a)."[14] Nonetheless, an argument also exists that under the plain language of Rules 6007(b) and 9013, absent a court order or local rule to the contrary, service of the party in interest's motion to compel abandonment on only the trustee or debtor in possession is sufficient.[15]

Analysis of Proposed Amendments

In the suggestion, Judge Goldgar identifies several issues with the abandonment process under Rule 6007(b). He notes that Rule 6007(b) fails to identify the parties to be served with a motion to compel abandonment. He also explains that "[a]bandonment can be controversial, and it is not that unusual for creditors to object. It would be better if all abandonment requests

[12] 50 B.R. at 29-30.
[13] FED. R. BANKR. P. 9013.
[14] 2014 WL 1304641 at *5 (citing COLLIER ON BANKRUPTCY ¶ 6007.02[2][B]).
[15] In addition, it should be noted that, in *In re Caron*, Judge Norton suggested that the filing of a motion under Rule 6007(b) "commences a contested matter proceeding under Rule 9014 which is a judicial proceeding requiring a judicial order." 50 B.R. at 31. Rule 9014 incorporates certain of the rules applicable to adversary proceedings in bankruptcy cases, including Rule 7004 governing service of process.

required a 14-day notice and if that notice had to be given, at a minimum, to all creditors." Although Judge Goldgar recognizes that the courts' local rules may clarify the process for a party in interest to file a motion to compel abandonment, he posits that local practices and local rules may vary and that "[i]n all likelihood, notice of these motions under local practice is minimal."

The cases and local rules reviewed for purposes of preparing this Memorandum support the concerns identified by Judge Goldgar. The language of Rule 6007(b), in juxtaposition to Rule 6007(a), is potentially confusing given the parity in the language of subsections 554(a) and (b)[16] and the 1983 Advisory Committee Note on Rule 6007(b).[17] Courts and parties strive to interpret Rule 6007(b), in light of Rule 6007(a) and Rule 9013, in a manner that best serves the interests of the estate.[18] Although courts generally find their way to imposing service similar to the notice required by Rule 6007(a), the party in interest who filed the motion to compel abandonment may have reached a different conclusion. The uncertainty for movants is expressed by the following passage from *Norton Bankruptcy Law & Practice*,

> Presumably, the same parties entitled to receive notice of a proposed abandonment by the trustee or debtor in possession under subdivision (a) are entitled to notice of the motion from the party in interest. When in doubt, expanded notice may be given, or a motion to reduce notice may be appropriate.[19]

[16] The only meaningful differences between the two subsections of section 554 are the parties seeking to abandon property of the estate and the mode for seeking such relief: subsection (a) states, "After notice and a hearing, the trustee may abandon"; and subsection (b) states, "On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon." 11 U.S.C. § 554.
[17] *See supra* note 10 and accompanying text.
[18] *See supra* notes 12-15 and accompanying text.
[19] 4 NORTON BANKR. L. & PRACT. 3d § 74:12 (citations omitted).

In addition, local rules appear to vary concerning the parties to be served, whether the motion or simply a notice of the motion must be served, and the time within which any objections to the motion must be filed.[20]

The potential for confusion or uncertainty alone under Rule 6007(b) may not warrant action by the Advisory Committee if courts are otherwise addressing the issue adequately by orders or local rules. Indeed, any change to Rule 6007(b) may upset local practices and disrupt any certainty that courts have achieved through their rulings in their particular jurisdictions. Courts will likely, at a minimum, need to review their local rules and practices to ensure compliance with any amendments to Rule 6007(b). In addition, an argument exists that serving a motion to compel abandonment on the trustee, in her capacity as estate representative, is sufficient notice to the estate and its stakeholders. Unlike a trustee's unilateral decision to abandon property under section 554(a) and Rule 6007(a), a motion to compel abandonment requires a hearing or the trustee's consent to the requested action. If the latter, the trustee arguably should then file a notice of abandonment under Rule 6007(a).[21]

In balancing these factors, the Advisory Committee should consider the ultimate objective of notice to parties in bankruptcy cases. As the Supreme Court explained in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably [sic] to convey the required information and it must afford a reasonable time for those interested to make their appearance.

[20] *See supra* note 11 and accompanying text.
[21] Notably, the rules do not specifically address the trustee's obligations to notice a decision to abandon property that results from a motion to compel filed under section 554(b) and Rule 6007(b).

The *Mullane* case distinguished between a right granted by a procedural rule and constitutional due process, holding that statutory notice by publication was not sufficient to satisfy due process for individuals whose whereabouts were known.[22] The Court underscored the importance of constitutional due process in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). In *Espinosa*, the Court held that the debtor's failure to serve the creditor with a summons and complaint as required by Bankruptcy Rule 7004 did not violate the creditor's due process rights where that creditor had actual notice of the proceedings.[23] Again, the Court's focus was on notice and an opportunity to be heard. Although the bankruptcy rules may, as a matter of procedure, impose more stringent notice requirements, the rules should at least satisfy the *Mullane* standard for constitutional due process.

Rule 6007(b) arguably leaves open, and subject to interpretation, the extent and timing of service of a motion to compel abandonment. Although Rules 9013 and 9014, as well as courts' local rules, may help courts and parties fill that void, such an *ad hoc* approach to the issue creates opportunities for variances not only by jurisdiction, but also with respect to notices to abandon property filed by the trustee and motions to compel abandonment filed by a party in interest. Uniformity and due process concerns appear to weigh in favor of some amendment to Rule 6007(b).

The Subcommittee's Deliberations

The Subcommittee first discussed whether parties and courts need additional guidance under Rule 6007(b), given that Rule 9013 governs motions filed in bankruptcy cases. Although some members believed that the existing language of the rules was adequate, others found

[22] *Mullane*, 339 U.S. at 314.
[23] *Espinosa*, 559 U.S. at 272.

ambiguity and some confusion in the abandonment process under Rule 6007(b). Members considered the important implications for the estate when a third party seeks to compel abandonment of estate property, and they debated whether providing notice only to the trustee or debtor in possession was sufficient. Members also observed differences in how courts proceed once a motion to compel abandonment is granted—e.g., whether the trustee must file a notice to abandon property or, rather, the abandonment process is complete upon entry of the order granting the motion to compel.

On balance, the Subcommittee determined that the language of Rule 6007(b) should be clarified to identify the parties to be served with the motion and notice of the motion, as well as the fact that the entry of an order granting a motion to compel abandonment completes the abandonment process. *Accordingly, the Subcommittee recommends that the Advisory Committee propose the following amendment to Rule 6007:*

> (b) Motion by Party in Interest. A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion on the trustee or debtor in possession and shall give notice of the motion to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, no further notice of the proposed abandonment is required, unless otherwise directed by the court.
>
> Committee Note
>
> Subdivision (b) of the rule is amended to specify the parties to be served with the motion and notice of the motion. The rule also establishes an objection deadline. Both of these changes align subdivision (b) with the notice and objection procedures set forth in subdivision (a). In addition, the rule clarifies that no further action is necessary to notice the abandonment of property ordered by the

> court in connection with a motion filed under subdivision (b), unless the court directs otherwise.

The proposed amendment largely tracks the language of Rule 6007(a) and would clarify the process for third party motions brought under section 554(b) of the Bankruptcy Code and Rule 6007(b).

TAB 5C

TAB 5C1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: COMMENTS ON PROPOSED REVISIONS TO FORMS 425A, B, C

DATE: MARCH 10, 2017

As part of the Advisory Committee's Forms Modernization Project that began in 2008, the Advisory Committee deferred consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Advisory Committee referred those forms to the Subcommittee on Business Issues for review and consideration, which in turn appointed a working group to address these particular forms.[1] Based on the Subcommittee's recommendations, the Advisory Committee approved revised forms, renumbered as Official Forms 425A, 425B, 425C, and 426 for submission to the Standing Committee at its Spring 2016 meeting. The Standing Committee approved the proposed revisions to Official Forms 425A, 425B, 425C, and 426 for publication and comment at its June 2016 meeting.

The Advisory Committee received three public comments on the proposed revisions to Official Forms 425A, 425B, and 425C.[2] Each of these comments is summarized below. The Subcommittee considered each of the comments during its conference call on March 3, 2017. This Memorandum analyzes the comments and summarizes the Subcommittee's proposed responses to each comment. Specifically, the Subcommittee recommends incorporating three minor changes to Official Form 425A (the plan) and three minor changes to Official Form 425B

[1] The working group members are Judge Stuart Bernstein (Chair of the Subcommittee), Thomas Mayer, Ramona Elliott, and Michelle Harner (Prof. Harner's predecessor, Prof. Troy McKenzie, previously served on the working group).

[2] As noted above, the Advisory Committee also recommended, and the Standing Committee approved, proposed revisions to Official Form 426 (Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest). The Advisory Committee did not receive any comments on Official Form 426.

(the disclosure statement). In addition, one of these changes (i.e., caption format) applies to Forms 425C and 426 as well. Each of these proposed changes is explained below. The Subcommittee recommends final approval of proposed Official Forms 425A, 425B, 425C, and 426, as revised.

Background on Official Forms 425A, 425B, and 425C

Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) (which incorporates, among other things, section 704(a)(8)) of the Bankruptcy Code. The revised forms incorporate stylistic and formatting changes to conform to the general structure of the modernized forms. In addition, they reconcile several inconsistencies that existed between Official Forms 425A and 425B and the Bankruptcy Code.

Moreover, the Subcommittee and the Advisory Committee sought and received significant input from the Executive Office of the U.S. Trustee on Official Form 425C, which is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. As explained in the Committee Note to Official Form 425C, the form is rearranged to eliminate duplicative sections and further explain the kinds of information required by the form. It also clarifies that the person completing the form on behalf of the debtor must answer all questions, unless otherwise provided, and it provides a checkbox to indicate if the report is an amended filing.

Comments on Official Forms 425A, 425B, and 425C

The Advisory Committee received three public comments on the proposed revisions to Official Forms 425A, 425B, and 425C. Two of these comments largely support the proposed revisions, and one comment offers significant suggestions to the forms. The primary points of each comment are set forth below.

- ***Honorable Neil W. Bason, U.S. Bankruptcy Court for the Central District of California.*** Judge Bason submitted comments on Official Forms 425A and 425B. Specifically, Judge Bason suggests:
  - The two forms are redundant and should be streamlined to eliminate unnecessary repetition of plan provisions in the disclosure statement.
  - The charts at Part III.C of Official Form 425B only require disclosure of insider status for secured claims, but not for priority or unsecured claims. Judge Bason recommends adding insider disclosures to the latter two classes to facilitate the section 1129(a)(10) analysis.
  - Official Form 425B does not address whether a creditor has made a section 1111(b) election, or a process for creditors to exercise their rights under section 1111(b). Judge Bason suggests adding a provision explaining the section 1111(b) election and setting a deadline for creditors to make such an election.
  - The explanation of who may or may not vote on a plan is inconsistent and incomplete. Judge Bason suggests replacing this explanation in the disclosure statement and the relevant plan provisions with language that offers a different definition of "disputed claim" and a more extensive explanation of who may or may not vote.
  - The plan does not contain provisions dealing with claims reserves or unclaimed funds. Judge Bason offers language to address this issue.
  - The meaning of the term "final non-appealable order" as used in the plan is ambiguous. Judge Bason offers language to address this issue.
  - The terminology in the executory contracts section (i.e., "executory contract," "assume," "reject") is not well defined and may be confusing to non-lawyers. The plan should include a sample chart in Part III.F that shows how the debtor proposes to cure any defaults under executory contracts and unexpired leases. Judge Bason offers language to address these issues.
  - The two charts in Part II.C and III.D.2 should be combined to allow a better comparison of individuals who will and will not have a postpetition control position in the debtor.
  - The minimum statement concerning the tax consequences of the plan that is required by Part III.G of the plan is contrary to section 1125(a)(1). Judge Bason offers language to address this issue.
  - Add a separate signature line for a debtor's spouse.

- Add provisions (i) allowing the debtor under Section 5.03 of the plan to enter into settlements under a certain dollar amount on notice and without court approval; and (ii) providing that the court will retain jurisdiction over certain matters after the effective date of the plan.
- Delete sections 8.03 and 8.05 of the plan, which address severability and captions, respectively.
- Section 9.01 of the plan is wrong in referencing section 1141(d)(3) of the Bankruptcy Code, and it is unclear regarding the timing of any discharge.

- ***National Conference of Bankruptcy Judges (NCBJ).*** The NCBJ questions the decision to remove from Form 425B the hearing date on the disclosure statement and the deadlines for voting and filing objections. The NCBJ recognizes the Advisory Committee's justification for this change—i.e., the court's order provides this information. It asserts, however, that the additional disclosure of this information in the disclosure statement itself will benefit parties in small business cases.

- ***Pennsylvania Bar Association (PBA).*** The PBA supports the adoption of the proposed revisions to Official Forms 425A, 425B, 425C, and 426. It does, however, note that it received one comment encouraging the adoption of a new Official Form 425.1 that would offer a combined chapter 11 plan and disclosure statement form.

Proposed Responses to Comments

Overall, the comments on Official Forms 425A, 425B, and 425C support the Advisory Committee's proposed revisions. The comment from the PBA does not require a response, though the Advisory Committee may want to study the recommended new form for a combined chapter 11 plan and disclosure statement. The comment from the NCBJ raises valid concerns regarding the potential costs to streamlining the disclosure of hearing dates and relevant filing deadlines. The primary advantage to relying on the court's order is that it eliminates the potential for mistakes by having the same information listed in two different places. It also allows for greater ease in changes to these dates by subsequent court order. Section I.B of Official Form 425B does inform parties that these important dates are set forth in a separate order entered by the court. On balance, the court's order is likely sufficient.

The final set of comments from Judge Bason demonstrates a close reading of the proposed revisions to the forms and a thoughtful analysis of potential issues. Notably, the Subcommittee's working group considered some of these issues, and the proposed revisions to the official forms reflect the working group's recommended positions. Potential responses to Judge Bason's comments are as follows:

- The two forms are redundant and should be streamlined to eliminate unnecessary repetition of plan provisions in the disclosure statement.
    - *Potential Response:* The disclosures in the disclosure statement provide additional information about the plan provisions and are not directly duplicative. They also provide information that may help the debtor formulate the plan provisions. In addition, this structure is consistent with the requirements of old form 25B. The Advisory Committee could take no action at this time.

- The charts at Part III.C of Official Form 425B only require disclosure of insider status for secured claims, but not for priority or unsecured claims. Judge Bason recommends adding insider disclosures to the latter two classes to facilitate the section 1129(a)(10) analysis.
    - *Potential Response:* This observation is correct. Part III.C of the disclosure statement currently asks for insider status only in the context of Part III.C.1 (secured claims) and not Parts III.C.2 and 3 (priority and unsecured claims, respectively).[3] Although this part of the form is focused on claim treatment and not the status of the claimholder for voting purposes, there does not appear to be a reason to differentiate between the disclosures required for the three classes of claims. Accordingly, the Advisory Committee could recommend adding an insider disclosure box to Parts III.C.2 and 3 or otherwise making the disclosures for all three classes the same.

