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June 11, 2018

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 Preliminary Draft of Proposed Amendment to 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 the preliminary draft of an amendment to Rule 30(b)(6), which would require plaintiffs and defendants to "confer in good faith about the number and description of the matters for examination" "[b]efore or promptly after the notice of subpoena is served[.]"[1] The business community welcomes an amendment to Rule 30(b)(6) that would require the parties to meet and confer before a corporate representative deposition. After all, corporate depositions are a central aspect of discovery in many cases, and "by [their] nature . . . can be time-consuming and inefficient."[2] In addition, disputes over these depositions often lead to extensive, time-consuming motions practice. However, the preliminary draft amendment goes on to require that the parties also confer on the "***identity*** of ***each*** person who will testify."[3] As explained below, this portion of the

1 Draft Amend. to Fed. R. Civ. P. 30(b)(6).

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

3 Draft Amend. to Fed. R. Civ. P. 30(b)(6) (emphasis added).

draft amendment is misguided and should be deleted for two reasons: (1) it would impose unnecessary practical burdens on large corporations that are not in a position to identify the most suitable 30(b)(6) corporate representative shortly after a subpoena is served – and that should not be forced to do so on the fly; and (2) requiring the parties to confer on the identity of corporate representatives could be construed as giving the party seeking a 30(b)(6) deposition license to request deponents other than those proposed by the organization from which a deposition is sought, in derogation of well-established law.

First, there is a significant risk that including the "identity" of corporate representatives as a topic for the mandatory meet-and-confer meeting will be construed as requiring parties to prematurely disclose the identity of 30(b)(6) corporate representatives, thereby imposing serious practical burdens on large corporations. Indeed, it would be utterly illogical to require a corporation to identify witnesses at the very same meet-and-confer where the parties are discussing the "number and description of the matters for examination" since whatever is resolved at such a conference regarding the topics that will be addressed at the deposition will obviously affect who is selected to testify on behalf of the company.

"Selecting a [30(b)(6)] witness or witnesses . . . entail[s] significant effort."[4] This is so because "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."[5] But ascertaining the identity of an individual within the corporation who can satisfy both prongs can be – and often is – a challenging and time consuming exercise, particularly where there is ***no*** knowledgeable witness within the entity[6] or the information is not reasonably available to the organization.[7]

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4 *S.E.C. v. Merkin*, 283 F.R.D. 689, 698 n.11 (S.D. Fla. 2012).

5 Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternate Mechanisms*, 50 ALA. L. REV. 651, 689 (1999).

6 *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.").

7 *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

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.[8] In addition, depending on the kinds of topics enumerated in the deposition notice or subpoena, the responding party might consider using different individuals to address different Rule 30(b)(6) categories or even dividing specific categories among multiple witnesses. All of these considerations are part of the calculus in selecting appropriate representatives – a "most critical" decision that can have significant legal implications for the defendant at future stages of the litigation.[9]

Under the current draft amendment, a corporation would have to confer with the serving party about the "identity of each person who will testify" "[***b***]***efore*** or ***promptly*** after the" 30(b)(6) notice or subpoena is served.[10] Some courts might construe this requirement as imposing an affirmative obligation on the corporation to disclose the specific names of the corporate representatives at the meet-and-confer, which would in all likelihood occur ***before*** the company has had a meaningful or fair opportunity to cull through the relevant documents, custodial files, emails and other materials pertaining to the topics set forth in the notice or subpoena that is part and parcel of selecting the most suitable 30(b)(6) representative consistent with the considerations discussed above. Upending this orderly process and forcing corporations to provide the names of corporate representatives early in the 30(b)(6) process would generate a Hobson's choice for these parties. Either they could spend exorbitant amounts of money (on top of the substantial sums already associated with civil discovery) in an attempt to expedite the process for selecting the best suited corporate representative at the outset or they could simply come up with the name of a representative off the cuff. Neither scenario would be wise – let alone fair – given the pivotal role 30(b)(6) depositions play in civil litigation.[11] For this reason, the

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documents created over many years, located in multiple locations, or may involve highly technical or obscure data.").

[8] *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.").

[9] Federal Tax Litigation § 1A.11 ("Most critical in selecting the representative(s) is that the testimony on the 30(b)(6) topics will be deemed admissible against it for any purpose at trial.").

[10] Draft Amend. to Fed. R. Civ. P. 30(b)(6) (emphases added).

[11] *See, e.g., Portfolio v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-09371 (KPF)(SN), 2017 WL 9400671, at *2 (S.D.N.Y. Apr. 27, 2017) (highlighting "the potential impact of the testimony that can

requirement of conferring on the "identity" of corporate representatives should be excised from the preliminary draft amendment.

