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Via Rules_Comments@aouscourts.gov
and United States First Class Mail

July 13, 2017

The Honorable Joan N. Ericksen
Chair, Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
c/o Administrative Office
of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Madam Chair:

The National Federation of Independent Business (NFIB) appreciates the opportunity to comment, in response to the Rule 30(b)(6) Subcommittee invitation of May 1, 2017, on issues regarding Rule 30(b)(6) of the Federal Rules of Civil Procedure. As set forth below, NFIB urges the Rule 30(b)(6) Subcommittee to recommend to the Advisory Committee on Civil Rules that it, in turn, recommend to the Supreme Court amendments to Rule 30(b)(6) to: (1) allow nonparty small businesses a reasonable period of time to locate and confer with an attorney before designating deponents, and (2) provide a means for nonparty small businesses to raise and resolve inexpensively objections to matters for examination described in a Rule 45 subpoena for a Rule 30(b)(6) deposition.

NFIB is an incorporated nonprofit association with more than 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The membership of NFIB includes small business entities that sometimes find themselves involved in civil lawsuits in federal courts. Also, the NFIB Small Business Legal Center affiliated with NFIB engages from time to time in litigation in the federal courts. NFIB and its members have a substantial interest in the "just, speedy, and inexpensive determination" (Rule 1) of civil suits in federal courts. Unlike large corporations that employ staffs of lawyers and accountants, America's small businesses -- and

more than half of NFIB members employ five or fewer employees -- rarely employ lawyers or other persons with legal knowledge or experience.

Rule 30(b)(6) currently provides:

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Rule 30(b)(6) creates two particular concerns for nonparty small businesses.

First, a nonparty small business needs time to find and consult a lawyer. A subpoena issued under Rule 45 for a Rule 30(b)(6) deposition directed to a nonparty small business names the business and must describe with reasonable particularity the matters for examination. The small business must then designate persons to testify on its behalf, a duty about which the small business owner most likely first learns by reading the mandatory notice of that duty in the subpoena. The small business owner needs time to find and consult a lawyer so the owner can protect the legal interests of the business and timely comply with the requirements of Rule 30(b)(6). Since the party issuing the subpoena controls setting the date for the deposition, the party should be under a duty to allow a reasonable period of time for the nonparty small business owner to find and consult counsel prior to responding to the subpoena.

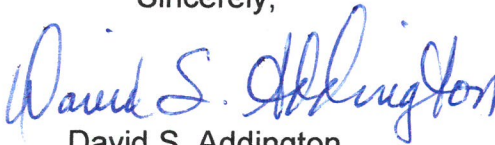
Secondly, small businesses are particularly vulnerable to overbearing litigation tactics because small businesses lack the resources to combat them. A nonparty small business may receive a Rule 45 subpoena for a Rule 30(b)(6) deposition that gives only a vague description of matters for examination, lists matters for examination that are not within the scope of discovery under Rule 26(b)(1), or seeks information covered by an evidentiary privilege. A nonparty small business should have the ability to raise objections to such a subpoena prior to the deposition, with a procedure for deciding the objections that (unlike the Rule 45(d)(1) enforcement process or Rule 45(d)(3) quashing process) places the procedural burdens for getting a court determination of the objections on the party issuing the subpoena rather than on the small business.

To correct the problems described above, the Subcommittee should recommend the following changes to Rule 30(b)(6) (material to add is underscored):

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. A nonparty organization shall have a reasonable time to engage and consult an attorney prior to responding to the subpoena. A nonparty organization shall notify the party issuing the subpoena if the organization objects to the subpoena's description of the matters for examination on the ground of privilege, lack of reasonable particularity, or exceeding the scope of discovery and may decline to present deponents to testify on the matters to which the objection applies unless otherwise directed by the court at the instance of the party issuing the subpoena. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Thank you for the opportunity to comment on the need for changes to Rule 30(b)(6) of the Federal Rules of Civil Procedure.

Sincerely,



David S. Addington
Senior Vice President and General Counsel