- Official Form 425B does not address whether a creditor has made a section 1111(b) election, or a process for creditors to exercise their rights under section 1111(b). Judge Bason suggests adding a provision explaining the section 1111(b) election and setting a deadline for creditors to make such an election.
    - *Potential Response:* The response to this comment depends somewhat on how much guidance the Advisory Committee believes that the official forms should provide creditors regarding their legal rights and remedies in bankruptcy cases. Creditors and other parties in interest have many rights under the Bankruptcy Code that might be implicated in the plan process. The official forms currently strive to inform parties of the debtor's plan, and the deadlines for parties in interest to exercise their respective rights under the Code. Accordingly, although

[3] Part II.B of the disclosure statement requires the debtor to list all insiders as defined in section 101(31) of the Bankruptcy Code and their relationship to the debtor.

the official form could explain the section 1111(b) election, it is not necessary to make the form complete or more accurate. That said, the proposed language drafted by Judge Bason is informative and likely would help creditors understand this particular right. On balance, however, the Advisory Committee could take no action at this time.

- The explanation of who may or may not vote on a plan is inconsistent and incomplete. Judge Bason suggests replacing this explanation in the disclosure statement and the relevant plan provisions with language that offers a different definition of "disputed claim" and a more extensive explanation of who may or may not vote.
    - *Potential Response:* The definition of "disputed claim" in Section 5.01 of the plan covers the essential components of the definition. Moreover, the disclosure statement's explanation of claims and interests entitled to vote on the plan aligns with section 1126 of the Bankruptcy Code and old forms 25A and 25B. That said, Judge Bason's point that this basic explanation does not sufficiently explain the nuances in whether a claim or interest is entitled to vote is well taken. Judge Bason proposes a more detailed explanation. An alternative would be to cross-reference Part IV.A.3 of the disclosure statement in the general description of claims and interests entitled to vote. For example, a sentence could be added after the second paragraph in Part IV.A of the disclosure statement that read, "In addition, as explained below, certain creditors and equity interest holders are not entitled to vote on the plan because of their proposed treatment or classification under the plan." Some clarification of the scope of the parties entitled to vote on the plan appears warranted.

- The plan does not contain provisions dealing with claims reserves or unclaimed funds. Judge Bason offers language to address this issue.
    - *Potential Response:* This comment is well taken, and encouraging a debtor to make disclosures regarding a claims reserve or the treatment of unclaimed funds could be beneficial. Neither of these concepts, however, needs to be in a plan. A claims reserve speaks to the feasibility of the proposed plan, which is addressed by section 1129(a)(11) of the Bankruptcy Code. Likewise, the treatment of unclaimed funds in a chapter 11 case is addressed by section 347(b) of the Bankruptcy Code. In addition, a debtor could add these provisions as part of its proposed plan. The Advisory Committee could take no action at this time, or it could add a claims reserve provision, as that kind of provision could be overlooked if no objections are filed to the plan.

- The meaning of the term "final non-appealable order" as used in the plan is ambiguous. Judge Bason offers language to address this issue.
    - *Potential Response:* The Subcommittee's working group considered the best terminology for this concept, and elected to use the term "final non-appealable order." Judge Bason suggests that this term could refer to an order that is not interlocutory, a final order as articulated by the Supreme Court in *Stern v. Marshall*, 546 U.S. 462 (2011), or a non-stayed order as to which the time for appeal has run. Judge Bason offers two definitions for "final" in this context. Although there are different ways in which an order may become a "final non-

appealable order," those standards are defined by applicable law. Those standards should continue to govern the term in the chapter 11 plan context. Accordingly, the Advisory Committee could take no action at this time.

- The terminology in the executory contracts section (i.e., "executory contract," "assume," "reject") is not well defined and may be confusing to non-lawyers. The plan should include a sample chart in Part III.F that shows how the debtor proposes to cure any defaults under executory contracts and unexpired leases. Judge Bason offers language to address these issues.
    - *Potential Response:* Part III.F defines assumption as "the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any." That definition adequately describes the assumption option. Trying to define the term "executory contract" is problematic, as courts currently do not interpret that term in a uniform or consistent manner (e.g., Countryman versus functional approach). Judge Bason recognizes this potential issue, but urges a general definition nonetheless. Given that the rules and forms cannot alter substantive law, formulating an appropriate definition would be difficult. Moreover, a chart to disclose cure amounts may be helpful, but is not necessary. The Advisory Committee could take no action at this time.

- The two charts in Part II.C and III.D.2 should be combined to allow a better comparison of individuals who will and will not have a postpetition control position in the debtor.
    - *Potential Response:* Part II.C asks the debtor to identify "all current officers, directors, managing members, or other persons in control (collectively the Management) who will not have a position post-petition that you list in III.D.2." Part III.D.2, in turn, asks the debtor to identify postpetition management. Although having this information in one place may help in comparing the two lists, these lists are mutually exclusive and serve different purposes in the context of the disclosure statement and plan. Part II.C speaks historically about the debtor, and Part III.D.2 speaks to the debtor's future operations. The Advisory Committee could take no action at this time.

- The minimum statement concerning the tax consequences of the plan that is required by Part III.G of the plan is contrary to section 1125(a)(1). Judge Bason offers language to address this issue.
    - *Potential Response:* Part III.G currently requires the debtor to identify the potential tax consequences of the plan to the debtor and to creditors. It does not set forth the standard of disclosure required to meet this section. Rather, a court will evaluate a debtor's disclosure in Part III.G under section 1125(a)(1), which governs adequate information for purposes of disclosure. This section also is consistent with the language in old form 25B. The Advisory Committee could take no action at this time.

- Add a separate signature line for a debtor's spouse.
    - *Potential Response:* To the extent the forms apply to individual chapter 11 debtors, this suggestion appears warranted.

- Add provisions (i) allowing the debtor under Section 5.03 of the plan to enter into settlements under a certain dollar amount on notice and without court approval; and (ii) providing that the court will retain jurisdiction over certain matters after the effective date of the plan.
    - *Potential Response:* Judge Bason raises valid points under this comment, as these kinds of provisions are generally included in a traditional chapter 11 plan. Neither of these comments is, however, necessary to make the plan accurate or more complete. In addition, a debtor could add these provisions as part of its proposed plan. Nevertheless, the Advisory Committee may want to consider adding a retention of jurisdiction provision (or providing a placeholder for one in the plan) because, at least in some jurisdictions, such a provision is necessary in order for the court to exercise jurisdiction over the plan after its effective date. Thus, the Advisory Committee could take no action at this time, or it could add a provision addressing retention of jurisdiction to highlight the need to consider this issue prior to confirmation.

- Delete sections 8.03 and 8.05 of the plan, which address severability and captions, respectively.
    - *Potential Response:* Judge Bason questions whether this boilerplate language is advisable in chapter 11 plans. He suggests that nonbankruptcy law is evolving on these issues and better addresses whether a contract remains enforceable and the impact of captions. The provisions do, however, provide certainty for the parties. They also are consistent with the language in old form 25A. The Advisory Committee could take no action at this time.

- Section 9.01 of the plan is wrong in referencing section 1141(d)(3) of the Bankruptcy Code, and it is unclear regarding the timing of any discharge.
    - *Potential Response:* Section 1141(d)(3) references section 727(a) in its entirety. Several subsections of section 727(a) apply to individuals. The Subcommittee's working group also considered and reviewed the discharge provisions at length, and recommended the current language as consistent with the Bankruptcy Code and applicable case law. In addition, the discharge provisions are largely consistent with the language in old form 25A. The Advisory Committee could take no action at this time.

The Subcommittee's Deliberations

The Subcommittee discussed each of the comments received to Official Forms 425A, B, and C, with a particular focus on several comments submitted by Judge Bason. With respect to the disclosure of insider status in Part III.C of the disclosure statement, members generally agreed that the disclosure requirements should be the same for each class of creditors. They

considered adding an insider disclosure to the priority and general unsecured classes, but then noted those classes are typically disclosed in the aggregate and not by individual claim. A plan provision requiring a debtor to list each priority and general unsecured claim to indicate whether the holder is an insider may be unduly burdensome and difficult to manage, at least in some cases. Members then discussed limiting the individual claim disclosures to only claims held by insiders and then allowing the debtor to disclose the remainder of the claims in that class in the aggregate. Again, members thought these kinds of changes would add more complexity to the form without necessarily adding corresponding value. To that end, members discussed the purpose of the disclosures in Part III.C and the objective of disclosing class claim amounts. The Part III.C chart is not focused on voting or whether a class might meet the voting requirements of section 1129(a)(10). *Accordingly, the Subcommittee recommends deleting the insider disclosure column from Part III.C.1 (Classes of Secured Claims).*

The Subcommittee then considered the explanation of who can vote on a plan in Part IV.A of the disclosure statement. Members generally agreed with Judge Bason's observation and suggested adding a cross-reference to Part IV.A.3 of the disclosure statement, which provides detailed information on the kinds of allowed and impaired claims not entitled to vote on the plan. *Accordingly, the Subcommittee recommends the addition of "Except as stated in Part IV.A.3 below," to the second paragraph in Part IV.A, as follows:*

> Many parties in interest, however, are not entitled to vote to accept or reject the Plan. Except as stated in Part IV.A.3 below, ~~A~~a creditor or equity interest holder has a right to vote for or against the Plan ~~only~~ if that creditor or equity interest holder has a claim or equity interest that is both
>
> (1) allowed or allowed for voting purposes and
> (2) impaired.

With respect to Judge Bason's suggestions concerning a claims reserve and retention of jurisdiction language, the Subcommittee discussed the need for addressing these kinds of issues in a small business plan form. Some members felt strongly that a debtor should disclose how the plan would fund the payment of disputed or contingent claims in the case. Although the feasibility determination under section 1129(a)(11) of the Bankruptcy Code should account for the payment of these claims, members debated whether that review was sufficient to protect the interests of creditors in the case, particularly if no objections are filed to confirmation of the plan. Members generally agreed, however, that the Bankruptcy Code does not require a plan to contain a claims reserve. Likewise, members discussed the importance of a retention of jurisdiction clause. Again, although not required, such a clause provides clarity concerning the resolution of postconfirmation disputes and may be required in some jurisdictions. Given the importance of, but different approaches to, both claims reserves and retention of jurisdiction clauses, the Subcommittee determined that the best approach would be to add a placeholder for such provisions in the plan. *Accordingly, the Subcommittee recommends the following changes to the plan form:*[4]

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the Plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

[4] Revised versions of the forms and committee notes are attached to this Memorandum.

Article 8: General Provisions

***

[8.08 Retention of Jurisdiction

[Language addressing the extent and scope of the bankruptcy court's jurisdiction after the effective date of the Plan.]

Finally, the Subcommittee discussed whether the signature block to the plan should include a space for a joint debtor, specifically a spouse in the case of an individual chapter 11 debtor. Members generally agreed with this suggestion, but subsequent research indicated that the caption to the plan and disclosure statement forms should identify only a single, non-individual debtor, with an instruction on how to complete the forms if there is an individual debtor or more than one debtor. *Accordingly, the Subcommittee recommends the following change to the caption of the plan and disclosure statement:*[5]

Fill in this information to identify the case and this filing:
Debtor Name _____
United States Bankruptcy Court for the: _____ District of _____ (State)
Case number (*If known*): _____

An instruction also will be added to the Committee Note to explain the appropriate caption and signature block for an individual chapter 11 debtor in a joint case. This instruction would reference the use of "Debtor 1" and "Debtor 2" and otherwise comply with the modernized forms.

[5] In addition, this change to the caption format applies to Forms 425C and 426 as well.

In addition, the following language will be added to the Committee Notes:[6]

Committee Note for Official Form 425A

Changes Made After Publication and Comment

- The caption on the plan was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals.
- A reference to a claims reserve, if any, was added to the list of potential information items to be discussed in Article 7 (Means for Implementation of Plan).
- Section 8.08 (Retention of Jurisdiction) was added to address the post-effective date jurisdiction of the bankruptcy court.

Committee Note for Official Form 425B

Changes Made After Publication and Comment

- The caption on the disclosure statement was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals.
- The column in Part III.C.1 (Classes of secured claims) for disclosing the insider status of creditors holding secured claims was deleted.
- A cross-reference to Part IV.A.3 was added to the introductory language in Part IV.A (Who May Vote or Object).

The Subcommittee recommends final approval of proposed Official Forms 425A, 425B, 425C, and 426, as revised.

[6] Language regarding the caption change will be added to the Committee Notes for Forms 425C and 426 as well.

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number: _____

❑ Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11 **12/17**

[Name of Proponent]'s Plan of Reorganization, Dated [Insert Date]

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income]**.**

This Plan provides for:
- [ ] classes of priority claims;
- [ ] classes of secured claims;
- [ ] classes of non-priority unsecured clams; and
- [ ] classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately [ ] cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

2.01	**Class 1**.....	All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)). [Add classes of priority claims, if applicable]
2.02	**Class 2**.....	The claim of [_____], to the extent allowed as a secured claim under § 506 of the Code. [Add other classes of secured creditors, if any. *Note*: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]
2.03	**Class 3**.....	All non-priority unsecured claims allowed under § 502 of the Code. [Add other classes of unsecured claims, if any.]

2.04	**Class 4**.....	Equity interests of the Debtor. [If the Debtor is an individual, change this heading *to The interests of the individual Debtor in property of the estate*.]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
3.04	**Statutory fees**	All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
3.05	**Prospective quarterly fees**	All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - **Priority claims** excluding those in Article 3	❑ Impaired ❑ Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 – **Secured claim** of [*Insert name of secured creditor*.]	❑ Impaired ❑ Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – **Non-priority unsecured creditors**	❑ Impaired ❑ Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - **Equity security holders of the Debtor**	❑ Impaired ❑ Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

5.01	**Disputed claim**	A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
5.02	**Delay of distribution on a disputed claim**	No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03	**Settlement of disputed claims**	The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01	**Assumed executory contracts and unexpired leases**	(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date: [List assumed, or if applicable assigned, executory contracts and unexpired leases.]
		(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01	**Definitions and rules of construction**	The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].
8.02	**Effective date**	The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.
8.03	**Severability**	If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.
8.04	**Binding effect**	The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.
8.05	**Captions**	The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 **Controlling effect**	Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [ ] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]
[8.07 **Corporate governance**	[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]
[8.08 **Retention of Jurisdiction**	Language addressing the extent and the scope of the bankruptcy court's jurisdiction after the effective date of the plan.]

Article 9: Discharge

Check one box.

9.01 ☐ **Discharge if the Debtor is an individual and § 1141(d)(3) is not applicable.** Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

☐ **Discharge if the Debtor is a partnership and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

☐ **Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or

(ii) to the extent provided in § 1141(d)(6).

