PROPOSED RULE AMENDMENTS
OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent with this report.

Federal Rules of Appellate Procedure

I. Appellate Rule 4

A. Brief Description

Existing Rule 4 provides a 60-day appeal period in a case in which the "United States or its officer or agency is a party." The same provision is contained in 28 U.S.C. § 2107. The proposed amendment to Rule 4(a)(1)(B) makes clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

B. Arguments in Favor

- The proposed amendment eliminates confusion and clarifies the applicability of the existing rule to cases in which federal officers and employees are sued in an individual capacity.
- Civil Rule 12 recognizes that the government often needs more time than is otherwise provided to determine whether to represent a defendant officer or employee sued in an individual capacity. The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

C. Objections

- The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), emphasized that statutory appeal time periods are jurisdictional. Changing the Rule 4 appeal period by rule amendment might raise a jurisdictional issue in light of *Bowles* because the period is set by 28 U.S.C. § 2107 as well as by rule.

D. Rules Committees' Consideration

The rules committees concluded that amending § 2107 as well as Rule 4, using identical language, would avoid any potential jurisdictional issue raised by *Bowles*. The Judicial Conference will seek legislation to amend § 2107, coordinated to have the same provisions and to take effect on the same day as the amendments to Rule 4. Preliminary

discussions with congressional staff indicate that such legislation can be enacted, barring unforeseen circumstances.

Federal Rules of Bankruptcy Procedure

I. Bankruptcy Rule 2003(e)

A. Brief Description

A chapter 13 debtor must 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," and the debtor's failure to file the required tax returns is a basis for dismissal or conversion of the chapter 13 case. However, under 11 U.S.C. § 1308(b), 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," which gives the debtor additional time to file the required return. The proposed amendments to Rule 2003(e) require a presiding official who "adjourns" a creditors' meeting to file a statement specifying the date and time to which the meeting is adjourned. The adjournment to a specific date is the equivalent of holding the meeting "open" for the purpose of § 1308(b) and allows the trustee to provide additional time to the debtor to file tax returns without risking dismissal or conversion of the chapter 13 case.

B. Arguments in Favor

- The requirement to file a statement specifying the date and time to which a meeting is adjourned ensures that the record clearly reflects whether the creditors' meeting was concluded or extended to another day.

C. Objections

- The Office of Chief Counsel of the IRS recommended revising the proposed amendments to require the official presiding at the creditors' meeting 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 IRS suggested that the debtor would have additional time to file tax returns only if the trustee expressly declared that the meeting was being "held open" under § 1308(b).

D. Rules Committees' Consideration

The rules committees concluded that requiring the trustee to make the distinction proposed by the IRS expressly and on the record in every case would subject chapter 13 cases to conversion or dismissal merely because the trustee overlooked the need to make an explicit statement or unintentionally used the wrong words in adjourning a creditors'

meeting. The rules committees 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), allowing the debtor additional time to file a tax return. There is no risk that this would create an indefinite or unduly lengthy extension because the additional time for filing tax returns is limited by statute.

II. Bankruptcy Rule 2019

A. Brief Description

The proposed amendments to Rule 2019, which applies in chapter 9 and chapter 11 proceedings, 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. The amendments broadly define the term 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, committee, or entity 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.

B. Arguments in Favor

- The disclosure of economic interests of groups or committees that consist of or represent, and entities that represent, multiple creditors or equity security holders that are acting in concert to advance their common interests is important in order to reveal potential conflicts of interest and to permit evaluation of positions taken by such groups, committees, and entities.

- The proposed amendments facilitate openness and transparency by requiring information that reveals potentially divergent economic interests within groups of creditors or equity security holders and on the part of putative representatives of other stakeholders.

C. Objections

- Earlier versions of the proposed 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 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 the disclosure of pricing information in every case could discourage investors from purchasing distressed debt, which would be

counterproductive.

D. Rules Committees' Consideration

The rules committees 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 requirement to disclose more specific information is not necessary to accomplish the primary purpose of the amendments. As revised, the proposed amendments require the disclosure of information sufficient 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.

III. Bankruptcy Rule 3001

A. Brief Description

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 proposed amendments 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 provision published for comment generally mandated sanctions for creditors who failed to provide the required information, including prohibiting the creditor from presenting 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 sanctions provision was revised to address comments received after publication.

B. Arguments in Favor

- Consumer bankruptcy lawyers, trustees, and judges have long raised concerns about creditors, especially bulk purchasers of credit-card debt, filing bare proofs of claim with little supporting documentation. Such bare proofs of claim make it virtually impossible to ascertain whether the claims are valid. Despite the lack of supporting documentation, many invalid claims purchased in bulk are not challenged because debtors' lawyers have little incentive to expend time and resources to evaluate such claims, and because trustees often cannot investigate suspicious proofs of claim because of their workload.

