EXCERPT FROM THE
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:

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FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2003, 2019, 3001, 4004, and 6003, new Rules 1004.2 and 3002.1, and proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2009. Fifteen witnesses appeared at a public hearing conducted on February 5, 2010, in New York. The other scheduled public hearing on the proposed changes was cancelled because the one witness who asked to testify at the hearing agreed to do so by telephone. The advisory committee considered more than 150 written comments on the proposed amendments.

Rule 1004.2

Proposed new Rule 1004.2 requires that a petition for recognition of a foreign proceeding under new chapter 15 of the Bankruptcy Code identify the countries where a foreign proceeding is pending against the same debtor and the country where the debtor has its "center of main interests." The rule sets out applicable notice provisions and generally requires that a challenge to the debtor's designation of the center of main interests be raised at least seven days before the hearing on the petition for recognition. The proposed new rule was published in August 2008 and republished with a revision in August 2009. As revised, the deadline to file a motion

challenging the debtor's designation was changed from "60 days after the notice of the petition has been given" to no later than seven days before the petition hearing. No comments were submitted following republication.

Rule 2003(e)

The proposed amendments to Rule 2003(e) require a presiding official who "adjourns" a meeting of creditors to file a statement specifying the date and time to which the meeting is adjourned. The requirement ensures that the record clearly reflects whether the meeting of creditors was concluded or extended to another day. The Committee Note makes clear that an adjournment to a specific date is the equivalent of holding the meeting "open" for purposes of § 1308(b) of the Bankruptcy Code. Under 11 U.S.C. § 1308(a), a chapter 13 debtor is required to file certain tax returns "[n]ot later than the day before the date on which the meeting of creditors is first scheduled to be held." Under § 1307(e), the debtor's failure to file the required tax returns is a basis for dismissal or conversion of the chapter 13 case. Section 1308(b), however, provides that if the debtor has not filed the required tax returns by the date on which the meeting of creditors is first scheduled, the trustee may "hold open that meeting for a reasonable period of time" — not to exceed 120 days for a return that is past due as of the date the petition is filed — which gives the debtor additional time to file the required return.

Eight of the nine comments submitted on the proposed amendments expressed support. The Office of Chief Counsel of the IRS recommended revising the proposed amendments to require the official presiding at the meeting of creditors to specify whether the meeting is being "held open" to allow a taxpayer additional time to file a tax return, or whether the meeting is being "adjourned" for some other purpose. The advisory committee concluded that requiring the trustee to make this distinction expressly and on the record in every case would subject chapter

13 cases to conversion or dismissal merely because the trustee failed to make the necessary statement or unintentionally used the wrong words in adjourning a meeting of creditors. Instead, the advisory committee concluded that it would be simpler and less confusing, and would avoid an unnecessary trap for debtors, to treat a meeting that is "adjourned" to a specific date as "held open" under § 1308(b) and as allowing the debtor additional time to file a tax return. There is no risk that this would create an indefinite extension because the additional time for filing tax returns is limited by statute.

Rule 2019

The proposed amendments to Rule 2019, which applies in chapter 9 and chapter 11 proceedings, expand disclosure requirements to facilitate openness and transparency by revealing potentially divergent economic interests within groups of creditors or equity security holders and on the part of putative representatives of other stakeholders. The proposed amendments require committees, groups, or entities that consist of or represent creditors or equity security holders who are acting in concert to identify their "disclosable economic interests" relating to the debtor. This term is broadly defined in subdivision (a) to include economic rights and interests that are affected by the value, acquisition, or disposition of a claim or interest. The amendments require every such group or committee to provide a verified statement of, among other things, the nature and amount of each disclosable economic interest relating to the debtor. In addition, each member of an unofficial group or committee that claims to represent any entity in addition to the members of the group or committee must disclose the acquisition date of each disclosable interest by quarter and year, unless the interest was acquired more than a year before the bankruptcy petition was filed. Such information is important to evaluate positions taken by these groups and entities. For example, it is important to know that members of a committee

purporting to represent the debtor's bond holders also hold a derivative position the value of which is inverse to that of the bonds.