☐ **No discharge if § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

✘ _____ _____

[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed Name]

COMMITTEE NOTE

Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*, replaces Official Form 25A, *Plan of Reorganization in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. It is intended to provide an illustrative format, rather than a specific prescription for the form's language or content of a plan in any particular case.

In Article 1, *Summary*, a category is added for priority claims that are required to be classified and provided for under the plan, and the category for "unsecured claims" is revised to provide for only "non-priority unsecured claims." Also, the value that the proponent estimates to be distributed to unsecured claims is revised to clarify that the estimate is limited to non-priority claims. The instruction to identify and briefly summarize priority and administrative claims that will not be paid on the effective date of the plan, to the extent permitted by the Bankruptcy Code, is eliminated because it is duplicative of the information requested in Articles 3 and 4.

In Article 2, *Classification of Claims and Interests*, section 2.01 is revised to clarify that the priority of claims is determined under section 507(a) of the Bankruptcy Code and to provide for the classification of priority claims where necessary and appropriate. *See* 11 U.S.C. § 1129(a)(9)(B). Section 2.03 is revised to clarify that Class 3 "unsecured claims" are limited to "non-priority unsecured claims."

In Article 3, *Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees*, the title and categories of claims have been revised to include all unclassified administrative and priority claims and all fees payable under 28 U.S.C. § 1930 for which the Bankruptcy Code specifies the treatment under the plan. *See* 11 U.S.C. § 1129(a)(9), (12). In the title, the reference to "United States Trustee fees" is changed to "Quarterly and Court Fees" to include all of the fees payable under

28 U.S.C. § 1930. Also, section 3.04 is revised to include all statutory fees under 28 U.S.C. § 1930(a), and quarterly fees payable under 28 U.S.C. § 1930(a)(6) and (7) after the effective date of the plan are moved to a new section 3.05.

Article 4, *Treatment of Claims and Interests Under the Plan*, is revised to conform to the changes made in sections 2.01 and 2.03 of the plan to classify priority claims, if applicable, and to distinguish the non-priority unsecured claims.

In Article 6, *Provisions for Executory Contracts and Unexpired Leases*, references to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable. Section 6.01 is revised to clarify that executory contracts and unexpired leases are assumed, and if applicable assigned, under section 6.01(a) and rejected under section 6.01(b) as of the effective date of the plan. Section 6.01(b) is revised to clarify that all executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Article 9, *Discharge*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

The caption block for the plan is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on the plan was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in non-individual chapter 11 cases and joint cases involving individual debtors.

- A reference to a claims reserve, if any, was added to the list of potential information items to be discussed in Article 7 (Means for Implementation of Plan).
- Section 8.08 (Retention of Jurisdiction) was added to address the post-effective date jurisdiction of the bankruptcy court.

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number: _____

❑ Check if this is an amended filing

Official Form 425B

Disclosure Statement for Small Business Under Chapter 11 **12/17**

[Name of Proponent]'s Disclosure Statement, Dated [Insert Date]

Table of Contents. See instructions about how to modify the table of contents if you do not have all of the sections below.

[Insert when text is finalized]

I. Introduction

This is the disclosure statement (the *Disclosure Statement*) in the small business chapter 11 case of _____ (the *Debtor*). This Disclosure Statement provides information about the Debtor and the Plan filed on [insert date] (the *Plan*) to help you decide how to vote.

A copy of the Plan is attached as *Exhibit A*. **Your rights may be affected**. You should read the Plan and this Disclosure Statement carefully. You may wish to consult an attorney about your rights and your treatment under the Plan.

The proposed distributions under the Plan are discussed at pages __-__ of this Disclosure Statement. [General unsecured creditors are classified in Class ___, and will receive a distribution of ____ % of their allowed claims, to be distributed as follows _____.]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the *Court*) will consider when deciding whether to confirm the Plan,
- Why [the proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. A separate order has been entered setting the following information:

- Time and place of the hearing to [finally approve this disclosure statement and] confirm the plan,
- Deadline for voting to accept or reject the plan, and
- Deadline for objecting to the [**adequacy of disclosure and**] confirmation of the plan.

If you want additional information about the Plan or the voting procedure, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally**] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.**

II. Background

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in § 101(31) of the United States Bankruptcy Code (the Code) and their relationship to the Debtor.

For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the 2 years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor During the Bankruptcy

List the name and position of all current officers, directors, managing members, or other persons in control (collectively the *Management*) who will not have a position post-confirmation that you list in III D 2.

Name	Position

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor's bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, Debtor in Possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers

Check one box.

☐ The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

☐ The Debtor estimates that up to $_____ may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed

☐ The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. Claims Objections

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. Disputed claims are treated in Article 5 of the Plan.

H. Current and Historical Financial Conditions

The identity and fair market value of the estate's assets are listed in *Exhibit B*. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in *Exhibit C*.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

[A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

III. Summary of the Plan of Reorganization and Treatment of Claims and Equity Interests

A. What Is the Purpose of the Plan of Reorganization?

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. Therefore, the Plan Proponent has *not* placed the following claims in any class:

1. Administrative expenses, involuntary gap claims, and quarterly and Court fees

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 503(b) of the Code. Administrative expenses include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition, and compensation for services and reimbursement of expenses awarded by the court under § 330(a) of the Code. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment. Involuntary gap claims allowed under § 502(f) of the Code are entitled to the same treatment as administrative expense claims. The Code also requires that fees owed under section 1930 of title 28, including quarterly and court fees, have been paid or will be paid on the effective date of the Plan.

The following chart lists the Debtor's estimated administrative expenses, and quarterly and court fees, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Administrative expenses		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Involuntary gap claims		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Statutory Court fees		Paid in full on the effective date of the Plan

Statutory quarterly fees	Paid in full on the effective date of the Plan
Total	

2. Priority tax claims

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim pursuant to 11 U.S.C. § 511, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor's estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (Name and type of tax)	**Estimated Amount Owed**	**Date of Assessment**	**Treatment**		
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. Classes of secured claims

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor's secured prepetition claims and their proposed treatment under the Plan:

Class #	Description		Impairment?	Treatment			
	Secured claim of: Name		❑ Impaired ❑ Unimpaired	[Monthly] payment	$		
	Collateral description			Payments begin			
	Allowed secured amount	$		Payments end			
	Priority of lien			[Balloon payment]			
	Principal owed			Interest rate		%	
	Pre-pet. arrearage			Treatment of lien			
	Total claim	$		[Additional payment required to cure defaults]	$		
	Secured claim of: Name		❑ Impaired ❑ Unimpaired	[Monthly] payment		$	
	Collateral description			Payment begin			
	Allowed secured amount	$		Payments end			
	Priority of lien			[Balloon payment]			
	Principal owed			Interest rate			%
	Pre-pet. arrearage			Treatment of lien			
	Total claim	$		[Additional payment required to cure defaults]		$	

2. Classes of priority unsecured claims

The Code requires that, with respect to a class of claims of a kind referred to in §§ 507(a)(1), (4), (5), (6), and (7), each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim, unless a particular claimant agrees to a different treatment or the class agrees to deferred cash payments.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment?	Treatment
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	

3. Classes of general unsecured claims

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of § 1122(b) convenience class if applicable.]

The following chart identifies the Plan's proposed treatment of classes ☐ through ☐, which contain general unsecured claims against the Debtor:

Class #	Description	Impairment?	Treatment
	[1122(b) Convenience Class]	❑ Impaired ❑ Unimpaired	[Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"]
	General unsecured class	❑ Impaired ❑ Unimpaired	[Monthly] payment $ Payments begin Payments end [Balloon payment] $ Interest rate from [date] % Estimated percent of claim paid %

4. Classes of equity interest holders

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (*LLC*), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan's proposed treatment of the classes of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition Debtor had issued multiple classes of stock.]

Class #	Description	Impairment?	Treatment
	Equity interest holders	❑ Impaired ❑ Unimpaired	

D. Means of Implementing the Plan

1. Source of payments

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. Post-confirmation Management

The Post-Confirmation Management of the Debtor (including officers, directors, managing members, and other persons in control), and their compensation, shall be as follows:

Name	Position	Compensation

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor's ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan in Article 6 lists all executory contracts and unexpired leases that the Debtor will assume, and if applicable assign, under the Plan. *Assumption* means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Article 6 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Article 6 or have not previously been assumed, and if applicable assigned, or are not the subject of a pending motion to assume, and if applicable assign, will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is ☐**.**

Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and equity interest holders concerned with how the plan may affect their tax liability should consult with their own accountants, attorneys, and/or advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum:

(1) Tax consequences to the Debtor of the Plan;

(2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. Confirmation Requirements and Procedures

To be confirmable, the Plan must meet the requirements listed in §1129 of the Code. These include the requirements that:

- the Plan must be proposed in good faith;
- if a class of claims is impaired under the Plan, at least one impaired class of claims must accept the Plan, without counting votes of insiders;
- the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and
- the Plan must be feasible.

These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. Except as stated in Part IV.A.3 below, a creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both

(1) allowed or allowed for voting purposes and

(2) impaired.

In this case, the Plan Proponent believes that classes [ ] are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes [ ] are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. What is an allowed claim or an allowed equity interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either

(1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or

(2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was [ ].

[If applicable – The deadline for filing objections to claims is [ ].]

2. What is an impaired claim or impaired equity interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it

is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered *impaired* if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. Who is not entitled to vote

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not "allowed claims" or "allowed equity interests" (as discussed above), unless they have been "allowed" for voting purposes;
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code;
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan; and
- administrative expenses.

Even if you are not entitled to vote on the plan, you have a right to object to the confirmation of the Plan [and to the adequacy of the Disclosure Statement].

4. Who can vote in more than one class

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless:

(1) all impaired classes have voted to accept the Plan; or

(2) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and the Plan is eligible to be confirmed by "cram down" of the non-accepting classes, as discussed later in Section B.2.

1. Votes necessary for a class to accept the plan

A class of claims accepts the Plan if both of the following occur:

(1) the holders of more than ½ of the allowed claims in the class, who vote, cast their votes to accept the Plan, and

(2) the holders of at least ⅔ in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least ⅔ in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. Treatment of non-accepting classes of secured claims, general unsecured claims, and interests

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan upon the request of the Plan proponent if the non-accepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds non-accepting classes is commonly referred to as a *cram down* plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not *discriminate unfairly*, and

is *fair and equitable* toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a *cram down* confirmation will affect your claim or equity interest, as the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as *Exhibit E*.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. Ability to initially fund plan

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as *Exhibit F*.

2. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information. Those projections are listed in *Exhibit G*.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of $ ☐.

The final Plan payment is expected to be paid on ☐.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

V. Effect of Confirmation of Plan

A. Discharge of Debtor

Check one box.

❑	**Discharge if the Debtor is an individual and 11 U.S.C. § 1141(d)(3) is not applicable.** Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.
❑	**Discharge if the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.
❑	**Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt: (i) imposed by the Plan, or (ii) to the extent provided in 11 U.S.C. § 1141(d)(6).
❑	**No Discharge** i**f § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or re-voting on the Plan.

[**If the Debtor is not an individual, add the following**:

The Plan Proponent may also seek to modify the Plan at any time after confirmation only if

(1) the Plan has not been substantially consummated and
(2) the Court authorizes the proposed modifications after notice and a hearing.]

[**If the Debtor is an individual, add the following:**

Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to

(1) increase or reduce the amount of payments under the Plan on claims of a particular class,
(2) extend or reduce the time period for such payments, or
(3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. Other Plan Provisions

[Insert other provisions here, as necessary and appropriate.]

✘ _____ _____

[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed Name]

Exhibits

Exhibit A: Copy of Proposed Plan of Reorganization

Exhibit B: Identity and Value of Material Assets of Debtor

Exhibit C: Prepetition Financial Statements

(to be taken from those filed with the court)

Exhibit D: [Most Recently Filed Postpetition Operating Report]
[Summary of Postpetition Operating Reports]

Exhibit E: Liquidation Analysis

Plan Proponent's Estimated Liquidation Value of Assets

Assets			
a.	Cash on hand		$
b.	Accounts receivable		$
c.	Inventory		$
d.	Office furniture and equipment		$
e.	Machinery and equipment		$
f.	Automobiles		$
g.	Building and land		$
h.	Customer list		$
i.	Investment property (such as stocks, bonds or other financial assets)		$
j.	Lawsuits or other claims against third-parties		$
K	Other intangibles (such as avoiding powers actions)		$
Total Assets at Liquidation Value			$
Less:	Secured creditors' recoveries	–	$
Less:	Chapter 7 trustee fees and expenses	–	$
Less:	Chapter 11 administrative expenses	–	$
Less:	Priority claims, excluding administrative expense claims	–	$
[Less:	Debtor's claimed exemptions]	–	$
(1)	Balance for unsecured claims		$
(2)	Total dollar amount of unsecured claims		$
Percentage of claims which unsecured creditors would receive or retain in a chapter 7 liquidation:			%
Percentage of claims which unsecured creditors will receive or retain under the Plan:			% [Divide (1) by (2)]

Exhibit F: Cash on hand on the effective date of the Plan

Cash on hand on effective date of plan			$
Less:	Amount of administrative expenses payable on effective date of the Plan	–	$
Less:	Amount of statutory costs and charges	–	$
Less:	Amount of cure payments for executory contracts	–	$
Less:	Other Plan payments due on effective date of the Plan	–	$
Balance after paying these amounts			$

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:	
Cash in Debtor's bank account now	$
Net earnings between now and effective date of the Plan [State the basis for such projections]	$
Borrowing [Separately state terms of repayment]	$
Capital contributions	$
Other	$
Total (This number should match "cash on hand" figure noted above)	$

Exhibit G: Projections of Cash Flow for Post-Confirmation Period

COMMITTEE NOTE

Official Form 425B, *Disclosure Statement for Small Business Under Chapter 11*, replaces Official Form 25B, *Disclosure Statement in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. Where possible, the form parallels how businesses commonly keep their financial records. It is intended to provide an illustrative format for disclosure, rather than a specific prescription for the form's language or content.

Part I, *Introduction*, is revised to clarify that the disclosure statement is being provided for purposes of voting on the plan. The instructions that the recipient discuss the plan and disclosure statement with an attorney are revised to clarify that, if the recipient has an attorney, the recipient is not required to consult with the attorney, but may wish to consult with an attorney regardless of whether it has one.

Part I.B., *Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing*, is revised to provide for the court's entry of a separate order setting time frames for hearings and deadlines, *see* Official Form 313, and to delete those dates from the form as redundant. Also, this part is revised to clarify that requests for additional information about the voting procedure, in addition to the plan, should be directed to the plan proponent's representative.

In Part I.C., *Disclaimer*, the instruction to provide the date by which an objection to final approval of the disclosure statement must be filed is eliminated as duplicative of the court's order required under Part I.B. Repetitive language indicating that the court's approval of the disclosure statement is not final is eliminated.