Second, requiring the parties to confer on the specific identity of 30(b)(6) witnesses in advance of a deposition also raises the specter that the requesting party will seek to influence the decision-making process for selecting corporate representatives. As court after court has recognized, it is the party from whom discovery is sought – ***not*** the party seeking discovery – that decides who sits for a 30(b)(6) deposition.[12] There are several important rationales underpinning this important principle. In the first place, because corporate knowledge "lies within the organization," it is the ***corporation*** that is uniquely positioned to "identify and designate a witness who is knowledgeable on the noticed topic[.]"[13] Further, and relatedly, giving the corporation the "benefit of choosing and preparing its deponent" avoids needless delay and inefficiencies and furthers the overall purpose of Rule 30(b)(6), which is to "'streamline'" discovery.[14] And this axiomatic precept also follows perforce from the potentially binding nature of corporate representative testimony. Indeed, it would be inherently unfair for the party seeking discovery to have ***any*** role in selecting a 30(b)(6) designee given that the deponent ultimately "speaks" for the corporation.[15]

The Committee itself considered the "risk that some might interpret" the draft amendment "as requiring that the organization obtain the noticing party's approval of

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be obtained through this procedural device"); Sinclair & Fendrich, *supra* note 5, at 729 (noting that a driving force behind the "widespread use of Rule 30(b)(6) depositions" is the often-touted "ability to force the identity to provide 'binding' admissions").

[12] *See, e.g.*, *Folwell v. Hernandez*, 210 F.R.D. 169, 172 (M.D.N.C. 2002) ("One of the most important consequences of Rule 30(b)(6) is that under it, only the corporation selects the persons who will testify."); *Grahl v. Circle K Stores, Inc.*, No. 2:14-cv-305-RFB-VCF, 2017 WL 3812912, at *4 (D. Nev. Aug. 31, 2012) (corporation has "the benefit of choosing and preparing its deponent"); *Apple Inc. v. Samsung Electronics, Co.*, No. C 11-1846 LHK (PSG), 2012 WL 1511901, at *2 (N.D. Cal. Jan. 27, 2012) ("the purpose served by Fed.R.Civ.P. 30(b)(6)" is "to require an organization to identify and designate a witness who is knowledgeable on the noticed topic"); *Klorczyk v. Sears, Roebuck & Co.*, No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D. Conn. Apr. 9, 2015) ("the Court will not require Shinn Fu America to provide plaintiffs with the name and resume of its 30(b)(6) witness"); *Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 304 (N.D. Iowa 2013) ("the corporation itself selects the deponent who will speak for it").

[13] *Apple*, 2012 WL 1511901, at *2 (emphasis added).

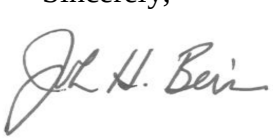
[14] *Grahl*, 2017 WL 3812912, at *4.

[15] *Thompson*, 291 F.R.D. at 304 (testimony "bind[s]" corporation because, *inter alia*, "the corporation ***itself*** selects the deponent who will speak for it and has the opportunity to prepare the deponent to testify to matters beyond his or her personal experience") (emphasis added).

the organization's selection of its witness."[16] Although the Committee reaffirmed that the "choice of the designee is ultimately the choice of the organization,"[17] it did not grapple with the distinct (and thorny) risk that the party seeking discovery will suggest other witnesses than those proposed by the corporation. At the very least, the current draft amendment appears to invite some input by the party seeking discovery with regard to a fundamental decision that courts have repeatedly made clear lies within the sole discretion of the corporation. This will inevitably generate disputes between the parties, protracting a discovery process that is already far too long and expensive and undermining the streamlining purpose of 30(b)(6) depositions.

In sum, the current draft amendment to Rule 30(b)(6) has the potential to narrow discovery disputes and mitigate costs by requiring the parties to meet and confer on "the number and description of the matter for examination." However, by also requiring the parties to confer on the identity of a 30(b)(6) witness in advance of his or her deposition, the current draft simultaneously threatens to undermine the fair and efficient process for selecting the most suitable corporate representative and give the party seeking discovery influence over a decision that the Committee itself has recognized rests with the corporation alone. For this reason, too, the Committee should delete this latter requirement from the otherwise salutary amendment to Rule 30(b)(6).

Sincerely,



John H. Beisner

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16 Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, at 292.

17 *Id.*; *see also id.* at 293-94 ("Although the named organization ultimately has the right to select its designee, discussion about the identity of persons to be designated to testify may avoid later disputes.").