SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

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DIRECT DIAL
(202) 371-7410
DIRECT FAX
(202) 393-5760
EMAIL ADDRESS
JOHN.BEISNER@SKADDEN.COM

17-CV-JJJJJ

August 3, 2017

VIA EMAIL

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and
Procedure of the Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Invitation for Comment on Possible Issues Regarding Rule 30(b)(6)

Dear Ms. Womeldorf:

I am writing on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") to respond to the Invitation for Comment on Possible Issues Regarding Rule 30(b)(6) by the Rule 30(b)(6) Subcommittee ("Subcommittee") of the Advisory Committee on Civil Rules.

When Rule 30(b)(6) was adopted in 1970, it was intended to mitigate the practice of "bandying," a practice under which some corporations would produce one deponent after another, each of whom disclaimed knowledge of information that someone in the organization undoubtedly knew.[1] Over the years, however, Rule 30(b)(6) practice has veered away from that principal goal and has spawned other

[1] Fed. R. Civ. P. 30(b)(6) advisory committee's note to 1970 amendment ("It will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons of the organization and thereby to it . . . [and] should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge[.]") (citation omitted).

forms of litigation abuse. As one commentator has noted, "Federal Rule 30(b)(6) has become a powerful and one-sided weapon that can be abused by the interrogating party to the prejudice of the corporation."[2] These problems can be addressed by amending Rule 30(b)(6) in a few key ways. Specifically, we believe the Subcommittee should:

- Require that Rule 30(b)(6) depositions be addressed in Rule 16 reports and at Rule 26(f) conferences;
- Establish a clear procedure for objecting to 30(b)(6) notices; and
- Clarify that statements made during a 30(b)(6) deposition are not judicial admissions.

As described in more detail below, these rule changes would cultivate greater cooperation and compromise between parties at the outset with regard to the scope of Rule 30(b)(6) depositions, the number of topics, the number of corporate witnesses, the duration, the location, and any potential objections to these and other issues that may arise later in the case. At the same time, they would also level the playing field for corporate and individual parties alike.

I. RULES 16 AND 26 SHOULD BE AMENDED TO INCLUDE RULE 30(b)(6) DEPOSITIONS.

ILR applauds the Subcommittee for raising the possibility of amending Rules 16 and 26 to include Rule 30(b)(6) depositions within their scope. As the Subcommittee recognizes, such an amendment could serve as "a catalyst for early attention and judicial oversight" that "could forestall later disputes."[3] After all, corporate depositions are a central aspect of discovery in many cases, and "by [their] nature . . . can be time-consuming and inefficient."[4] However, despite the significance of these depositions – which are supposed to reflect the knowledge of the corporate defendant regarding the key issues in the case – the subject of Rule 30(b)(6) depositions generally is not discussed until late in the discovery process,

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[2] James Winton, *Corporate Representative Depositions Revisited*, 65 BAYLOR L. REV. 939, 944 (2013) (citing *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996)).

[3] Rule 30(b)(6) Subcommittee, Advisory Committee on Civil Rules, Invitation for Comment on Possible Issues Regarding Civil Rule 30(b)(6) (May 1, 2017), http://www.uscourts.gov/sites/default/files/invitation_for_comment_from_the_rule_30b6_subcommittee_may_1_2017_0.pdf.

[4] *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005).

often "at the eleventh hour (or later)[.]"[5] Moreover, once 30(b)(6) depositions are addressed, such discussions usually occur ***after*** the plaintiff has propounded a 30(b)(6) notice that calls for a deposition in short order on numerous and poorly defined topics.[6] Pursuant to Rule 37, the court can impose sanctions when a party designated under Rule 30(b)(6) fails to appear for the deposition "after being served with proper notice."[7] As a result, unless the parties are able to reach some kind of agreement, the corporate defendant must attempt to comply with the notice or move for a protective order – a motion that is often not resolved by the court until long after the 30(b)(6) deposition is scheduled to take place.