In Part II.C., *Management of the Debtor During the Bankruptcy*, the title is revised to eliminate the reference to the debtor's management before the bankruptcy, and the instruction is revised to limit the required disclosure to those current officers,

directors, managing members, and other persons in control who will not retain a position after confirmation. The instruction to provide information regarding the debtor's pre-petition management is deleted because similar information is required in the *Statement of Financial Affairs of Non-Individuals Filing for Bankruptcy*, Official Form 207. The instruction to provide information regarding the debtor's post-confirmation management is incorporated in Part III.D.2, *Post-confirmation Management*, of the form.

In Part III.B.1, *Administrative expenses, involuntary gap claims, and quarterly and Court fees*, the title and form are revised to clarify that the debtor must provide for the treatment of all fees and expenses owed under 28 U.S.C. § 1930, including quarterly fees and court fees. *See* 11 U.S.C. § 1129(a)(12). Also, the title and form are revised to include involuntary "gap" period claims in an involuntary case under section 502(f) of the Bankruptcy Code. *See* 11 U.S.C. §§ 507(a)(3), 1129(a)(9)(A). The reference to the provision governing the allowance of administrative expenses is corrected and changed from section 507(a) to 503(b) of the Bankruptcy Code. The example is revised to include compensation for services and reimbursement of expenses awarded by the court under section 330(a) of the Bankruptcy Code. The requirement that any agreement to pay professional fees and expenses and other unclassified administrative expenses on a date other than the effective date be in writing is deleted. *See* 11 U.S.C. § 1129(a)(9). The list is revised to include a single category of administrative expenses allowed under section 503(b) of the Bankruptcy Code, deleting as redundant the specific categories for reclamation claims under section 503(b)(9) and approved professional fees and expenses under section 503(b)(2), and to clarify that any holder of an allowed administrative expense claim may agree to payment other than in full on the effective date. *Id.*

Part III.B.2, *Priority tax claims*, is revised to include a reference to section 511 of the Bankruptcy Code governing the rate of interest on tax claims.

Part III.C.2, *Classes of priority unsecured claims*, is revised to comply with section 1129(a)(9)(B), including the addition that any particular claimant may agree to treatment other than cash

payment in full on the effective date and to clarify that any class may agree to deferred cash payments. *See* 11 U.S.C. § 1129(a)(9)(B).

Part III.D.2, *Post-confirmation Management*, is revised to comply with section 1129(a)(5) of the Bankruptcy Code.

Part III.F., *Executory Contracts and Unexpired Leases*, is revised to incorporate changes to Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*. "Exhibit 5.1" is changed to "Article 6" of the plan. References to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable, including the requirement that a party objecting to the assignment of an executory contract or unexpired lease under the plan must timely file and serve an objection to the plan. The form is revised to clarify that executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Part IV, *Confirmation Requirements and Procedures*, the introduction is revised to delete references to subsections (a) and (b) to clarify that a plan must satisfy all of the requirements of section 1129 of the Bankruptcy Code. Also, the form is revised to clarify that the requirement to obtain the acceptance of at least one impaired accepting class of claims, excluding any acceptance by an insider, applies only if the plan proposes to impair at least one class of claims. *See* 11 U.S.C. § 1129(a)(10).

In Part IV.B.1, *Votes necessary for a class to accept the plan*, the standards for confirmation in the event the plan has impaired classes have been corrected. *See* 11 U.S.C. § 1129(a)(8)(A), (10) and (b).

The title to Part IV.B.2, *Treatment of non-accepting classes of secured claims, general unsecured claims, and interests*, is revised for clarity to exclude priority claimants. *See* 11 U.S.C. § 1129(b). Also, the requirement that the proponent must request

confirmation pursuant to section 1129(b) of the Bankruptcy Code is added.

In Part IV.D.2, *Ability to make future plan payments and operate without further reorganization*, the requirement that the plan proponent show that the business will have sufficient cash flow to operate the business, in addition to making the required plan payments, is new. *See* 11 U.S.C. § 1129(a)(11).

In Part V.A., *Discharge of Debtor*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

In the title to Exhibit G, *Projections of Cash Flow for Post-Confirmation Period*, the reference to "and Earnings" is deleted to ensure consistency given the disparate ways in which "earnings" can be interpreted.

The caption block for the disclosure statement is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on the disclosure statement was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in individual chapter 11 cases or joint cases involving individuals.
- The column in Part III.C.1 (Classes of secured claims) for disclosing the insider status of creditors holding secured claims was deleted.
- A cross-reference to Part IV.A.3 was added to the introductory language in Part IV.A (Who May Vote or Object).

THIS PAGE INTENTIONALLY BLANK

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number: _____

❑ Check if this is an amended filing

Official Form 425C

Monthly Operating Report for Small Business Under Chapter 11 **12/17**

Month: _____ Date report filed: _____ MM / DD / YYYY

Line of business: _____ NAISC code: _____

In accordance with title 28, section 1746, of the United States Code, I declare under penalty of perjury that I have examined the following small business monthly operating report and the accompanying attachments and, to the best of my knowledge, these documents are true, correct, and complete.

Responsible party: _____

Original signature of responsible party _____

Printed name of responsible party _____

1. Questionnaire

Answer all questions on behalf of the debtor for the period covered by this report, unless otherwise indicated.

		Yes	No	N/A
	If you answer *No* to any of the questions in lines 1-9, attach an explanation and label it *Exhibit A*.			
1.	Did the business operate during the entire reporting period?	❑	❑	❑
2.	Do you plan to continue to operate the business next month?	❑	❑	❑
3.	Have you paid all of your bills on time?	❑	❑	❑
4.	Did you pay your employees on time?	❑	❑	❑
5.	Have you deposited all the receipts for your business into debtor in possession (DIP) accounts?	❑	❑	❑
6.	Have you timely filed your tax returns and paid all of your taxes?	❑	❑	❑
7.	Have you timely filed all other required government filings?	❑	❑	❑
8.	Are you current on your quarterly fee payments to the U.S. Trustee or Bankruptcy Administrator?	❑	❑	❑
9.	Have you timely paid all of your insurance premiums?	❑	❑	❑
	If you answer *Yes* to any of the questions in lines 10-18, attach an explanation and label it *Exhibit B*.			
10.	Do you have any bank accounts open other than the DIP accounts?	❑	❑	❑
11.	Have you sold any assets other than inventory?	❑	❑	❑
12.	Have you sold or transferred any assets or provided services to anyone related to the DIP in any way?	❑	❑	❑
13.	Did any insurance company cancel your policy?	❑	❑	❑
14.	Did you have any unusual or significant unanticipated expenses?	❑	❑	❑
15.	Have you borrowed money from anyone or has anyone made any payments on your behalf?	❑	❑	❑
16.	Has anyone made an investment in your business?	❑	❑	❑

17. Have you paid any bills you owed before you filed bankruptcy? ❑ ❑ ❑

18. Have you allowed any checks to clear the bank that were issued before you filed bankruptcy? ❑ ❑ ❑

2. Summary of Cash Activity for All Accounts

19. **Total opening balance of all accounts**

This amount must equal what you reported as the cash on hand at the end of the month in the previous month. If this is your first report, report the total cash on hand as of the date of the filing of this case.

$ _____

20. **Total cash receipts**

Attach a listing of all cash received for the month and label it *Exhibit C*. Include all cash received even if you have not deposited it at the bank, collections on receivables, credit card deposits, cash received from other parties, or loans, gifts, or payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit C*.

Report the total from *Exhibit C* here. $ _____

21. **Total cash disbursements**

Attach a listing of all payments you made in the month and label it *Exhibit D*. List the date paid, payee, purpose, and amount. Include all cash payments, debit card transactions, checks issued even if they have not cleared the bank, outstanding checks issued before the bankruptcy was filed that were allowed to clear this month, and payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit D*.

\- $ _____

Report the total from *Exhibit D* here.

22. **Net cash flow**

\+ $ _____

Subtract line 21 from line 20 and report the result here.
This amount may be different from what you may have calculated as *net profit*.

23. **Cash on hand at the end of the month**

Add line 22 + line 19. Report the result here.

Report this figure as the *cash on hand at the beginning of the month* on your next operating report.

= $ _____

This amount may not match your bank account balance because you may have outstanding checks that have not cleared the bank or deposits in transit.

3. Unpaid Bills

Attach a list of all debts (including taxes) which you have incurred since the date you filed bankruptcy but have not paid. Label it *Exhibit E*. Include the date the debt was incurred, who is owed the money, the purpose of the debt, and when the debt is due. Report the total from *Exhibit E* here.

24. **Total payables** $ _____

(Exhibit E)

4. Money Owed to You

Attach a list of all amounts owed to you by your customers for work you have done or merchandise you have sold. Include amounts owed to you both before, and after you filed bankruptcy. Label it *Exhibit F*. Identify who owes you money, how much is owed, and when payment is due. Report the total from *Exhibit F* here.

25. **Total receivables** $ _____

(Exhibit F)

5. Employees

26. What was the number of employees when the case was filed? _____
27. What is the number of employees as of the date of this monthly report? _____

6. Professional Fees

28. How much have you paid this month in professional fees related to this bankruptcy case? $ _____
29. How much have you paid in professional fees related to this bankruptcy case since the case was filed? $ _____
30. How much have you paid this month in other professional fees? $ _____
31. How much have you paid in total other professional fees since filing the case? $ _____

7. Projections

Compare your actual cash receipts and disbursements to what you projected in the previous month. Projected figures in the first month should match those provided at the initial debtor interview, if any.

	Column A **Projected** Copy lines 35-37 from the previous month's report.	–	Column B **Actual** Copy lines 20-22 of this report.	=	*Column C* **Difference** Subtract Column B from Column A.
32. **Cash receipts**	$ _____	–	$ _____	=	$ _____
33. **Cash disbursements**	$ _____	–	$ _____	=	$ _____
34. **Net cash flow**	$ _____	–	$ _____	=	$ _____

35. Total projected cash receipts for the next month: $ _____
36. Total projected cash disbursements for the next month: - $ _____
37. Total projected net cash flow for the next month: = $ _____

8. Additional Information

If available, check the box to the left and attach copies of the following documents.

- ❑ 38. Bank statements for each open account (redact all but the last 4 digits of account numbers).
- ❑ 39. Bank reconciliation reports for each account.
- ❑ 40. Financial reports such as an income statement (profit & loss) and/or balance sheet.
- ❑ 41. Budget, projection, or forecast reports.
- ❑ 42. Project, job costing, or work-in-progress reports.

COMMITTEE NOTE

Official Form 425C, *Monthly Operating Report for Small Business Under Chapter 11*, replaces Official Form 25C, *Small Business Monthly Operating Report*. It is revised as part of the Forms Modernization Project, which was designed so that persons completing the forms would do so accurately and completely. To facilitate this, Official Form 425C is renumbered and includes formatting and stylistic changes throughout the form. The form requires basic financial information that the Internal Revenue Service recommends that businesses maintain.

The form is revised to add a checkbox to indicate if the report is an amended filing. It also clarifies that persons completing the form on behalf of the debtor should answer all questions for the period covered by the report, unless otherwise indicated. All instructions indicating that the U.S. Trustee may waive the attachments to the form are eliminated.

The form is reorganized. The previous sections for *Tax* and *Banking Information* are eliminated as redundant of information requested elsewhere within the form. The previous sections for *Income*, *Summary of Cash on Hand*, *Expenses*, and *Cash Profit* are revised and incorporated into Section 2, *Summary of Cash Activity for All Accounts*.

In Part 1, *Questionnaire*, a third checkbox column option, "N/A," has been added to indicate if the question is not applicable. New exhibits to be attached provide explanations for any negative responses to questions 1 through 9 (Exhibit A) and any affirmative answers to questions 10 through 18 (Exhibit B). The questions are reorganized and renumbered, and several are revised. Question 1 is revised to ask whether the business operated during the period. Question 8, regarding the payment of quarterly fees under 28 U.S.C. § 1930(a)(6), is revised to include payments to the bankruptcy administrator. Question 15 is expanded to include payments made on the debtor's behalf. The question whether the debtor has paid anything to an attorney or other professionals is eliminated, as redundant of information disclosed in Part 6. A new

question 17 is added inquiring whether the debtor has allowed any checks to clear the bank that were issued before the bankruptcy case.

Part 2, *Summary of Cash Activity for All Accounts*, clarifies and simplifies the reporting of the debtor's cash on hand during the period, and the letters of the attached exhibits are revised. References to "income," "expenses," and "cash profit" are eliminated. Line 19 clarifies that the cash on hand at the beginning of the month is the same as the cash on hand reported at the end of the previous month (or the commencement of the case if no prior report has been submitted). Net cash flow during the month, calculated in line 22, is equal to total cash receipts in line 20 (as itemized in Exhibit C) less total cash disbursements in line 21 (as itemized in Exhibit D). Net cash flow is added to the beginning balance to calculate the cash on hand at the end of the month in line 23. The form is revised to add explanations of the receipts and disbursements to be included in Exhibits C and D, as well as an instruction to clarify that bank statements should not be submitted in lieu of the exhibits.

In Part 3, *Unpaid Bills*, the exhibit letter is revised to *Exhibit E*.

In Part 4, *Money Owed to You*, the exhibit letter is revised to *Exhibit F*.

In Part 6, *Professional Fees*, the subheadings "*Bankruptcy Related*" and "*Non-Bankruptcy Related*" are eliminated.

Part 7, *Projections*, is revised to compare the debtor's actual cash receipts, cash disbursements, and net cash flow for the month to the projections in the previous month's report (or if the case is new, that the debtor reported at the initial debtor interview). *See* 11 U.S.C. § 308(b)(2) and (3). References to "income," "expenses," "cash profit," and the 180 day look-back period are eliminated.

Part 8, *Additional Information*, is revised to clarify which documents should be attached, if available and regardless of whether the debtor prepares them internally. These documents are:

(1) redacted bank statements for each open account; (2) bank reconciliation reports for each account; (3) financial reports such as an income statement (profit & loss) or balance sheet; (4) budget, projection, or forecast reports; and (5) project, job casting, or work-in-progress reports.

The caption block for this form is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on this form was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in non-individual chapter 11 cases and joint cases involving individual debtors.

THIS PAGE INTENTIONALLY BLANK

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number: _____

Official Form 426

Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest

12/17

This is the *Periodic Report* as of _____ on the value, operations, and profitability of those entities in which a Debtor holds, or two or more Debtors collectively hold, a substantial or controlling interest (a "Controlled Non-Debtor Entity"), as required by Bankruptcy Rule 2015.3. For purposes of this form, "Debtor" shall include the estate of such Debtor.

[Name of Debtor] holds a substantial or controlling interest in the following entities:

Name of Controlled Non-Debtor Entity	Interest of the Debtor	Tab #

This *Periodic Report* contains separate reports (*Entity Reports*) on the value, operations, and profitability of each Controlled Non-Debtor Entity.

Each *Entity Report* consists of five exhibits.