- The proposed amendments clarify the existing rule, which requires creditors to submit the original or a duplicate of the "writing" on which a claim is based.

C. Objections

- 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. Creditors asserted that the statement is often not 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. Creditors also asserted that account information is usually stored in an electronic format, and that it may not be practicable to produce a duplicate account statement.

- Creditors asserted that the sanctions provision in the published proposed amendments was too harsh and inflexible, was inconsistent with the Bankruptcy Code, exceeded the authority granted under the Rules Enabling Act, and was unnecessary.

D. Rules Committees' Consideration

In response to the concern raised about the burdens involved in the proposed requirement that the holder of a claim based on an open-end or revolving consumer credit agreement attach to its proof of claim the last account statement sent to the debtor, the rules committees concluded that the rule should not insist on an exclusive way for creditors to provide the information needed to assess the validity of its claim. The provision was revised to allow creditors to provide information relevant to determining the age, prior holders, and other salient features of the claim in ways that might be less costly and burdensome. 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, and instead 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 to these provisions of the rule were so significant, this proposal was published in August 2010 for public comment and is withdrawn from the amendment at this time.

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 was revised to address concerns about the penalty. The amendments continue to permit exclusionary sanctions only if the failure to provide the required information was not "substantially justified or . . . harmless," and were revised to further emphasize the court's discretion to determine whether any sanction is appropriate and to clarify that "notice and hearing" is required before the imposition of any sanction.

Federal Rules of Criminal Procedure

I. Criminal Rule 6

A. Brief Description

Existing Rule 6(f) requires that an indictment be returned to a magistrate judge in open court. The proposed amendments to Rule 6 allow the return of an indictment by video teleconference when appropriate to "avoid unnecessary cost or delay."

B. Arguments in Favor

- The amendments provide needed flexibility to courts in jurisdictions that cover large geographic areas in which the nearest judge may be hundreds of miles away from where the grand jury is sitting. Because the return of an indictment is generally brief and uncomplicated, the amendments will allow judges in far-flung districts to avoid travel to distant courthouses when it is extremely time-consuming or difficult due to weather or road conditions.

- Taking the return of an indictment by video teleconference preserves the judge's time and safety, while accommodating the Speedy Trial Act's requirement under 18 U.S.C. § 3161(b) that an indictment be returned within 30 days of arrest, and while preserving the return of indictments in open court.

C. Objections

- An indictment returned by a grand jury is an important public event that should be recognized by the physical attendance of a federal magistrate judge.

D. Rules Committees' Consideration

The rules committees concluded that having a judge in the same courtroom as the grand jury when returns are made remains the preferred practice. The video teleconferencing option is expected to be used sparingly and in limited circumstances. In courts in metropolitan areas, the attendance of a magistrate judge to accept the return of an indictment will continue to be routine. But in certain parts of the country, requiring a magistrate judge to travel for hours over long distances to perform a brief and essentially "ministerial" function can be an unnecessary hardship. The proposed option to accept the return by video teleconference provides flexibility to meet a very practical need.

II. Criminal Rule 43

A. Brief Description

The proposed amendments to Rule 43 provide that a court may permit a defendant to appear by video teleconference in a misdemeanor or petty offense proceeding.

B. Arguments in Favor

- Under the current rule, a defendant may consent not to be physically present during a misdemeanor or petty offense proceeding, including trial and sentencing. Instead of the accused relinquishing the right to attend the misdemeanor or petty offense proceeding altogether, the proposed amendments offer the judge the option of permitting the accused to participate in the arraignment, plea, trial, and sentencing by video teleconference.

C. Objections

- Although there were no public comments focusing on this provision, there was a general concern that allowing any defendant to be tried and sentenced outside a courtroom diminishes the status of the law and erodes the public's respect for the judicial process.

- The proposed amendments will permit the trial and sentencing of defendants to substantial prison terms of up to one year by video teleconference. The defendant's "virtual presence" is no substitute for a face-to-face communication with a federal judge.

D. Rules Committees' Consideration

The rules committees recognize the important benefits and impact of requiring a defendant to appear before a federal judge in a courtroom and what is lost when virtual presence is substituted for actual presence. However, the rules committees concluded that the use of video teleconferencing may be valuable in circumstances in which the defendant would otherwise be unable to attend. The proposed amendment does not work a major change; the rule now authorizes the entirety of the proceedings to occur without the defendant's presence at all. The flexibility to appear by video teleconference is most appropriate and helpful when the alleged offense is minor—such as a traffic violation committed in a national park that the defendant visits while on vacation—and requiring the accused to travel long distances to attend the proceeding is unreasonable. This option is intended to be used in limited circumstances, contingent on the defendant's written consent and on the court's discretion.