The rancorous, expensive and time-consuming motion practice that ensues could largely be obviated by fleshing out the timing, number, scope or location of 30(b)(6) depositions at the outset through the Rule 16 pretrial conference. That conference is designed to "establish[] early and continuing control so that the case will not be protracted because of lack of management" and to "improve[e] the quality of the trial through more thorough preparation."[8] Including the subject of 30(b)(6) depositions in the Rule 16 pretrial conference would further that purpose and comport with the most recent amendments to Rule 16, which were aimed at "engag[ing] judges in early and active case management," as Chief Justice Roberts explained.[9] This is especially important in "[l]itigation involving complex issues, multiple parties, and large organizations, public or private, [which] may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way."[10]

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5 Sidney I. Schenkier, *Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(*6*)*, 29 LITIG. 20, 22 (2003); *see also* Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternate Mechanisms*, 50 ALA. L. REV. 651, 718 (1999) ("The [Advisory] Committee was quite conscious of the fact that the discovery of contentions generates substantial volumes of motion practice, and that the goal of providing fair description of trial contentions is best advanced by a statement of them late in the preparations. On the other hand, the entire flavor of the new provision for entity depositions reflects concerns applicable at the outset of the litigation. It is at the early state when the adversary of a company will know least about the internal structure of the entity.") (footnotes omitted).

6 *See, e.g.*, *E3 Biofuels, LLC v. Biothane, LLC*, No. 8:11CV44, 2013 WL 4400506 (D. Neb. Aug. 15, 2013) (discussing a deposition notice containing 71 inquiries that were broad, vague, and failed to set forth the inquiries with reasonable particularity mere weeks before the entity deposition).

7 Fed. R. Civ. P. 37(d).

8 Fed. R. Civ. P. 16(a).

9 Chief Justice John G. Roberts, 2015 Year-End Report on the Federal Judiciary 5 (2015).

10 Fed. R. Civ. P. 16 advisory committee's note to 2015 amendment.

"Mandating the use of a discovery plan to specifically address issues that may arise regarding the scope of Rule 30(b)(6) depositions before problems develop will serve to enhance the efficiency of the discovery process."[11] Accordingly, scheduling orders entered pursuant to Rule 16 and the parties' discovery plan as provided in Rule 26(f)(3)(B) should be amended to include a reference to the timing, scope and limitations surrounding Rule 30(b)(6) depositions. In particular, ILR supports the following specific language proposed in the comments submitted by the Lawyers for Civil Justice ("LCJ"), which would be added to Rule 16(b)(3)(B), Rule 16(c)(2) and Rule 26(f):

> Include any agreements the parties reach for conducting Rule 30(b)(6) depositions, including as to the number and identification of anticipated topics, the anticipated number of witnesses for those topics, anticipated objections to the topics, and the timing for objections for such topics, the scope of the deposition(s), the date, duration and location for the deposition, and supplementation.[12]

II. RULE 30(b)(6) SHOULD ESTABLISH A CLEAR PROCEDURE FOR OBJECTIONS.

Rule 30(b)(6) does not currently provide a formal procedure for objecting to a deficient corporate deposition notice. In other words, there is no procedure for objecting to the scope or breadth of the topics identified in the notice (which are supposed to be described with "reasonable particularity"); the number of topics; or the location of the deposition – much less to whether a witness should be produced at all.

These issues are often hotly contested. For instance, parties are frequently at loggerheads over the "reasonable particularity" requirement provided in Rule 30(b)(6). Some courts have interpreted the phrase as requiring "painstaking specificity,"[13] while others have taken a more liberal approach to the "reasonable

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[11] Kelly Tenille Crouse, Note, *An Unreasonable Scope: The Need for Clarity in Federal Rule 30(b)(6) Depositions*, 49 U. LOUISVILLE L. REV. 133, 161-62 (2010).

[12] *See* Comment to the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules, *Advantageous to Both Sides: Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for all Parties*, at 3, Lawyers for Civil Justice, July 5, 2017.