Exhibit A contains the most recently available: balance sheet, statement of income (*loss*), statement of cash flows, and a statement of changes in shareholders' or partners' equity (*deficit*) for the period covered by the *Entity Report*, along with summarized footnotes.

Exhibit B describes the Controlled Non-Debtor Entity's business operations.

Exhibit C describes claims between the Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity.

Exhibit D describes how federal, state or local taxes, and any tax attributes, refunds, or other benefits, have been allocated between or among the Controlled Non-Debtor Entity and any Debtor or any other Controlled Non-Debtor Entity and includes a copy of each tax sharing or tax allocation agreement to which the Controlled Non-Debtor Entity is a party with any other Controlled Non-Debtor Entity.

Exhibit E describes any payment, by the Controlled Non-Debtor Entity, of any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor, or the incurrence of any obligation to make such payments, together with the reason for the entity's payment thereof or incurrence of any obligation with respect thereto.

This *Periodic Report* must be signed by a representative of the trustee or debtor in possession.

Debtor Name _____ Case number_____

The undersigned, having reviewed the *Entity Reports* for each Controlled Non-Debtor Entity, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that to the best of his or her knowledge, (i) this *Periodic Report* and the attached *Entity Reports* are complete, accurate and truthful to the best of his or her knowledge, and (ii) the Debtor did not cause the creation of any entity with actual deliberate intent to evade the requirements of Bankruptcy Rule 2015.3

For non-individual Debtors:	✘ _____ Signature of Authorized Individual _____ Printed name of Authorized Individual Date _____ MM / DD / YYYY	
For individual Debtors:	✘ _____ Signature of Debtor 1 _____ Printed name of Debtor 1 Date _____ MM / DD / YYYY	✘ _____ Signature of Debtor 2 _____ Printed name of Debtor 2 Date _____ MM / DD / YYYY

Exhibit A: Financial Statements for [Name of Controlled Non-Debtor Entity]

Exhibit A-1: Balance Sheet for [**Name of Controlled Non-Debtor Entity**] as of [date]

[Provide a balance sheet dated as of the end of the most recent 3-month period of the current fiscal year and as of the end of the preceding fiscal year.

Describe the source of this information.]

Exhibit A-2: Statement of Income (*Loss*) for [**Name of Controlled Non-Debtor Entity**] for period ending [date]

[Provide a statement of income (*loss*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-3: Statement of Cash Flows for [Name of Controlled Non-Debtor Entity**]** for period ending [**date**]

[Provide a statement of changes in cash position for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-4: Statement of Changes in Shareholders'/Partners' Equity (*Deficit*) for [**Name of Controlled Non-Debtor Entity**] for period ending [date]

[Provide a statement of changes in shareholders'/partners equity (*deficit*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit B: Description of Operations for [**Name of Controlled Non-Debtor Entity**]

[Describe the nature and extent of the Debtor's interest in the Controlled Non-Debtor Entity.

Describe the business conducted and intended to be conducted by the Controlled Non-Debtor Entity, focusing on the entity's dominant business segments.

Describe the source of this information.]

Exhibit C: Description of Intercompany Claims

[List and describe the Controlled Non-Debtor Entity's claims against any other Controlled Non-Debtor Entity, together with the basis for such claims and whether each claim is contingent, unliquidated or disputed.

Describe the source of this information.]

Exhibit D: Allocation of Tax Liabilities and Assets

[Describe how income, losses, tax payments, tax refunds or other tax attributes relating to federal, state or local taxes have been allocated between or among the Controlled Non-Debtor Entity and one or more other Controlled Non-Debtor Entities.

Include a copy of each tax sharing or tax allocation agreement to which the entity is a party with any other Controlled Non-Debtor Entity.

Describe the source of this information.]

Exhibit E: Description of Controlled Non-Debtor Entity's payments of Administrative Expenses or Professional Fees otherwise payable by a Debtor

[Describe any payment made, or obligations incurred (or claims purchased), by the Controlled Non-Debtor Entity in connection with any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor.

Describe the source of this information.]

COMMITTEE NOTE

Official Form 426, *Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*, is revised and renumbered as part of the Forms Modernization Project. It implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

In addition to formatting revisions, certain aspects of Official Form 426 are changed to make the form easier for the debtor to complete and to better identify the kinds of information that a debtor must disclose in accordance with section 419 of BAPCPA and Rule 2015.3.

Official Form 426 limits its application to entities in which the debtor has a substantial or controlling interest, which the rule defines as a "Controlled Non-Debtor Entity." The scope of this defined term is guided by subdivisions (a) and (c) of Rule 2015.3.

Official Form 426 eliminates the requirement to file a valuation of the Controlled Non-Debtor Entity. Exhibit A to Official Form 426 requires only periodic filings of the Controlled Non-Debtor Entity's most recently available balance sheet, statement of income (*loss*), statement of cash flows, and statement of changes in shareholders' or partners' equity (*deficit*), together with summarized footnotes for such financial statements. If any of these financial statements are not available, the debtor can seek relief under Rule 2015.3(d).

Exhibit B to Official Form 426 requires a description of the Controlled Non-Debtor Entity's business, which was required by Exhibit C of former Rule 26.

Exhibits C, D, and E to Official Form 426 are new. Exhibit C requires a description of claims between a Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity. Exhibit D requires disclosure of information relating to the allocation of taxable income, losses, and other attributes among Controlled Non-Debtor Entities. Exhibit E requires disclosure about a Controlled Non-Debtor Entity's payment of claims or administrative expenses that would otherwise have been payable by a debtor.

The caption block for this form is formatted for a non-individual debtor. An individual chapter 11 debtor should use the caption block formatted for individual debtors, including a joint case involving more than one individual debtor, such as the caption found in Official Form B309I.

Changes Made After Publication and Comment

- The caption on this form was changed to follow the form for non-individual debtor cases. An instruction was added to the Committee Note regarding the caption and signature block to be used in non-individual chapter 11 cases and joint cases involving individual debtors.

TAB 5C2

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: COMMENTS ON PROPOSED AMENDMENT TO OFFICIAL FORM 309F

DATE: MARCH 12, 2017

In August 2016, the Standing Committee published for public comment an amendment to Official Form 309F (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships). The proposed amendment would change the instruction on the form concerning the deadline in a chapter 11 case for seeking an exception to the discharge of a debt owed by a corporate or partnership debtor. The amendment was proposed in response to recent case law that raises questions about whether the current instruction reflects an accurate interpretation of Code § 1141(d)(6)(A). Specifically, it is unclear whether a creditor seeking to have its debt excepted from discharge under that provision must take action pursuant to § 523(c) in the bankruptcy case and, if § 523(c) does apply, whether it applies to the "persons" referred to in § 1141(d)(6)(A) or only to domestic governmental units.

In recognition of ambiguities in the wording of § 1141(d)(6)(A), the amendment would revise line 8 of the form as follows:

> If § 523(c) applies to your claim and you seek to have it excepted from discharge, ~~Y~~you must start a judicial proceeding by filing a complaint by the deadline stated below ~~if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A)~~.

Comments

Two comments were submitted in response to the publication of this amendment. One was from the Pennsylvania Bar Association (BK-2016-0003-0008). It supports adoption of the amendment.

The other comment was submitted by Judge Laurel Isicoff (Bankr. S.D. Fla.) (BK-2016-0003-0003). She stated that because no amendment to line 11 of the form is proposed, "using different language [in lines 8 and 11] creates confusion for the recipient of the notice, who might believe that the deadline in paragraph 8 does not apply to the complaint referred to in paragraph 11." Line 11 of the form currently provides as follows:

> Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

Line 8 of Form 309F, which is proposed for amendment, addresses "Exception to discharge deadline," whereas line 11 addresses "Discharge of debts." In proposing the amendment to line 8, it appears that we overlooked the overlapping language in line 11. As a result, the form continues to make a statement ("you must start a judicial proceeding . . . by the deadline") that is an incorrect statement of the law under some interpretations of § 1141(d)(6)(A).

One possible solution is to delete the last sentence of line 11 and leave the discussion of seeking an exception to discharge to line 8. That solution, however, could be misleading by failing to point out that some debts are excepted from discharge. The Subcommittee concluded

that a better solution would be to amend the last sentence of line 11 in a manner similar to the amendment to line 8:

> Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge ~~under 11 U.S.C. § 1141(d)(6)(A)~~ and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.

The Subcommittee recommends that the amendment to Official Form 309F be approved with the above change made and that the Committee Note be revised as follows:

COMMITTEE NOTE

> Official Form 309F (For Corporations or Partnerships), *Notice of Chapter 11 Bankruptcy Case*, is amended at Lines 8 and 11. Both ~~L~~lines ~~8~~ previously stated that a creditor seeking to have a debt excepted from discharge under § 1141(d)(6)(A) must file a complaint by the stated deadline. That statement has been revised in light of ambiguities in § 1141(d)(6)(A) regarding its relationship with § 523. Specifically, the provision is unclear about whether not only a debt "owed to a domestic governmental unit" but also a debt "owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute" must be of the type described by § 523(a)(2)(A) and (B). The provision is also unclear about whether the procedural requirements of § 523(c)(1) apply, given that § 1141(d)(6)(A) specifically refers to § 523(a) but not to § 523(c). Rather than take a position on the proper interpretation of § 1141(d)(6)(A), the form leaves to creditors the determination of whether § 523(c) applies to their claims, in which case they must commence a dischargeability proceeding by the Rule 4007(c) deadline that is stated on the form.

TAB 6

TAB 6A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: COMMENTS ON PART VIII RULE AMENDMENTS PUBLISHED IN AUGUST 2016

DATE: MARCH 13, 2017

In August 2016, the Standing Committee published for public comment proposed amendments to nine bankruptcy appellate rules, a proposed new bankruptcy appellate rule, amendments to two bankruptcy appellate Official Forms, and a new appendix to Part VIII: Rules 8002, 8006, 8011, 8013, 8015, 8016, 8022, 8023, new Rule 8018.1, Official Forms 416 A and C, and new Part VIII Appendix. The amendments to the existing rules and forms and the new appendix were proposed primarily to bring them into conformity with recent amendments to parallel provisions of the Federal Rules of Appellate Procedure ("FRAP") regarding inmate appeals, timeliness of tolling motions, document length limits, and amicus filings. The new rule was proposed to provide a procedure for handling appeals when a district court determines that the bankruptcy court lacked constitutional authority to enter a final judgment.

Three comments were submitted on these rules, forms, and appendix. One commenter—the National Conference of Bankruptcy Judges—stated that it supports all of the published bankruptcy appellate rules (BK-2016-0003-0007). It did not comment on the forms or appendix. The other two comments were submitted by the Pennsylvania Bar Association (BK-2016-0003-0008) and attorney Heather Dixon (BK-2016-0003-0009). The Bar Association expressed support for all of the published appellate rules, form, and appendix, except as noted below.

Both the Bar Association and Ms. Dixon commented on the amendments to Rule 8017(a) that would permit district courts and BAPs to strike or prohibit the filing of an amicus brief that the parties had consented to if it would result in a judge's disqualification.[1] They both incorporated comments that they had submitted in response to the simultaneous publication of parallel amendments to FRAP 29 (Brief of an Amicus Curiae). The Bar Association stated that it opposes this amendment in both sets of rules because amicus briefs are usually filed before an appeal is assigned to a panel of judges and thus the amicus and its counsel would have no way of knowing whether recusal would later be required. The Association suggested that under those circumstances the better course would be for the judge to recuse. Striking of the amicus brief might be appropriate, the Association commented, if it appeared that the brief was filed for the purpose of obtaining a recusal, but the proposed provision is not so limited. The Association further stated that when an amicus retains counsel for the purpose of prompting a recusal of a judge, the lawyer could be disqualified instead.

Ms. Dixon also expressed opposition to the FRAP 29/Rule 8017 amendments as currently worded. She has proposed a revision of FRAP 29(a) and (b) that she believes would better serve the purposes underlying the allowance of amicus participation. Her version of the rule would read as follows:

Rule 29. Brief of an *Amicus Curiae*

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs *amicus <u>curiae</u>* filings during a court's initial consideration of a case on the merits.

[1] As amended, the second sentence of Rule 8017(a)(2) would read: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing<u>, except that a district court or BAP may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification.</u>

(2) When Permitted. The United States or its officer or agency or a state may file an *amicus curiae* brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court ~~or if the brief states that all parties have consented to its filing~~. Counsel for *amicus curiae* are advised that, once a panel of judges has been assigned to a case, amicus curiae briefing that would result in recusal of an assigned judge will only be permitted where the *amicus curiae* brief would (a) provide the Court with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the Court's decision and (ii) has not been made known to the Court by the parties' briefing.

(3) Motion for Leave to File. The motion must ~~be accompanied by the proposed brief and~~ state:

(A) the movant's interest; and

(B) the reason why an amicus *curiae* brief is desirable and why the matters asserted are relevant to the disposition of the case.

. . . . .

(b) During Consideration of Whether to Grant Rehearing.

(1) Applicability. This Rule 29(b) governs amicus *curiae* filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) When Permitted. The United States or its officer or agency or a state may file an *amicus curiae* brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court, and only if such filing presents no reason for recusal of a judge who participated in decision of the case during the initial stage of considering the case on its merits.

(3) Motion for Leave to File. Rule 29(a)(3) applies to a motion for leave.

Recommendation

Because the Committee's primary motivation in proposing this amendment to Rule 9017(a) was to conform to FRAP 29(a), the Committee should coordinate any responsive changes to the rule with the Appellate Rules Committee. The reporter has contacted the reporter for that committee, but because this Committee's spring meeting is being held several weeks before the Appellate Rules Committee is meeting, it is not yet known what, if any, changes that committee will propose.

Absent a different decision by the Appellate Rules Committee, the Subcommittee recommends that the changes suggested by Ms. Dixon not be accepted. Her proposal represents a more fundamental change (elimination of amicus filings with the consent of the parties and the requirement that the amicus brief be filed with motion) than either Committee had in mind when it proposed an amendment to address the narrow situation of authorizing the denial of amicus participation, despite the consent of all parties, when recusal would otherwise result. The Subcommittee concluded that it is unnecessary to prescribe in a rule the considerations that a court should take into account when ruling on a request to file an amicus brief. As for the Pennsylvania Bar Association's concern about the potential unfairness of striking amicus briefs, the Subcommittee notes that, because the proposed rule is permissive, an appellate court could weigh competing considerations in deciding whether recusal, lawyer disqualification, or striking the brief would be appropriate.

Therefore, the Subcommittee recommends that Rule 8017 be approved as published unless the Appellate Rules Committee concludes that changes to the FRAP 29(a) amendment should be made, in which case the Committees should try to maintain uniformity. The Subcommittee also recommends that our Committee approve the other published appellate rules, forms, and appendix, for which no opposition was expressed.[2]

[2] Additional amendments to Rule 8011 are addressed in Agenda Item 6(C).