The overwhelming majority of individuals and groups commenting on the published proposed amendments supported a clarified and reinvigorated Rule 2019. During the public comment period, the advisory committee heard concerns from some distressed-debt investors about the potential impact of the proposed rule on certain proprietary business information and about the breadth of the proposed rule's enforcement provision. The advisory committee revised the published amendments in several important respects to address these concerns.

As published, the amendments would have required disclosure of the precise date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. The proposed disclosure obligations would have applied to each covered entity, indenture trustee, or member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official committee). During the public comment period, the advisory committee was informed that pricing information is highly guarded by distressed-debt purchasers who fear that its disclosure could give industry participants unfair insight into competitors' trading strategies. Though the published amendments had taken the conservative approach of requiring automatic disclosure only of the acquisition date and insisting on a court order to obtain price information, the advisory committee was persuaded by the public comments that this approach was still too broad. The combination of market volatility and publicly available price data means that requiring disclosure of the date of purchase would as a practical matter reveal the acquisition price, even if the court did not order disclosure. Effectively requiring pricing information disclosed in every

case could discourage investors from purchasing distressed debt, which would be counterproductive.

After careful consideration, the advisory committee made several changes to the published rule. The advisory committee eliminated the provision specifically authorizing a court to order the disclosure of the amount paid for a disclosable economic interest. In addition, the acquisition-date disclosure provision was modified to require disclosure only by quarter and year. The information that was eliminated is not necessary to accomplish the primary purpose of the amendments. As revised, the proposed amendments require the disclosure of enough information to reveal potential conflicts of interest. If more specific information is important in an individual case, disclosure could be obtained through discovery or ordered pursuant to the court's existing authority.

The advisory committee also added language in subdivision (b)(1) limiting the covered groups, committees, and entities to those that represent or consist of multiple creditors or equity security holders acting in concert to advance their common interests. This revision clarifies that groups composed entirely of affiliates or insiders of one another are not subject to Rule 2019's disclosure requirements.

The advisory committee also added a definition of "represent" or "represents" in subdivision (a)(2) that limits the application of the rule to groups, committees, and entities taking a position before the court or soliciting votes on a plan. This revision excludes from the rule those whose involvement in a case is merely passive. The revision addresses concerns expressed during the public comment period that the rule's disclosure requirements should not be triggered when, for example, a law firm represents more than one client with respect to a chapter 11 case but does not appear in court to seek or oppose relief on behalf of more than one of those clients.

There is no reason to require an entity that remains passive in the case to publicly disclose its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

For similar reasons, the advisory committee eliminated the provision in subdivision (b) of the published amendments that authorized a court to require disclosure by an entity that does not represent anyone else. The advisory committee also added subdivision (b)(2), which excludes certain entities — including indenture trustees and class action representatives — from the rule's disclosure requirements unless the court orders otherwise.

Finally, the published enforcement provisions that authorized the court to determine failures to comply with legal requirements regulating the activities and personnel of an entity, group, or committee were deleted, limiting the scope of the enforcement provision to failures to comply with the rule itself.

Rule 3001

The proposed amendments to Rule 3001 require creditors to provide additional information supporting certain proofs of claim and impose penalties if creditors fail to comply with the new disclosure requirements. The amendments proposed for Judicial Conference approval were revised after publication to refer to an official form that will be prepared to facilitate reporting certain of the disclosure items. Other revisions limit the amended rule's sanctions provision. Provisions of the published rule that imposed certain disclosure requirements in connection with claims based on open-end or revolving credit arrangements have been revised more extensively and, as explained below, will be republished in August 2010 for further public comment.

As revised, the proposed amendments presented for Judicial Conference consideration continue and clarify the long-established disclosure requirement that a creditor presenting a claim in an individual-debtor case provide an itemized statement of the interest, fees, expenses, and other charges incurred before the petition was filed. Special disclosure requirements apply under the amendments if the claim is secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must also be provided.