[13] *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 U.S. Dist. LEXIS 120818, at *4 (N.D. Okla. Aug. 26, 2013); *see also Schneider v. CitiMortage, Inc.*, No. 13-4094-SAC, 2016 WL 362488, at *2 (D. Kan. Jan. 28, 2016) ("[B]oth parties should bear in mind that 'In order for Rule 30(b)(6) to function effectively, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in

particularity" requirement, rejecting any suggestion that deposition topics must be spelled out with "painstaking specificity."[14]

Another contentious issue surrounding 30(b)(6) deposition notices relates to knowledge. "Rule 30(b)(6) delineates what has been called an 'affirmative duty' to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are ***known or reasonably available to the corporation***."[15] But what happens when there is ***no*** knowledgeable witness within the entity[16] or the information is not reasonably available to the organization?[17] Such a case might arise, for example, where the events giving rise to the litigation occurred many years in the past and the relevant actors can no longer recall the events, have retired, are deceased or are unwilling to cooperate with a prior employer.[18] "[E]ven the courts which impose the most stringent preparation burdens on an entity responding to a deposition notice commonly recite that it is possible for the corporation to plead lack of knowledge, sometimes analogized to an individual

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dispute.'") (quoting *Lipari v. U.S. Bancorp, N.A.*, No. 07-2146-CM-DJM, 2008 WL 4642618, at *5 (D. Kan. Oct. 16, 2008)).

[14] *Espy v. Information Techs, Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at *4 (D. Kan. Apr. 13, 2010); *see also Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605-PAB-KMT, 2017 WL 1325344, at *2 (D. Colo. Jan. 3, 2017) ("Since the Rule itself requires that topics be defined with 'reasonable particularity,' this court sees no reason to graft the word 'painstaking' to what is otherwise the clear directive of the Rule that the topic definitions be 'reasonable.'").

[15] Sinclair & Fendrich, *supra* note 5, at 689 (emphasis added).

[16] *See* Craig M. Roen & Catherine O'Connor, *Don't Forget to Remember Everything: The Trouble with Rule 30(b)(6) Depositions*, 45 U. TOL. L. REV. 29, 37 (2013) ("Courts often seem oblivious to the obvious problem that Rule 30(b)(6) designated witnesses often lack personal knowledge of the subject matter, and consequently, may have difficulty providing complete responses on behalf of the organization.").

[17] *See id.* at 30-31 ("Unfortunately, in the context of Rule 30(b)(6) discovery disputes, courts too often seem to ignore the fact that organizations are an administrative or functional structure, i.e., a collection of people with a common sets of goals and are usually not of a single mind with a single set of experiences and a single memory of those experiences . . . issues may be informed by facts that may reside with dozens of present and former employees, contained in thousands of pages of documents created over many years, located in multiple locations, or may involve highly technical or obscure data.").

[18] *See Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177 (E.D. Pa. 1996) ("Because this litigation involves a piece of equipment that Cat designed and manufactured twenty five years ago, both parties should anticipate the unavailability of certain information concerning the machine. [The corporate designee] provides the Barrons with their best chance of obtaining any information . . . [B]oth parties should expect that the inescapable and unstoppable forces of time have erased items from his memory which neither party can retrieve.").

deponent's lack of memory."[19] But other courts have applied sanctions or other "consequences" – i.e., precluding the presentation of information at trial on the issue, deeming the unavailability of information to be a failure to adequately prepare or a "natural consequence of [the corporation's] inability to obtain knowledge . . . on the relevant subjects listed in the 30(b)(6) notice."[20]

While corporate deposition notices increasingly precipitate these sorts of disputes, there is no formal procedure for lodging objections and responding to them under Rule 30(b)(6). Instead, as courts have explained, the only mechanism for challenging a deposition notice on the grounds described above is to move for a protective order.[21] Some courts require that a protective order be obtained prior to the scheduled deposition unless the district court has a local rule staying the deposition pending resolution of the motion.[22] And still other courts are not even willing to entertain such motions, generally requiring the responding party to proceed with the deposition and ultimately litigate the objections after the deposition is completed.[23]

These approaches are unduly burdensome and generate needless motion practice and court involvement that could otherwise be avoided by a formal objection procedure. Like LCJ, we believe that Rule 45 could serve as a model for such a process. Rule 45 provides that a person subject to a subpoena must object within the time for compliance or within 14 days, whichever is greater.[24] These

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19 Sinclair & Fendrich, *supra* note 5, at 690.