TAB 6B

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: AMENDMENTS TO CONFORM TO PROPOSED AMENDMENTS TO CIVIL RULES 62 AND 65.1 AND FRAP 8, 11, AND 39

DATE: MARCH 13, 2017

The Civil Rules Committee has proposed and published for public comment amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and broaden and modernize the terminology "supersedeas bond" and "surety." The Appellate Rules Committee has published amendments to FRAP 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology. This Committee now needs to consider whether to adopt similar amendments to the parallel Bankruptcy Rules.

This memorandum proceeds in two parts. First it discusses amendments to Rules 9025, 8007, 8010, and 8021 that would conform to the new terminology proposed for the Civil and Appellate Rules. Then it discusses the need to amend Rule 7062 to retain the current 14-day period during which a judgment is automatically stayed in a bankruptcy adversary proceeding. **The Subcommittee recommends that the Committee approve both sets of amendments and ask the Standing Committee to approve them without publication.**

Terminology Changes

If approved as published, Civil Rule 62 would no longer refer to a "supersedeas bond." Instead, it would use the more expansive terms "bond or other security." This amendment is proposed in order to make clear that security in a form other than a bond may be used.

Consistent with that change, Civil Rule 65.1 would be amended to refer to "other security" and "other security providers."

Bankruptcy Rule 7062 would not need to be amended to adopt the changed terminology because it provides that Civil Rule 62 "applies in adversary proceedings." Thus any amendment to Rule 62 automatically applies in bankruptcy adversary proceedings.

Rule 9025 would, however, need to be amended to be consistent with amended Rules 62 and 7062. If the proposed changes to Civil Rule 65.1 were adopted for Rule 9025, it would read as follows:

Rule 9025. Security: Proceedings Against Sureties or Other Security Providers

Whenever the Code or these rules require or permit the giving of security by a party, and security is given in the form of a bond, other security, ~~or~~ ~~stipulation~~ or other undertaking, with one or more sureties or other security providers, each provider ~~surety~~ submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Committee Note

This rule is amended to reflect the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting this rule's enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into the rule by these amendments.

The Subcommittee recommends that a slight change in wording be made. In lines 5 and 6, it proposes changing the wording to "a bond or other security," and deleting as unnecessary "or other undertaking."

To conform to the proposed amendments to FRAP 8, 11, and 39, the following amendments to the Part VIII rules would be required. The Subcommittee recommends that they be approved.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT.

(1) *In General*. Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment;

* * * * *

(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other ~~appropriate~~ security with the bankruptcy court.

(d) BOND OR OTHER SECURITY FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other ~~appropriate~~ security when the trustee appeals. A bond or other security is not required when the appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B), (c), and (d) conform this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary

proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 8010. Completing and Transmitting the Record

* * * * *

(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a ~~supersedeas~~ bond~~,~~ or other security provided to obtain a stay of judgment ~~additional security on a bond or undertaking on appeal~~; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 8021. Costs

* * * * *

(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief, appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a ~~supersedeas~~ bond or other security ~~bonds~~ to preserve rights pending appeal;

(5) the fee for filing the notice of appeal.

* * * * *

Committee Note

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Duration of the Automatic Stay of Judgment

In addition to changing the terminology of Civil Rule 62, the published amendments would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The Committee Note explains this change as follows:

> New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for

> a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Without action by the Committee, this change will apply to adversary proceedings in bankruptcy because of Rule 7062's incorporation of Civil Rule 62.

The Subcommittee recommends that Rule 7062 be amended to retain the current 14-day duration of the automatic stay of judgment. Such a change is needed to keep Rule 7062 consistent with other Bankruptcy Rules that govern post-judgment motions and the time for appeal. When the Civil Rules were amended to provide 28 days for post-judgment motions, the Bankruptcy Rules were not similarly amended. Bankruptcy Rules 7052, 9015, and 9023 provide for a 14-day period for seeking a renewed motion for judgment as a matter of law, an amendment of findings, or a new trial. Similarly, Rule 8002 provides for a 14-day period for filing a notice of appeal. These shorter periods have been retained because expedition is frequently important in bankruptcy cases.

To accomplish this deviation from Rule 62's time period, the Subcommittee recommends that Rule 7062 be amended as follows:

Rule 7062. Stay of Proceedings to Enforce A Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14, rather than 30, days after its entry, unless Rule 62(c) or (d) or a court order provides otherwise.[1]

[1] As amended, Rule 62(a) provides for a 30-day automatic stay "except as provided in Rule 62(c) and (d)" and "unless the court orders otherwise." Rule 62(c) provides that certain judgments are not stayed unless

Committee Note

The rule is amended to retain a 14-day period for the automatic stay of a judgment. Rule 62(a) F.R.Civ.P. now provides for a 30-day stay to accommodate the 28-day time periods under the Federal Rules of Civil Procedure for filing post-judgment motions and the 30-day period for filing a notice of appeal. Under the Bankruptcy Rules, however, those periods are limited to 14 days. *See* Rules 7052, 9015, 8002, and 9023.

Because the proposed amendments conform to changes in terminology in the Civil and Appellate Rules and maintain the status quo regarding the length of the stay of a judgment, **the Subcommittee recommends that the Committee seek approval of them without publication**.

---

ordered by the court, and (d) authorizes the court to court to suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights while an appeal is pending from an interlocutory or final judgment regarding an injunction.

TAB 6C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: COMBINED AMENDMENTS TO RULE 8011

DATE: MARCH 13, 2017

At the fall 2016 meeting, our Committee approved proposed amendments to Rule 8011 (Filing and Service; Signature) that would conform to proposed amendments to FRAP 25 and other federal rules governing electronic filing and service, proofs of service, and electronic signatures of registered users of the courts' CM/ECF system. The Committee voted to ask the Standing Committee to give final approval to these conforming amendments to Rule 8011 at the June 2017 meeting without first publishing them for public comment. In approving these amendments at the fall meeting, our Committee recognized that additional changes might be proposed to the parallel sets of federal rules (Civil Rule 5, Criminal Rule 49, Appellate Rule 25, and Bankruptcy Rule 5005) in response to comments received following the publication of those rule amendments and that those changes would need to be considered for Rule 8011.

Judge Ikuta informed the Standing Committee at the January meeting that our Committee would ask to have the Rule 8011 conforming amendments approved without publication. No one on the Standing Committee expressed opposition.

Because our Committee is meeting before any of the other advisory committees, it is not yet clear whether any additional changes will be needed. Based on preliminary discussions among the reporters, however, it appears likely that some wording changes for the parallel sets of rules will be proposed. The Subcommittee is continuing to review proposed language and

potential alternatives, and it will provide additional information to the Committee at, or prior to, the spring meeting.

Meanwhile, there is another alteration that needs to be made to the version of Rule 8011 that our Committee approved in the fall. As was noted then, a separate amendment to Rule 8011 relating to inmate filings was published for comment in August 2016.[1] We proposed that amendment to conform to an earlier amendment of FRAP 25 that has already gone into effect. These two sets of amendments have now been consolidated so that our Committee can give its final approval to the entire set of amendments to Rule 8011. The text of the rule with both sets of amendments indicated follows. **The Subcommittee recommends that the Committee approve the rule, subject to any additional changes that might be proposed to the parallel sets of federal rules.**

[1] As discussed at Agenda Item 6(A), the only comment received on the published amendment to Rule 8011 was from the National Conference of Bankruptcy Judges, which expressed support for all of the proposed amendments to the Part VIII rules.

Rule 8011. Filing and Service; Signature

(a) FILING.

* * * * *

(2) *Method and Timeliness.*

(A) *Nonelectronic Filing*

~~(A)~~(i) *In General*. ~~Filing~~ For a document not filed electronically, filing may be accomplished by ~~transmission~~ mail addressed to the clerk of the district court or BAP. Except as provided in subdivision ~~(a)(2)(B) and (C)~~ (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

~~(B)~~(ii) *Brief or Appendix*. A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid~~, if the district court's or BAP's procedures permit or require a brief or appendix to be filed by mailing~~; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery within 3 days to the clerk~~, if the court's procedures so permit or require~~.

~~(C)~~(iii) *Inmate Filing*. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution's internal mailing system on or

before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or
- evidence (such as a postmark or date stamp) showing that the notice was

so deposited and that postage was prepaid; or

(ii) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8011(a)(2)(A)(i).

(B) *Electronic Filing.*

(i) *By a Represented Person—Generally Required; Exceptions.* An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) *Same as Written Paper*. A document filed electronically is a written paper for purposes of these rules.

~~(D)~~(C) *Copies*. If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

* * * * *

(c) MANNER OF SERVICE.

(1) *Nonelectronic Service.* ~~*Methods.* Service must be made electronically, unless it is being made by or on an individual who is not represented by counsel or the court's governing rules permit or require service by mail or other means of delivery. Service~~ Nonelectronic service may be ~~made by or on an unrepresented party~~ by any of the following ~~methods~~:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(2) *Electronic Service.* Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

~~(2)~~(3) *When Service is Complete*. Service by electronic means is complete on ~~transmission~~ filing or sending, unless the ~~party~~ person making service receives notice that the document was not ~~transmitted successfully~~ received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What is Required*. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

* * * * *

(e) SIGNATURE. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. ~~The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes.~~ The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's electronic signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Committee Note

The rule is amended to conform to the amendments to Fed. R. App. P. 25 on inmate filing, electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (a)(2)(A)(iii) is revised to conform to F.R.App. P. 25(a)(2)(A)(iii), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to

accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served. As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.

Subdivision (e), which requires the signature of counsel or an unrepresented party on every document that is filed, is amended to make an attorney's user name and password the attorney's electronic signature.

TAB 8

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: The Rules Committees

FROM: Scott Myers -- Rules Committee Support Office

RE: Rules Coordination Report

DATE: March 14, 2017

At its June 2016 meeting, the Standing Committee asked the Rules Committee Support Office (RCSO) to identify and coordinate proposed rule changes that have implications for more than one set of rules. The proposed changes listed below implicate more than one rule set.

Rules published for comment in 2016

Electronic filing. Proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49 to address electronic filing, signatures, service and proof of service; conforming amendments to Bankruptcy Appellate Rule 8011.

The advisory committees coordinated proposed amendments to their electronic filing rules using the same language to the greatest extent possible, and will refine their recommendations in light of comments. The rules are on track to go into effect December 1, 2018.[1] At the January 2017 Standing Committee meeting, the Bankruptcy Rules Committee stated that it planned to recommend conforming amendments to Bankruptcy Rule 8011 (the bankruptcy counterpart to Appellate Rule 25) so that all electronic filing rules can go forward at the same time. The advisory committees will make recommendations for final approval, subject to coordination of style and technical changes, at their spring 2017 meetings.

Stay of Proceedings to Enforce a Judgment. Proposed amendments to Civil Rules 62 and 65.1, Appellate Rules 8, 11, and 39, and Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.

The proposed amendment to Civil Rule 62 published for comment in August 2016 would substitute the phrase "bond or other security" for the antiquated term "supersedeas bond." The Appellate Rules Committee published conforming amendments to its Rules 8, 11, and 39 that eliminate the term "supersedeas bond," and also broaden related references to the term "surety" to include other security providers. Parallel changes are reflected in amendments proposed for Civil Rule 65.1. The Appellate and Civil Rules Committees will consider any comments at their spring 2017 meetings. The Bankruptcy Rules Committee will consider at its spring 2017 meeting technical conforming amendments, eliminating the term "supersedeas bond, to Bankruptcy Rules 8007, 8010, 8021, and 9025. A second proposed amendment to Civil Rule 62 would extend the automatic stay for judgments from 14 to 30 days after entry of judgment. The change is designed to prevent the judgment from taking effect before the 28-day time period for

[1] The Bankruptcy Committee is also evaluating additional potential amendments concerning electronic service and notice. *See Infra*, at page 4, under "Bankruptcy Rules Study Agenda."

post judgment motions in civil practice expires. The Bankruptcy Rules Committee incorporates Rule 62 into Bankruptcy Rule 7062 to stay the judgment in adversary proceedings until post judgment periods have run. In bankruptcy however, the time period for post judgment motions is 14 rather than 28 days. Accordingly, the Bankruptcy Rules Committee will recommend amending its Rule 7062 so that the automatic stay of the judgment remains limited to 14 days in bankruptcy. If the civil and the conforming appellate and bankruptcy rule changes are recommended for final approval by the Standing Committee at its June 2017 meeting, the amendments would all be on track to go into effect December 1, 2018.

Proposed Amendments to Criminal Rule 12.4 (Disclosure Statement).

The Criminal Rules Committee published amendments to its Rule 12.4(a) and (b) in 2016. The proposed changes, on track to go into effect December 1, 2018, have implications for various subsections of the appellate, bankruptcy, and civil disclosure rules.[2] Any conforming changes to the appellate, bankruptcy, and civil disclosure rules, if published in the summer of 2017, would be on track to go into effect December 1, 2019.

CR 12.4(a)

The proposed amendment to Rule 12.4(a) provides an exemption to the government's requirement to disclose organizational victims where the impact of the crime on the victim is relatively small. The Appellate Rules Committee discussed a parallel amendment to Rule 26.1(a) at its fall 2016 meeting, and will consider recommending the changes at its spring 2017 meeting. This amendment is not applicable in civil or bankruptcy practice.

CR 12.4(b)

The proposed amendment to Criminal Rule 12.4(b) makes two changes. It changes the time for making disclosures from "upon the initial appearance" of the party to "within 28 days from the initial appearance." It also adds language to emphasize that a supplemental, or later, filing is required not only when information that was previously disclosed changes, but also when additional information subject to disclosure comes to light. At the spring meetings, the Criminal Rules Committee will consider whether to recommend final approval of the 12.4(b) changes, and the Appellate, Bankruptcy, and Civil Rules Committees will consider whether similar changes should be incorporated into their disclosure rules.

Rules Under Active Consideration by the Advisory Committees

Proposed Bankruptcy Rule 9037(h) – a new subpart to the bankruptcy privacy rule in response to suggestion 14-BK-B from Committee on Court Administration and Case Management (CACM).

In response to a suggestion from CACM,[3] the Bankruptcy Rules Committee proposed an amendment to its disclosure rule, Bankruptcy Rule 9037(h), for public comment at its spring

[2] The Appellate Rules Committee is coordinating with the Bankruptcy Rules Committee concerning an unrelated amendment to its disclosure rule. *See Infra*, at page 3, under the heading "Proposed Appellate Rule 26.1(e) (Disclosure Statement)."

[3] The CACM suggestion arose out of a request to the AO from a national creditor for help facilitating an automated process to redact privacy information from thousands of proof of claims attachments filed in thousands of bankruptcy cases. Resolving the matter caused, among other things, CACM to recommend and the Judicial

2016 meeting. It held off submitting the proposal to the Standing Committee, however, in order to give the other advisory committees time to consider parallel amendments to their privacy rules.

