NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

February 1, 2021

Submitted Electronically

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Advisory Committee on Bankruptcy Rules
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Docket ID: USC-RULES-BK-2020-0002

Ladies and Gentlemen:

The National Bankruptcy Conference ("NBC") is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors, and practitioners. The NBC has provided advice to Congress regarding bankruptcy legislation for approximately 80 years. I enclose a Fact Sheet providing further information about the NBC.

A subgroup of the NBC's Court System and Bankruptcy Administration Committee (or Courts Committee for short) reviewed the proposed changes (both amendments and restyling revisions) to certain of the Federal Rules of Bankruptcy Procedure that were circulated in preliminary draft form via a request for comment package prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and dated August 2020. The subgroup prepared draft comments regarding the proposed changes, which draft was then approved by the full Courts Committee and the NBC's Executive Committee. The final set of NBC Courts Committee comments are detailed in this letter.

Consistent with the scope of the restyling project, we have generally limited our comments about the proposed restyled rules to drafting concerns specifically associated with the proposed restyling changes. Nevertheless, we note that certain of the existing rules may contain substantive problems that would be carried forward through the restyling process. To address this possibility, it may be appropriate to include commentary that any preexisting substantive issues are not being ratified through the adoption of restyled rules.

Restyled Rules Generally

- The commentary accompanying the restyled rules makes clear that the revisions are intended to be stylistic only and without substantive effect. We suggest that the promulgation of the final rules include a stronger feature than commentary – such as a specific rule of interpretation or a declarative statement in the Supreme Court order adopting the new rules –

to make clear that the restyled rules must be interpreted to avoid any substantive difference with the current rules.

- The restyled rules, without explanation, shift the capitalization used in the current rules for such words as "title," "chapter," "subchapter," and the like. This change creates discord between the rules and the statute (the latter of which consistently uses the lower-case style used in the current rules, *see, e.g.*, 11 U.S.C. §§ 101(19), (30), (35A)(F), (51C); 103(g)). This unnecessary asymmetry between the statute and the rules is likely to exacerbate inconsistent use of capitalized words in briefing and opinions. Moreover, the titles, sections, and other subdivisions of the United States Code are not proper nouns. Because we believe the rules should track the statute enacted by Congress and perceive harm resulting from this change with no offsetting benefit, we suggest this stylistic shift be rejected.

- Although the addition of bullet points to certain of the rules improves their visual appearance, we believe that it will be difficult and cumbersome for courts and parties to try to correctly cite any given bullet point. We therefore recommend that this change be rejected and that more traditional numbered or lettered designations be used for the items in these lists.

- Several of the restyled rules (including 1019(f)(3); 2002(a); 2002(b); 2002(d); 2002(k)(1); 2002(q)(1); and 2002(q)(3)) change the phrase "the clerk, or some other person as the court may direct" to "the clerk or the court's designee".[1] There is a question whether a court (as a collection of judges) can specify the "designee" by local rule. Recent Seventh Circuit precedent, specifically *In re Steenes*, 918 F.3d 554 (7th Cir. 2019), and *In re Cherry*, 963 F.3d 717 (7th Cir. 2020), cast doubt on whether a local rule, form, or general order can substitute for discretion vested in a judge by the Bankruptcy Code itself. Here, of course, the delegation is specified in a rule, not the statute, and so the concerns are less. But just as a matter of plain English usage, we have less trouble interpreting "as the court may direct" to mean a court can specify a particular class of entities in a local rule (or chambers rule) than we do with the use of the phrase "the court's designee." As such, we suggest not making these changes.

Restyled Part I Generally

The new part I title is inaccurate because this part contains provisions that go beyond just the petition and order for relief. For example, there are rules about the schedules, the filing fee, dismissal, and change of venue. The former title, "Proceedings Relating to Petition and Order for Relief," is less felicitous but more accurate.

Restyled Rule 1003

In (a)(2), the language could be tightened by deleting the "that" before the semicolon and then changing "affirms" to "affirming" and "sets" to "setting".