20 *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 681, 688-89 (S.D. Fla. 2012).

21 *See, e.g.*, *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165-66 (D. Mass. 2007) ("Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued."); *Robinson v. Quicken Loans, Inc.*, No. 3:12-CV-00981, 2013 WL 1776100, at *3 (S.D. W. Va. Apr. 25, 2013) ("When a corporation objects to a notice of Rule 30(b)(6) deposition, the proper procedure is to file a motion for protective order.").

22 *See, e.g.*, *Int'l Bd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2013 WL 627149, at *6 (D. Colo. Feb. 19, 2013) ("[F]iling a pre-deposition motion is the appropriate course of action."); *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007) (noting local rule providing for automatic stay of deposition pending resolution of motion for protective order).

23 *See New World Network ltd. v. W/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D. Fla. Apr. 6, 2007) ("the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule[d] deposition.").

24 Fed. R. Civ. P. 45(d)(2)(B).

deadlines should be applicable to a 30(b)(6) notice. Rule 45 places the burden on the requesting party to move to compel production or compliance with the subpoena. Similarly, the party requesting a corporate deposition should have the burden to move for a ruling on any objection he or she believes is not well-grounded and should be required to hold off on deposing a corporate witness pending a ruling if the parties cannot reach compromise.

Applying the Rule 45 approach to corporate depositions would facilitate resolution of certain disputes regarding the thorny particulars of 30(b)(6) notices without formal motion practice.[25] This jibes with the judicial preference that parties resolve 30(b)(6) issues through the meet-and-confer process, outside of court, where possible.[26] At the very least, a formal objection procedure in the 30(b)(6) context would eliminate the uncertainty over when or how objections may be raised or motions pursued with respect to the propriety of 30(b)(6) notices. Most importantly, corporations would no longer have to face the Hobson's choice of complying with an improper or overreaching deposition notice or mounting a pre-deposition challenge and risking draconian sanctions. Instead, parties would be operating under an orderly objection regime with clear deadlines for resolving 30(b)(6) deposition notice challenges – mitigating the costs and burdens of a key discovery tool.

III. RULE 30(b)(6) TESTIMONY SHOULD NOT BE TREATED AS JUDICIAL ADMISSIONS.

Finally, ILR urges the Subcommittee to clarify that statements made during a 30(b)(6) deposition are ***not*** judicial admissions and ***can*** be controverted or explained by other evidence.

A driving force behind the "widespread use of Rule 30(b)(6) depositions" is the often-touted "ability to force the entity to provide 'binding' admissions[.]"[27] "[W]hat is unclear in the cases," however, "is what it means to 'bind' the

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[25] *Int'l Bd. of Teamsters,* 2013 WL 627149, at *7 (before filing with the court, the parties were able to compromise on three deposition topics); *see also New England Carpenters*, 242 F.R.D. at 166 ("[I]t is indeed good practice to discuss any issues respecting a 30(b)(6) deposition notice with the party which noticed the deposition in an attempt to work out an agreement.").

[26] *See Int'l Bd. of Teamsters,* 2013 WL 627149, at *6 ("[D]isputes about the topics are most effectively addressed in advance of the deposition . . . In the event that the parties' attempts to resolve disagreements about a Rule 30(b)(6) deposition are unsuccessful, filing a pre-deposition motion is the appropriate course of action.").

[27] Sinclair & Fendrich, *supra* note 5, at 729.

corporation."[28] Some corporate defendants have been barred from defeating a motion for summary judgment by relying on evidence that conflicts with a prior 30(b)(6) deposition. For example, in *Hyde v. Stanley Tools*, a corporate representative admitted that the allegedly defective tool at issue was manufactured by the defendant.[29] The court later ruled that the corporation could not contradict that testimony through another witness in order to defeat summary judgment.[30] According to the court, "'[t]he Rule 30(b)(6) designee . . . presents the corporation's 'position' on the topic'" such that he "testifies on behalf of the corporation and holds it accountable accordingly."[31]