The Civil Rules Committee considered a parallel amendment to Civil Rule 5.2 at its fall 2016 meeting, and concluded that there was no independent need for a national rule to correct an inappropriate filing in the civil context. Although the need for such a rule in the bankruptcy context is significant, it is not necessary in the civil rules context. The Criminal Rules Committee discussed the need for a conforming amendment to Criminal Rule 49.1 at its spring 2016 meeting and most members did not believe a parallel amendment was necessary. Because Appellate Rule 25 is derivative, the Appellate Rules Committee plans no changes.

At its January 2017 meeting, the Standing Committee was presented with the views of the Civil and Criminal Rules Committees and no member expressed the view that there was a need to amend the civil and criminal privacy rules to parallel the proposed amendment to Bankruptcy Rule 9037(h).

Proposed Appellate Rule 26.1(e) (Disclosure Statement)

In addition to proposed amendments to its disclosure rule that would conform to some of the published amendments to Criminal Rule 12.4, the Appellate Rules Committee also discussed a new subsection to Appellate Rule 26.1 that would require disclosures of certain actors when an appeal originates from a bankruptcy proceeding. Over the winter, a member of the Appellate Rules Committee and its reporter participated in a conference call with a subcommittee of the Bankruptcy Rules Committee to consider the proposed amendment. If the Appellate Rules Committee recommends the proposed amendment for publication, the Bankruptcy Rules Committee will have to consider whether conforming amendments are needed to Bankruptcy Rule 8012, which addresses corporate disclosures in bankruptcy appeals.

Formal or Informal Suggestions *(yet to be considered, or on Advisory Committee Study Agendas)*

Appellate Rules Committee Study Agenda

[Nothing Reported].

Bankruptcy Rules Committee Study Agenda

In addition to the electronic filing amendments published for comment in 2016, the Bankruptcy Rules Committee will consider at its spring 2017 meeting (Agenda Item 5A) potential amendments to Rules 2002, 9036, and Official Form 410 that would allow electronic service and noticing on registered users, as well as on non-registered users who opt into

---

Conference to adopt a special case reopening fee to redact privacy information in closed bankruptcy cases, and to require courts to notify certain case participants when previously filed documents are replaced with redacted versions. CACM subsequently suggested that the Bankruptcy Rules Committee amend its privacy rule to account for the change in Judicial Conference policy. CACM did not make a similar suggestion to the other advisory committees.

electronic service and noticing on the bankruptcy proof of claim form. The proposed amendments would recognize and account for the multiple parties involved in federal bankruptcy cases who are not registered users, but who are still entitled to receive numerous papers and notices in bankruptcy cases. The potential amendments address bankruptcy-specific issues, but may affect the Appellate Rules Committee, the Civil Rules Committee, and the Criminal Rules Committee because they would govern issues similar to those in the proposed and pending amendments to Appellate Rule 25(c), Civil Rule 5(b)(2), and Criminal Rule 49(a)(3).

Civil Rules Committee Study Agenda

[Nothing Reported].

Criminal Rules Committee Study Agenda

[Nothing Reported].

TAB

Consent 1

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: FINAL APPROVAL OF RULE 9037(h)

DATE: MARCH 12, 2017

At the spring 2016 meeting, the Committee approved for publication a new subdivision of Rule 9037 (Privacy Protections For Filings Made with the Court). The new subdivision (h) would provide a procedure for redacting previously filed documents that were not redacted in accordance with Rule 9037(a). Because the civil and criminal rules have parallel privacy-protection rules, the Committee held the proposed amendment in abeyance to allow the other two advisory committees to consider whether to propose a similar amendment to their rules.

The proposed amendment approved by the Committee provides as follows:

Rule 9037. Privacy Protection for Filings Made With the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, an entity must file a "motion to redact" if it seeks to redact from a previously filed document information that is subject to privacy protection under subdivision (a). The motion must: (A) have an attached copy of the original document, identical

except for the proposed redactions; (B) include the docket or proof-of-claim number of the document to be redacted; and (C) unless the court orders otherwise, be served on the debtor, debtor's attorney, trustee if any, United States trustee, filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

(2) *Protecting an Unredacted Document from Public Access.* Upon the filing of the motion, the court must promptly restrict public access to the motion and the unredacted document pending a ruling on the motion. If the court grants the motion, these restrictions on public access remain in effect until a further court order. If the court denies the motion, the restrictions must be lifted, unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

The moving party must attach to the motion a copy of the original document as it is proposed to be redacted. Except for the redaction, the attached document must be identical to the one previously filed. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the redaction motion may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect that document from public access. This restriction may be accomplished electronically, simultaneous with the

> electronic filing of the redaction motion. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.
>
> If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.
>
> This procedure does not affect any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

Additional Changes Suggested by the Civil Rules Committee Reporter

The Civil and Criminal Advisory Committees decided at their fall 2016 meetings that they did not want to propose similar amendments to their privacy-protection rules unless the Standing Committee thought that it was important to maintain consistency among the parallel federal rules. When the question was presented at the January 2017 Standing Committee meeting, no member expressed disagreement with allowing only the Bankruptcy Rules Committee to propose a provision for post-filing redaction. As a result, the Committee can now go forward with seeking the publication for public comment of proposed Rule 9037(h).

The Subcommittee has reviewed some language and formatting changes that Professor Ed Cooper, the reporter for the Civil Rules Committee, proposed when drafting an amendment to present to his committee, and it recommends that they be made. The following draft indicates the additional changes with double underlining. **The Subcommittee recommends that the Committee approve the modified draft for publication.**

Rule 9037. Privacy Protection for Filings Made with the Court

* * * * *

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion; Service.* Unless the court orders otherwise, an entity that seeks to redact from a previously filed document information that is protected under subdivision (a) must file a motion to redact. The movant must:

(A) attach a copy of the previously filed document, showing the proposed redactions;

(B) include the docket or proof-of-claim number of the previously filed document; and

(C) unless the court orders otherwise, serve the debtor, debtor's attorney, trustee if any, United States trustee, filer of the unredacted

document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document.* The court must promptly restrict public access to the motion and the unredacted document pending a ruling on the motion. If the court grants the motion, these restrictions on public access remain in effect until a further court order. If the court denies the motion, the restrictions must be lifted, unless the court orders otherwise.

Committee Note

Subdivision (h) is new. It prescribes a procedure for the belated redaction of documents that were filed without complying with subdivision (a).

Generally, whenever someone discovers that information entitled to privacy protection under subdivision (a) appears in a document on file with the court—regardless of whether the case in question remains open or has been closed—that entity may file a motion to redact the document. A single motion may relate to more than one unredacted document. The moving party may be, but is not limited to, the original filer of the document. The motion must identify by location on the case docket or claims

register each document to be redacted. It should not, however, include the unredacted information itself.

Subsection (h)(1) authorizes the court to alter the prescribed procedure. This might be appropriate, for example, when the movant seeks to redact a large number of documents. In that situation the court by order or local rule might require the movant to file an omnibus motion, initiate a miscellaneous proceeding, or proceed in another manner directed by the court.

The moving party must attach to the motion a copy of the original document showing the proposed redactions. The attached document must otherwise be identical to the one previously filed. Service of the motion and the attachment must be made on all of the following individuals who are not the moving party: debtor, debtor's attorney, trustee, United States trustee, the filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

Because the filing of the motion to redact may call attention to the existence of the unredacted document as maintained in the court's files or downloaded by third parties, courts should take immediate steps to protect the motion and the document from public access. This restriction may be accomplished electronically, simultaneous with the electronic filing of the motion to redact. For motions filed on paper, restriction should occur at the same time that the motion is docketed so that no one receiving electronic notice of the filing of the motion will be able to access the unredacted document in the court's files.

If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to the motion and the document should be lifted.

This procedure does not affect the availability of any remedies that an individual whose personal identifiers are exposed may have against the entity that filed the unredacted document.

TAB

Consent 2

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: CORPORATE OWNERSHIP STATEMENT

DATE: MARCH 12, 2017

The Criminal Rules Committee has proposed amendments to its rule on Disclosure Statements (Rule 12.4), which were published for public comment last August. Among other things, the amendments would change the time for filing a disclosure statement and clarify the circumstances under which a supplemental statement would have to be filed. Because the other sets of federal rules of procedure have rules that parallel Crim. Rule 12.4, the Civil, Appellate, and Bankruptcy Committees need to consider whether to propose similar amendments.

The Bankruptcy Rules have two disclosure-statement rules: Rule 7007.1 (Corporate Ownership Statement), which applies to adversary proceedings in the bankruptcy court; and Rule 8012 (Corporate Disclosure Statement), which applies to appeals. During its conference call on March 3, the Subcommittee considered whether there is a need to conform those rules to Crim. Rule 12.4. For the reasons discussed below, i**t recommends that no amendments be proposed to the two Bankruptcy Rules at this time.**

Crim. Rule 12.4 Amendments

The proposed amendments to Crim. Rule 12.4 include a change to subdivision (a)(2) concerning organizational victims of alleged criminal activity. That amendment is not relevant to the Bankruptcy Rules. Of potential significance to our Committee is the proposed amendment to Crim. Rule 12.4(b). As published, it provides as follows:

Rule 12.4 Disclosure Statement

* * * * *

(b) Time ~~for~~to File~~ing~~; ~~Supplemental~~Later Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the party learns of any additional required information or any changes in required information ~~upon any change in the information that the statement requires~~.

The Criminal Rules Committee's primary reason for proposing the amendments to Rule 12.4 appears to have been to allow the government to be relieved of the obligation of identifying organizational victims upon a showing of good cause. Neither the Committee Note nor the Committee's report to the Standing Committee explains the reason for extending by 28 days the deadline for filing an initial statement. The Committee Note does explain that the change to (b)(2) is intended to "make[] clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements." The Committee noted in its report to the Standing Committee that "adding these details [to Rule 12.4(b)] while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment."[1]

Consideration by the Appellate and Civil Rules Committees

At the January 2017 Standing Committee meeting, the Appellate Rules Committee reported that it is considering whether to propose amendments to its Rules 26.1 (Corporate Disclosure Statement) and 29(c) (Brief of Amicus Curiae—Contents and Form) to require additional disclosures. As part of that consideration, the Appellate Rules Committee has tentatively decided to propose changes to FRAP 26.1 to partially conform to the proposed

[1] Memorandum from Hon. Donald W. Molloy to Hon. Jeffrey S. Sutton 9 (May 14, 2016).

amendments to Crim. Rule 12.4. In addition to adding a new subdivision to address disclosures regarding victims in criminal cases, the committee has tentatively decided to propose amendments to FRAP 26.1(b) that would match the heading of Crim. Rule 12.4(b) and the content of Rule 12.4(b)(2). The amendment would not, however, change the time for filing the initial disclosure statement. It would provide as follows:

> **Rule 26.1. Corporate Disclosure Statement**
>
> * * * * *
>
> **(b) Time ~~for~~ to File~~ing~~; ~~Supplemental~~ Later Filing.** A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must ~~supplement~~ file a statement at a later time promptly if the party learns of any additional required information or any changes in required information ~~upon its statement whenever the information that must be disclosed under Rule 26.1(a) changes~~.
>
> * * * * *

The Appellate Rules Committee has not yet concluded its consideration of the disclosure requirements and therefore has not sought publication of these amendments.

The Civil Rules Committee will be considering whether to propose any changes to Civil Rule 7.1 at its spring meeting, which will take place after this Committee's meeting. In correspondence with the reporters, the Civil Committee's reporter, Professor Ed Cooper, has expressed doubt about whether there is a need to amend the civil rule.[2] He noted with respect to the 28-day change that the civil and criminal rules are already worded differently and that the

[2] Email from Edward Cooper to Rules Advisory Committee reporters (Jan. 5, 2017).

contexts are sufficiently different that uniformity may not be required.[3] He also stated that he does not believe the provision for filing a supplemental statement needs clarification. All of the sets of rules require a supplemental statement if any required information "changes." Professor Cooper said that the information can change in two ways: "new information comes into existence, or preexisting information comes to be recognized." He noted that the 2002 Committee Note to FRAP 26.1(b) gives as an example of the situation in which a supplemental statement is required a public corporation's acquisition of 10% or more of a party's stock after the initial disclosure statement was filed. That situation appears to be one that the amendment to Crim. Rule 12.4(b) is intended to address, but in Professor Cooper's view it is already covered with sufficient clarity.

Bankruptcy Rules 7007.1 and 8012

The two rules are similar in content, but not identically worded for two reasons: (1) the trial versus appeal context requires differences, and (2) Rule 7007.1 was modeled on the wording of FRAP 26.1 before that rule was restyled, whereas Rule 8012 was modeled on the restyled version. Rule 7007.1(b), which governs the time for filing corporate ownership statements provides as follows:

> **Rule 7007.1. Corporate Ownership Statement**
>
> * * * * *
>
> (b) TIME FOR FILING. A party shall file the statement required under Rule 7007.1(a) with its first appearance, pleading, motion, response, or other request addressed to the court. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

[3] Civil Rule 7.1(b)(1) requires a party to file a disclosure statement "with its first appearance, pleading, petition, motion, response, or other request addressed to the court," whereas Crim. Rule 12.4(b)(1) currently requires such filing "upon the defendant's initial appearance."

Rule 8012(b), the parallel provision for bankruptcy appeals, provides:

> **Rule 8012. Corporate Disclosure Statement**
>
> * * * * *
>
> (b) TIME TO FILE; SUPPLEMENTAL FILING. A party must file the statement with its principal brief or upon filing a motion, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the required information changes.

Although worded differently, both rules require a supplemental statement when the information that needs to be disclosed changes.

Recommendation

Like Professor Cooper's view about Civil Rule 7.1, the Subcommittee concluded that there is no need to amend Rules 7007.1 and 8012 to conform to the proposed amendment to Crim. Rule 12.4 or the possible amendment to FRAP 26.1. The most significant change being proposed—disclosure of corporate victims of criminal activity—is not relevant to the Bankruptcy Rules. And there does not seem to be any reason to change the time for filing an initial disclosure statement. The only remaining amendment would be a minor wording change regarding supplemental statements that seems unnecessary because there does not appear to be any uncertainty about the need to file a supplemental statement when changes occur to the relevant facts regarding a corporate party's ownership. The Subcommittee was aware of no cases that raise this issue, and the reporter noted that the Collier treatise recognizes that "any change in circumstances, such as the existence of one or more additional 10-percent-or-more corporate owners," requires the filing of a supplemental statement.[4]

[4] 10-7007.1 Collier on Bankruptcy P 7007.1.01 (16th 2016).

The Subcommittee on Privacy, Public Access, and Appeals recently provided feedback to the Appellate Rules Committee about whether there is a need for additional disclosures under FRAP 26.1 in bankruptcy appeals to the courts of appeals. The conclusion was that only a minor addition is needed (the name of the debtor if not otherwise identified by the caption). If the Appellate Committee decides to propose that or any other substantive change to FRAP 26.1, our Committee might want to consider proposing similar amendments to Rule 8012 to keep the two rules consistent. The proposed change in subdivision (b) might then be included as part of that amendment package.

