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BY EMAIL (RulesCommittee_Secretary@ao.uscourts.gov)

Carolyn A. Dubay, Esq., Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E., Suite 7-300
Washington, D.C. 20544

**Re: Proposed Amendment to Rule 15 of the Federal Rules of Criminal Procedure
to Permit Defendant-Initiated Pretrial Depositions**

Dear Members of the Committee and Staff:

We are partners in Dechert LLP's Enforcement and Investigations group and regularly represent clients in federal criminal matters. Our backgrounds include service as former federal prosecutors in multiple districts and as a public defender. We write in strong support of the proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure that would permit defendants to take a limited number of pretrial depositions.

I. The Case for Defendant-Initiated Depositions

Rule 15 currently authorizes pretrial depositions only to preserve testimony for use at trial — not as a tool for defendants to investigate and prepare their defense. *See* Fed. R. Crim P. 15(a)(1) (providing that a court may permit a deposition of a prospective witness to preserve testimony for trial upon a showing of “exceptional circumstances” and “in the interest of justice”). Because of the limited scope of the rule, defense counsel fulfilling their obligation to investigate the charges against their clients must rely almost entirely on voluntary cooperation from witnesses. As other supporters of this proposed amendment have persuasively explained to this Committee, that reliance is frequently frustrated: witnesses may be difficult to locate, they may decline to speak with the defense, or they may be discouraged from doing so by prosecutors who communicate — explicitly or implicitly — that cooperation with the defense is not in their interest. A defendant's inability to depose such witnesses is a meaningful structural disadvantage that defense lawyers regularly encounter, and it undermines the ability to mount an effective defense.

Permitting defendants to take a limited number of pretrial depositions would help to ensure the effective assistance of counsel. Depositions provide a mechanism to discover facts that the



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government will rely on at trial, uncover exculpatory evidence, expose inconsistencies in the evidence, and lock in testimony before memories fade. These are not novel concepts — civil litigants use depositions as a matter of course, as do criminal defendants under the laws of some states. There is no principled reason why defendants in a federal criminal case, where the stakes include the potential loss of liberty for years or decades, should be afforded fewer investigative tools than the parties in a civil case involving money. As other letter writers have explained, in states where depositions are permitted in criminal cases, they are conducted efficiently, and they often lead to further efficiencies such as a pretrial resolution or the introduction of deposition testimony at trial instead of a live witness.

II. The Particular Need for Depositions in Cross-Border Cases

Our practice has given us extensive experience representing foreign nationals and other defendants in cases with significant international dimensions. These matters — which have become increasingly common as the Department of Justice has expanded its international reach — feature a category of structural unfairness that the current Rule 15 framework simply fails to address.

When a federal criminal case involves witnesses, evidence, or conduct outside the United States, the government enjoys substantial investigative advantages that are simply unavailable to defense counsel. The Department of Justice and its law enforcement partners maintain legal attaché offices around the world, staffed with trained agents who can identify and interview witnesses in foreign jurisdictions at government expense. Prosecutors can invoke the formal mechanisms of mutual legal assistance treaties ("MLATs") and other bilateral and multilateral cooperative arrangements to compel the production of evidence, secure the testimony of cooperative witnesses, and obtain access to records held by foreign governments and financial institutions. All of this is funded by the United States government.

Defense counsel in cross-border cases have none of these tools. They cannot invoke MLAT procedures. Unless they work at a very large law firm, they have no attachés or overseas infrastructure. Meaningful international investigation — hiring local counsel, retaining translators and investigators, and identifying and locating potential witnesses in unfamiliar jurisdictions — is extraordinarily expensive. For all but the most well-resourced defendants, it is simply not feasible. Indeed, in many foreign jurisdictions, defense counsel may not approach witnesses directly without risking obstruction of justice claims or violating local professional conduct rules.

The result is a profound and embedded asymmetry. The government arrives at trial having spoken to its international witnesses, having shaped and refined their accounts through repeated interviews, and having had the opportunity to identify and address potential weaknesses in their testimony. The defense usually arrives having had little or no meaningful contact with those



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witnesses. The proposed amendment would partially correct this imbalance. Even a limited right to depose government witnesses — subject, as the proposal contemplates, to judicial oversight and appropriate conditions — would give defendants a fighting chance to test the reliability of the government's case before trial rather than for the first time in front of a jury.

III. The Broader Systemic Interest in Reform

This modest reform would also serve the broader interests of the United States criminal justice system. The Department of Justice's assertion of jurisdiction over foreign individuals and conduct abroad has, in many countries, generated significant concern about whether foreign defendants receive fair treatment in U.S. courts. Those concerns are not unreasonable when a defendant must litigate far from home and the procedural tools available to the defense are so sharply outmatched by the investigative resources of the government. Reforms that enhance procedural fairness for foreign defendants will strengthen the credibility of U.S. prosecutions abroad, improve the willingness of foreign governments and individuals to cooperate with U.S. law enforcement, and demonstrate that the American criminal justice system is committed to the principles of fairness and due process that it professes to uphold.

IV. Conclusion

The proposed amendment to Rule 15 is a measured, necessary step toward a more equitable criminal process. It would also meaningfully address the structural advantages prosecutors enjoy in cross-border cases where the disparity in investigative resources is so acute. We respectfully urge the Advisory Committee to recommend adoption of this amendment.

Thank you for your consideration of our views.

Respectfully submitted,

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