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[1] This change was not universal. "As the court may direct" was retained in restyled Rule 2002(f) and in restyled Rule 2002(n).

Restyled Rule 1004.2

There is an inconsistency between (i) the second-to-last bullet in restyled Rule 1004.2(b) (using the present tense) and (ii) restyled Rules 1007(a)(4)(B)(ii) and 2002(q)(1) second-to-last bullet (both using the past tense). We suggest conforming to a single past-tense usage. In addition, the ordering of the subparts in the three rules is inconsistent; switching 1007(a)(4)(B)(ii) & (iii) would solve this issue.

Restyled Rule 1005

In (a), we suggest changing "docket number" to "case number (if known)". In the age of CM/ECF, many read "docket number" as a reference to individual docket entries rather than to the number associated with the case itself. This change would also conform the rule to the current Official Form 101.

Restyled Rule 1006

In (b), we suggest specifically referencing "any part of the fees required by (a)" to avoid ambiguity about whether the "filing fee" includes both the statutory fee under Judicial Code section 1930 and the additional AO fees.

Restyled Rule 1007

- There is an inconsistency between (i) the second-to-last bullet in restyled Rule 1004.2(b) (using the present tense) and (ii) restyled Rules 1007(a)(4)(B)(ii) and 2002(q)(1) second-to-last bullet (both using the past tense). We suggest conforming to a single past-tense usage. In addition, the ordering of the subparts in the three rules is inconsistent; switching 1007(a)(4)(B)(ii) & (iii) would solve this issue.

- In (c)(1), there is potential pronoun ambiguity with "after it is filed"; we suggest changing to "after the petition is filed".

- In (d), we suggest adding a comma between "excluding insiders" and "as prescribed".

- In (i)(2), there is potential pronoun ambiguity with "each of them"; we suggest changing to "each listed holder".

- There is a typo in (k)(1) – "to do so" should simply be "do so".

Restyled Rule 1010

- In (a), we suggest revising the second sentence to begin "The summons must be served on the debtor with a copy of the petition . . ." to avoid any ambiguity about the required service party.

- Also in (a), it would be clearer if the last sentence added a phrase at the end so it states, "Rule 7004(e) and Fed. R. Civ P. 4(*l*) govern service under this rule."

Restyled Rule 1014

In (b)(3), there is potential ambiguity about exactly what "the motion" references; we suggest changing to "a motion under (b)(2)".

Restyled Rule 1016

In (b), the revised final sentence is a substantive change to the current rule. The current rule simply states that "the case ***may*** proceed and be concluded in the same manner" (emphasis

added). The restyling turns the "may" into a "***must***." There is no substantive explanation for the change, which we suggest rejecting.

Restyled Rule 1017

In (a), it is not clear to us that "for any reason" is coextensive with the existing language ("on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties"). To avoid an unintended expansion of the scope of the current rule, we suggest tracking the existing language.

Restyled Rule 1019

- In (c), the change of "actually filed" to just "filed" potentially effects a substantive change or at least creates ambiguity. Under Bankruptcy Code section 1111(a), certain scheduled proofs of claim are deemed "filed." The use of the word "actually" in the current rule avoids uncertainty about its application in the context of "deemed filed" claims when a case is converted from chapter 11 to chapter 7. As such, removal of "actually" could create issues that do not exist under the current rule. We suggest sticking with "actually filed".

- In (d), "its" is an odd pronoun for a trustee. We suggest avoiding the need for a pronoun by replacing the last clause with "in possession or control of such trustee or debtor in possession."

- In (f)(1), we suggest changing "A request by a governmental unit" to "Such a request by a governmental unit" to make clearer the precise scope of the special timing rule in that sentence.

Restyled Rule 1020

- We suggest changing the title to the rule. The title should be "Designating a Chapter 11 Debtor as a Small Business Debtor." The debtor does not designate the case. The case designation flows from the Bankruptcy Code's definitions (and election in a subchapter V case once those rules are final) after designation by the debtor whether it is a Small Business Debtor, or determination by the court that the debtor's designation is incorrect.