It is also possible that the Committee may want to consider expanding the circumstances under which corporate ownership disclosures are required in the bankruptcy courts. The Committee on Codes of Conduct previously requested that our Committee consider requiring corporate disclosures in contested matters. The matter apparently fell by the wayside without the Committee's consideration, so it may be an issue that the Committee will want to restore to its agenda. If so, the proposed wording changes to Rule 7007.1(b) could be considered at that time.

TAB

Consent 3

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: PROCEDURE FOR CASES REMANDED FROM COURT OF APPEALS

DATE: MARCH 13, 2017

At the fall 2016 meeting, the Committee discussed Judge Goldgar's suggestion (16-BK-E) that the Committee study whether a mandate procedure, similar to FRAP 41 (Mandate; Contents; Issuance and Effective Date; Stay), would be useful for bankruptcy appeals to district courts and bankruptcy appellate panels ("BAPs"). The Bankruptcy Rules have never included such a provision. Instead, under Rule 8024(a) and (b), the district or BAP clerk enters the judgment in a bankruptcy appeal and immediately transmits notice of the entry and a copy of any opinion to the parties to the appeal, the U.S. trustee, and the bankruptcy clerk. No mandate is issued.

The Committee's discussion led it to focus on a narrower issue than the one originally presented: whether there is a need for a rule regarding remands of bankruptcy appeals from a court of appeals that would make clear whether any further proceedings would take place in the district court (or BAP), or whether the matter was back within the jurisdiction of the bankruptcy court. Judge Goldgar noted that it is sometimes unclear which court has authority to proceed and a procedure for clarifying the status of a case upon remand would be helpful. The Subcommittee considered this issue during its conference call on February 23. **It recommends that no further action be taken.**

The Subcommittee agreed that this problem could be solved by either a more specific statement by the court of appeals about what should happen upon remand or improved

communications between the district court or BAP and the bankruptcy court. Neither solution seems appropriate for a bankruptcy rule. The Subcommittee concluded instead that the topic might be addressed by educational programs of the Federal Judicial Center.

SUPPLEMENTAL MEMOS

SUPPLEMENTAL MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: MICHELLE M. HARNER, ASSOCIATE REPORTER

RE: COMMENTS ON RULES 5005(a)(2) and 8011

DATE: MARCH 24, 2017

Subsequent to the February 2017 conference call of the Subcommittee on Consumer Issues, a small working group convened an additional conference call to discuss: (i) alternative language to address electronic signatures under the proposed amendments to Rules 5005(a)(2)(C) and 8011(e); and (ii) a response submitted by Sai to the Subcommittee's Memorandum, dated March 9, 2017, on the proposed amendments to Rule 5005(a)(2) (and, in turn, Rule 8011). This Supplemental Memorandum summarizes the working group's deliberations and further recommendations for the Advisory Committee concerning the proposed amendments to Rules 5005(a)(2) and 8011.

Language on Electronic Signatures

As discussed in the Subcommittee's March 9th Memorandum, the Advisory Committee received several comments on the proposed amendment to Rule 5005(a)(2)(C). That amendment reads:

> (C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

The comments suggest that this language is confusing and does not clearly state who can file the document, who can sign the document, or the information required in the signature bock. The proposed amendments to Rule 8011 include similar language addressing electronic signatures.

The March 9th Memorandum summarizes the Subcommittee's consideration of these comments and potential language to address the comments. Specifically, the Subcommittee evaluated the following language:

> (C) *Signing.* Filing with the user name and password of an attorney of record, together with the attorney's name on the signature block, serves as the attorney's signature.[1]

As explained in the March 9th Memorandum, the Subcommittee raised several concerns regarding this potential language, including the need for further clarity in, and definition of, the terms used and a better description of the "filer" to ensure that non-represented parties who are authorized to file electronically are included within the electronic signature provision. Notably, the response filed by Sai to the March 9th Memorandum also identified this latter issue as a continuing problem with the language of the proposed amendment to Rule 5005(a)(2)(C) (and, in turn, Rule 8011(e)). The Subcommittee agreed to consider further changes to address these continuing issues and to provide the Advisory Committee with a status report prior to the April 6th meeting.

To that end, the Subcommittee's working group reviewed several proposals to better explain the mechanics of filing a document with an electronic signature and the information required to appear in the signature block. The working group discussed the following proposals, among others:

> *Signing.* An authorized filing made through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature.[2]

---

[1] The changes to the original language of Rule 5005(a)(2)(C) are marked below:

> (C) *Signing*. ~~The~~**Filing with the** user name and password of an attorney of record, together with the attorney's name on ~~a~~**the** signature block, serves as the attorney's signature.

> *Signing*. The submission of a document [paper] through the court's electronic-filing system, together with the filer's name in the signature block of that document [paper], constitutes [serves as] the filer's signature.
>
> *Signing*. If a person (or the person's agent) files pursuant to the procedures for electronic filing established by the court, the person's name in a signature block of the electronically filed document constitutes the person's signature.
>
> *Signing*. Filing with the user name and password of a registered electronic filer, together with the filer's name on the signature block, serves as the filer's signature.[3]
>
> *Signing*. Use by the filer (e.g., attorney of record or pro se filer) of the ECF user name and password when logging in to ECF, and inclusion of the filer's name on a signature block in the filed document, together comprise the filer's electronic signature.[4]

Although each of the proposed alternatives offer more clarity on certain points, the first alternative addresses the issue concerning a filing by a non-represented registered user and it eliminates certain terms that could be subject to different or uncertain definitions (e.g., "user name" or "password"). To the extent that the Advisory Committee believes that further definition is necessary, even in the context of the first alternative, it could add language to the Committee Note to explain the mechanics of the electronic signature provision. For example, the last paragraph of the Committee Note could state, "An authorized filing made through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature. A filing is authorized for purposes of this subdivision of the rule if it is made

[2] The Civil and Criminal Rules Committees are considering this (or very similar) language for their respective rules, which language was drafted, in part, in response to concerns raised by the Subcommittee during its February 2017 conference call.
[3] Suggested by Sai in the response to the Subcommittee's March 9th Memorandum.
[4] *See* Suggestion BK-2016-0003-0010, submitted by H. Dixon.

by the filer or by a person authorized by the filer to use the filer's electronic filing account with the court. The filing also must comply with the rules of the court governing electronic filing."

After much deliberation, the working group decided to propose the following language to the Advisory Committee for its consideration at its April 6th meeting:

> *Signing*. A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

In addition, the working group recommends that the last paragraph of the Committee Note read as follows:

> A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court. The filing also must comply with the rules of the court governing electronic filing.

Electronic Filing Rules for Pro Se Parties

The response submitted by Sai to the Subcommittee's March 9th Memorandum states that the Subcommittee misunderstood Sai's Suggestion,[5] interpreting it as a mandate instead of a rebuttable presumption in favor of electronic or nonelectronic filing by pro se parties. (The response also requests additional consideration of the language on electronic signatures, as noted above, and extends the Suggestion to the proposed amendments to Rule 8011.) The response is correct in describing Sai's Suggestion as one opposing a default rule that requires pro se parties to file nonelectronically and proposing a more flexible approach. Specifically, the Suggestion posits a rule that would allow pro se parties to file either electronically or nonelectronically,

[5] *See* Suggestion BK-2016-0003-0012, submitted by Sai NA.

unless the court, for good cause, orders otherwise.[6] The Suggestion further suggests, among other things, that a court could not order a non-represented prisoner to file electronically. A copy of the language proposed by Sai in the Suggestion is set forth at Appendix A.

The March 9th Memorandum did not fully restate Sai's proposed language and summarized the Suggestion as a proposal that "would require pro se parties to file electronically, unless the court orders otherwise." Despite this description, the Subcommittee did consider all alternatives for permitting electronic filing by pro se parties, recognizing the importance of this issue and the different perspectives held by courts, litigants, and others. Nevertheless, the working group is including Sai's concerns and the Suggestion's proposed language in this Supplemental Memorandum to ensure that the materials provide the Advisory Committee with an opportunity to vet the issues and all potential responses fully at its April 6th meeting. The Subcommittee also will review the arguments contained in Sai's Suggestion with the Advisory Committee at the meeting.

[6] The Suggestion would not allow a court, however, to prohibit electronic filing "on the basis that a person is not represented by an attorney or is not an attorney." *See* Appendix A.

Appendix A

[Language in BK-2016-0003-0012, submitted by Sai NA]

F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING. 1. ...

2. *Electronic* Filing *and Signing* ~~by Electronic Means~~.

a) ~~A court may by local rule permit or require documents 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 local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person may file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) ***No court may require a prisoner not represented by an attorney to file electronically.***

c) ***Prohibition. A person must not file electronically if prohibited, for good cause, by court order.***

(1) ***No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.***

d) *Signing.* ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

SUBJECT: WORDING OF SERVICE PROVISIONS IN RULE 8011

DATE: MARCH 24, 2017

As discussed in the memorandum concerning agenda item 6C, the Advisory Committee at the fall meeting approved amendments to Rule 8011 to parallel proposed amendments to FRAP 25 (which are modeled on proposed amendments to Civil Rule 5). The Committee voted to seek approval of these amendments without publication because they are conforming amendments, and dispensing with publication would allow them to go into effect at the same time as the parallel amendments to the other sets of federal rules. The Committee's approval was made subject to consideration at the spring meeting of any wording changes proposed by the other advisory committees in response to comments received after publication.

One set of proposed changes—regarding signatures on electronically filed documents—pertains to both Rule 5005 and Rule 8011 and is discussed in a separate supplemental memorandum prepared by Professor Harner. But the Civil Rules Committee reporter, Professor Cooper, has also proposed alternative language for certain provisions of Civil Rule 5(b) and (d) regarding service and certificates of service—topics that are also addressed by Bankruptcy Rule 8011.[1] An *ad hoc* group consisting of Judges Ikuta, Ambro, and Goldgar, clerk of court representative Ken Gardner, the reporters, and the AO attorney advisors reviewed the proposed wording changes during a conference call on March 24.

[1] In the bankruptcy court, Rules 7005 and 9014 make Civil Rule 5 applicable in adversary proceedings and contested matters, so any amendments to Rule 5 will automatically apply. Rule 5005, while addressing filing and—as proposed for amendment—signatures, does not address service and proof of service. For bankruptcy appeals, Rule 8011 addresses filing, service, proof of service, and signatures.

This memorandum presents the relevant provisions of Rule 8011 as they appear in the agenda book for the spring meeting. It then discusses Professor Cooper's proposed revised wording and gives the group's recommendations concerning adoption of similar language for Rule 8011.

The Amendments Currently Proposed for Rule 8011

The relevant portions of Rule 8011 approved at the fall meeting provide as follows:

Rule 8011. Filing and Service; Signature

* * * * *

(c) MANNER OF SERVICE.

(1) *Nonelectronic Service.* ~~*Methods.* Service must be made electronically, unless it is being made by or on an individual who is not represented by counsel or the court's governing rules permit or require service by mail or other means of delivery. Service~~ Nonelectronic service may be ~~made by or on an unrepresented party~~ by any of the following ~~methods~~:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(2) *Electronic Service.* Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

~~(2)~~(3) *When Service is Complete*. Service by electronic means is complete on ~~transmission~~ filing or sending, unless the ~~party~~ person making service receives notice that the document was not ~~transmitted successfully~~ received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What is Required*. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

* * * * *

Proposed Revisions

Professor Cooper has suggested that the Civil Rules Committee make two changes to Rule 5 or its Committee Note regarding service and proof of service.

1. In response to comments from court clerks, Professor Cooper proposes adding a paragraph to the Committee Note to clarify that clerk's offices are not responsible for monitoring service through the electronic filing system to determine whether service was successfully made. He proposes that the following language be added as the third paragraph of the Committee Note to Rule 5:

> Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

This explanation, if included in the Rule 8011 Committee Note, would relate to Rule 8011 (c)(3) (lines 17-22).

The proposed Committee Note to Rule 8011 was based on the Committee Note to FRAP 25. Because the structures of FRAP 25 and Rule 8011 differ from Civil Rule 5, the Committee Notes are not identical. If the proposed explanatory paragraph were added at the appropriate place in the Rule 8011 Committee Note, the Committee Note would read as follows:

Committee Note

The rule is amended to conform to the amendments to Fed. R. App. P. 25 on inmate filing, electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (a)(2)(A)(iii) is revised to conform to F.R.App. P. 25(a)(2)(A)(iii), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other

> electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.
>
> [new paragraph] As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.
>
> Subdivision (e), which requires the signature of counsel or an unrepresented party on every document that is filed, is amended to make an attorney's user name and password the attorney's electronic signature.

For the sake of consistency and to avoid the implication by silence that, in bankruptcy appeals, district and BAP clerks do have a duty to notify the serving party of a failed transmission, the review group recommends that the proposed paragraph be added to the Rule 8011 Committee Note. It does, however, suggest two wording changes to the proposed paragraph. The second and last sentences of the underlined paragraph refer to the sender "learn[ing]" that the transmission failed. The proposed rule provision, however, says at lines 17-20 that service is not complete if the person making service "receives notice" that the document was not received. Because someone might get a notice that is overlooked (and thus nothing is "learned"), the group recommends that the Committee Note be revised to be consistent with the rule. The added paragraph would then read as follows:

> Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means

> **receives notice** that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who **receives notice** that the transmission failed is responsible for making effective service.

2. Professor Cooper proposes a change to the published version of Rule 5(d)(1)(B) to clarify that a certificate of service is not required when a paper is filed and served using the court's electronic filing system. Comments on the published rule indicated that there was confusion about whether a notice of electronic filing, which was said to constitute a certificate of service, had to be filed with the court. To eliminate that possible reading, Professor Cooper recommends amending the civil rule to use the approach used in FRAP 25(d) and Rule 8011(d)(1). The following text shows the proposed change to the published version of Civil Rule 5(d)(1)(B):

> (B) ~~A certificate of service must be filed within a reasonable time after service; but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic filing system.~~ No certificate of service is required when a paper is served by filing it with the court's electronic filing system. When a paper is served by other means, a certificate of service must be filed within a reasonable time after service or filing, whichever is later.

Because Rule 8011(d)(1) already provides that "A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system . . ." (emphasis added), the group concluded that there is no need to change its wording. The provision already states an exception to the certificate-of-service requirement when the court's electronic-filing system is used. The group also concluded that there is no reason to add the second sentence regarding when a certificate of service must be filed. Rule 8011 and FRAP 25 differ from Civil Rule 5 in this regard. Currently and as proposed for amendment, Rule

8011(d)(1) and FRAP 25(d)(1) require that the document in question "contain" an acknowledgment or proof of service. Thus the document and the certificate will be filed simultaneously. Furthermore, these appellate rules do not present the issue arising under the civil rules regarding discovery documents that are initially served but not filed. Thus there is no need to refer to "service or filing, whichever is later."