The proposed amendments, modified after public comment, also strengthen the penalties for failing to comply with the Rule 3001 requirements. The provision published for comment generally mandated sanctions for creditors who failed to provide the required information, including prohibiting the creditor from presenting any of the omitted information as evidence in a contested matter or adversary proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The penalty provision is based on Civil Rule 37, which prohibits a party from using information "to supply evidence on a motion, at a hearing, or at a trial" that it fails to disclose as part of its disclosure obligations. The proposed amendments to the sanctions provision of Rule 3001 are grounded in the courts' well-recognized authority to control the presentation of evidence used in court proceedings. The sanctions provision, as revised after public comment, continues to permit exclusionary sanctions only if the failure to provide the required information was not "substantially justified or . . . harmless"; further emphasizes the court's discretion to determine whether that sanction or any other should be imposed; and makes it clear that "notice and hearing" is required before the imposition of any sanction. The Committee Note specifically recognizes that a creditor's failure to provide the required information under the proposed amendment to Rule 3001(c) is not in itself a ground for

disallowance of the claim. The claim can be disallowed only if it comes within one of the grounds for disallowance under § 502(b) of the Bankruptcy Code.

As published in August 2009, the proposed amendments to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor before the commencement of the bankruptcy case. Consumer bankruptcy lawyers, trustees, and judges have long raised concerns about creditors filing bare proofs of claim with little supporting documentation, especially bulk purchasers of credit-card debt. Such bare proofs of claim make it virtually impossible to ascertain whether the claims are valid. Though such bare proofs of claim raise suspicions, debtors' lawyers have little incentive to expend time and resources to evaluate such claims because they generally receive no compensation for the effort and any money derived from such efforts is paid to other unsecured creditors. The trustees often cannot investigate suspicious proofs of claim because of their workload burdens. As a result, despite the lack of supporting documentation, many invalid claims purchased in bulk are simply not challenged.

During the public comment period, many supported the increased disclosure requirements. Representatives of bulk purchasers of credit card debt, however, strongly objected to the account statement requirement. They asserted that the statement will often not be available when the proof of claim is filed. Under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement. The advisory committee concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on an exclusive, more costly, means of providing such

information. This provision was revised to allow creditors to provide information relevant to determinations of the age, prior holders, and other salient features of the claim in a more convenient fashion. The modified proposed rule also relieves claimants to which it applies from the general requirement of filing the original or duplicate of the writing on which the claim is based. Instead, the proposed rule provides that documentation relating to an open-end or revolving consumer credit claim must be disclosed if a party in interest requests it. Because the revisions were so significant, this proposal will be published in August 2010 for public comment and is not presented to the Judicial Conference at this time.

Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. The rule is intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any prepetition arrearage and the amount of the postpetition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the debtor and trustee to adjust postpetition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

Under the proposed rule, the holder of a home mortgage claim must give: (1) a notice itemizing any postpetition fees, expenses, or charges within 180 days after they are incurred; and (2) at least 21 days' advance notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. To address suggestions for different time periods and concerns about how the time period would apply to loan payments that adjust frequently, the deadline to notify the debtor of any payment changes was revised after the public comment period from thirty to 21 days before the debtor's payment in the new amount is due.

The proposed rule also establishes a procedure for determining whether the debtor has cured any default and is otherwise current on mortgage payments at the close of a chapter 13 case. Finally, the proposed rule provides for sanctions if the holder of a claim secured by the debtor's principal residence fails to provide any of the required information.

Rule 4004

The proposed amendments to Rule 4004 provide that a party may seek an extension of time, based on newly discovered information, to object to a debtor's discharge after the time for objecting expires but before a discharge is granted. In some cases the court does not enter a discharge immediately after the objection deadline passes. A gap period — between the expiration of the time for objecting and the actual entry of a discharge — is created during which a party may discover information that would have provided a basis for objecting had it been known in time to object. When the discharge is later entered, revocation of the discharge under § 727(d) of the Bankruptcy Code may not be available based on information acquired in the gap period, because some grounds for revocation require the complaining party to have learned of the debtor's misconduct after the entry of the discharge. The amendments allow a party in that

circumstance to file a motion for extension of time to object to the debtor's discharge even though the objection period has expired.

Rule 6003

The proposed amendments to Rule 6003 clarify that the 21-day waiting period before a court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying in the order that it is effective as of an earlier date. The amendments recognize the common practice of such nunc pro tunc orders.

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The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

a. Approve the proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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