- In (a) and (b), the change of "Except as provided in subdivision (c)" to "Unless (c) applies," creates ambiguities about the exceptions to the debtor's right to designate as a small business under (a) and the right of a party in interest to object to the designation under (b). By saying "Unless (c) applies," it is unclear which portion of (c) must apply. Read literally, the proposed revision would prohibit a party in interest from objecting to a debtor's designation as a small business case when a committee has been appointed. The current rule correctly permits such an objection, but merely makes the objection subject to the procedures under (c). The imprecision creates another ambiguity. Revised subdivision (c) prohibits a case from proceeding as a small business case if a committee has been appointed unless and until the court determines that the committee is inactive. If the court makes such a determination, the case "may" thereafter proceed as a small business case. The procedure for making this determination is set out in (c)(2). Subdivision (c) will apply if a committee has been appointed, and therefore, read literally, a case will not necessarily proceed as a small business case as provided in (a) if a committee has been appointed even if the court has since made the determination under

(c) that the committee is inactive. In that event, the case "may" proceed as a small business case under (c) after the court makes the determination. Therefore, the revision at a minimum provides that, even if the court determines that the committee is inactive and ineffective, the court will have the further discretion to determine that the case will not proceed as a small business case according to the debtor's designation. This result may be intended, but it would constitute a substantive change from current Rule 1020(c), which provides that the case "shall" proceed as a small business case if the court makes the determination that the committee is ineffective. To solve both ambiguities, we suggest merely striking the word "subdivision" from the current wording in the rule so that restyled (a) and (b) read "Except as provided in (c)."

Restyled Rule 2002

- In (a)(4), we suggest inserting "to" before "convert" in the second line to preserve parallelism with the infinitive "to dismiss" in the first line.

- In (a)(5), we suggest changing "proposal" to "motion".

- In (c)(3)(C), there is potential pronoun ambiguity with "it"; we suggest changing to "the injunction".

- In (g)(1), we suggest that "qualifying" or a similar term be added as a modifier to the word "request" in the phrase "The request may be:".

- In (g)(2), we believe the effort to erase all vestiges of the passive voice here erodes readability and suggest that the provision would be better understood in the present passive, i.e., "Except as otherwise provided in § 342(f),".

- Regarding (h)(2), the current rule requires notice to "creditors that hold claims for which proofs of claim have been filed." The restyling changes this to "creditors with claims for which proofs of claim have been filed." There may be a subtle distinction here: an assignee may hold a claim but may not be a creditor with a claim. We suggest retaining the original.

- It is not clear why the ordering of (n) and (o) was transposed from the current rule. We suggest not reordering in order to minimize the difficulties associated with researching case law interpreting the current rule.

- There is an inconsistency between (i) the second-to-last bullet in restyled Rule 1004.2(b) (using the present tense) and (ii) restyled Rules 1007(a)(4)(B)(ii) and 2002(q)(1) second-to-last bullet (both using the past tense). We suggest conforming to a single past-tense usage. In addition, the ordering of the subparts in the three rules is inconsistent; switching 1007(a)(4)(B)(ii) & (iii) would solve this issue.

Restyled Rule 2003

- In (a)(3), the second sentence awkwardly starts with "Or," continuing the substance of the prior section. We recommend that the rule be divided as with other rules as follows:

(3) ***Place; Possible Change in the Meeting Date.*** The meeting may be held at:

(A) a regular place for holding court; or

(B) any other place in the district designated by the United States trustee so long as that place is convenient for the parties in interest.

If the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief.

- In (b)(1)(B), we suggest changing "under Subchapter V" to "under subchapter V of chapter 7" to make clear this does not reference new subchapter V of chapter 11.

- (b)(3)(A)(ii) does not pick up the alternate to a proof of claim – "a writing" – referenced in (b)(3)(A)(i) and thus should be redrafted as: "the proof of claim or writing is not insufficient on its face; and".

- In (d)(2)(B), we thought the two instances of "must" are a bit strong and could suggest, for example, that the interim trustee is incapable of resigning, dying, etc. We suggest changing both to "will" instead.