Similarly, in *Chapman v. Ourisman Chevrolet Co.*, the defendant sought to oppose summary judgment on a dispositive statute-of-limitations issue by relying on an affidavit from one witness that provided additional information relating to events recounted by the defendant's 30(b)(6) designee.[32] However, the court struck the affidavit, reasoning that "[a]s John Ourisman was the corporate designee pursuant to Rule 30(b)(6), he bound the corporation to the answers that he gave in his deposition testimony. . . . Accordingly, Rule 30(b)(6) require[d] that the corporation be bound to the answers that Ourisman gave during his deposition testimony and that the [d]efendants be barred from using the Rashed affidavit, as th[e] affidavit provide[d] information that materially varie[d] from the information provided in Ourisman's deposition."[33]

Other courts have properly rejected such a rigid construction of Rule 30(b)(6). For instance, in *A.I. Credit Corp. v. Legion Insurance Co.*, a corporation sought to oppose a summary judgment motion based on testimony that contradicted that of its 30(b)(6) witness as to whether the corporate representative spoke with the moving party in a conference call.[34] The Seventh Circuit held that the statement in Rule 30(b)(6) providing that the designee must "testify as to matters known or reasonably available to the organization" does not "absolutely bind[] a corporate

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[28] Winton, *supra* note 2, at 1011.

[29] *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000).

[30] *Id.* at 993.

[31] *Id.* at 992-93 (citation omitted).

[32] *Chapman v. Ourisman Chevrolet Co.*, No. AW-08-2545, 2011 U.S. Dist. LEXIS 73708, at *10-20 (D. Md. July 1, 2011).

[33] *Id.* at *16.

[34] *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).

party to its designee's recollection[.]"[35] As the Seventh Circuit recognized, nothing in the advisory committee notes indicated that the Rule should go so far and therefore proceeded to consider the contradictory testimony.[36]

A.I. Credit and other cases like it have struck the right balance in interpreting Rule 30(b)(6) by concluding that a party is not 'bound by its Rule 30(b)(6) testimony as a matter of law' in the sense that matters admitted in the testimony cannot be controverted."[37] "Instead, a corporation is 'bound' in the same sense as any other witness: 'the witness has committed to a position at a particular point in time; it does not mean that the witness had made a *judicial admission* that formally and finally decides an issues. . . . Such evidence may be explained or contradicted.'"[38] Simply put, "[a] 30(b)(6) witness should be afforded no greater or less relief than that which would be afforded to an individual party."[39] Any rule to the contrary would be unduly "harsh,"[40] depriving corporations of a legitimate means of defending themselves.

In sum, the high-stakes and costly nature of corporate depositions warrants a fresh look at Rule 30(b)(6). The most logical starting point for reform is amending the Federal Rules of Civil Procedure to include the subject of corporate depositions in Rule 26(f) conferences and Rule 16 reports. Such a move would help focus parties' and courts' attention on corporate depositions and encourage agreements on their attendant issues early on in a case. In addition, the Subcommittee should consider establishing a formal objection procedure modeled on that provided by Rule 45, which would likewise winnow potential disputes between the parties, and at the very least, eliminate the confusion over how and when to mount challenges related to corporate deposition notices. And finally, the Subcommittee should also clarify that statements made by a corporate representative are ***not*** judicial admissions that bind the corporate party in the face of later-ascertained contradictory evidence.

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35 *Id.*

36 *Id.*

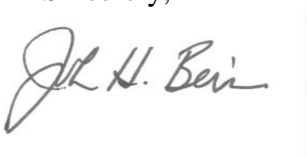
37 Sinclair & Fendrich, *supra* note 5, at 730 (citation omitted).

38 Winton, *supra* note 2, at 1013 (quoting Sinclair & Fendrich, *id.*).

39 *Amusement Art, LLC v. Life Is Beautiful, LLC*, No. 2-14-cv-08290-DDP-JPR, 2016 U.S. Dist. LEXIS 165429, at *32 (C.D. Cal. Nov. 29, 2016).

40 *Good Drop LLC v. Hayes*, No. 6:15-cv-00268-AA, 2016 U.S. Dist. LEXIS 100736, at *9 (D. Or. Aug. 1, 2016).

Sincerely,



John H. Beisner