Restyled Rule 2004

- In (b)(1)(D), we suggest adding the preface "any matter that may affect" to track (b)(1)(C) and as a better reading of the current rule. An examination into the debtor's right to a discharge only narrows the inquiry (especially when contrasted to the wording in subparagraph (C)). In any event, the wording destroys the mild parallelism between the two subparagraphs.

- In (e)(2), we suggest rewording the first sentence for clarity as: "If the debtor is to be examined, and if the examiner has scheduled the exam at a location more than 100 miles from the debtor's residence, then the examiner must first tender to the debtor a mileage fee."

Restyled Rule 2005

- As a general matter, the rule refers in various places to an "affidavit." Judicial Code section 1746 allows a declaration to be used in lieu of an affidavit, but experience suggests that some practitioners are unaware of section 1746 and thus driven to the formality of an affidavit as a result of the rule. Using "affidavit or declaration" instead would address the issue. This is a concern associated with the existing rule but one that likely could be fixed as a drafting matter during the restyling.

- In (a)(1)(B), the addition of the definite article "the" before "examination" makes it appear that the allegation has to be that the debtor has attempted to evade service for the examination sought to be taken under Rule 2005. We understood the current rule that the allegation only had to be that the debtor had attempted to evade service for a prior examination – e.g., a prior examination under Rule 2004. To avoid an unintended change to the current rule, we suggest changing "the" to "an".

- In (a)(2)(B), there is potential pronoun ambiguity with "it"; we suggest changing to "such examination".

Restyled Rule 2006
In (e)(2)(B)(ii), the cross-references do not track the changes made in the restyling and should be changed to (c)(2) or (c)(3).

Restyled Rule 2009

- In (b), we believe "that debtor's estate" rather than "the debtor's estate" would be more precise.

- Also in (b), we believe that "any debtor's creditors may elect" could be more clearly phrased as "the creditors of any debtor may elect".

Restyled Rule 2010
(a)(1) continues using the phrase "a number of" even though that phrase was changed to "multiple" in (a)(2); both for consistency and stylistic reasons, we suggest using "multiple" (or perhaps "several") rather than "a number of" in (a)(1), too.

Restyled Rule 2013
In (a), we suggest changing "docket number" to "case number".

Restyled Rule 2015

- Consider whether (a)(6) should more clearly indicate whether this reporting requirement applies in cases under subchapter V of chapter 11 or simply non-subchapter V small business cases.

- (c)(1) breaks two responsibilities for a trustee in a chapter 13 business case into an (A) and (B), but those same two responsibilities are simply part of a single sentence for chapter 12 trustees in (b). We suggest adopting a consistent approach.

Restyled Rule 2015.3
In (b), we suggest changing "date the plan becomes effective" to "date a plan becomes effective".

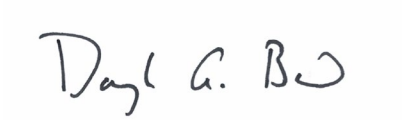
Restyled Rule 2018
In the last sentence of (d), the removal of the limiting reference to a union or association "which exercises its right to be heard" under (d) arguably results in an appeal-stripping rule of much broader reach than the current rule. We suggest adding the concept back to the restyled rule (perhaps restyled as "exercising its right to be heard under this Rule 2018(d)").

Amended Rule 5005
The redlined changes indicating the amendments do ***not*** include any changes implementing the Committee Note's statement that "The amendment to subdivision (b)(2) also eliminates the requirement that statements evidencing transmittal filed under Rule 5005(b)(2) be verified."

* * *

We hope these comments are helpful during the process of finalizing revisions to the Federal Rules of Bankruptcy Procedure. Please contact us if the NBC's Courts Committee can be of further assistance.

Sincerely,



Prof. Douglas G. Baird
NBC Chair

Encl.

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005. Most recently, the Conference played a leading role in developing the Small Business Reorganization Act of 2019, Pub. L. 116-54.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort, and tax-related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges, and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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