**U. S. Department of Justice**

Civil Division

*Office of the Assistant Attorney General* *Washington, D.C. 20530*

February 6, 2013

Via Electronic and Regular Mail

The Hon. David G. Campbell
Chair, Advisory Committee on Civil Rules
United States District Court
623 Sandra Day O'Connor
U.S. Courthouse
401 West Washington St.
Phoenix, AZ 85003-2146

The Honorable John G. Koeltl
Chair, Duke Subcommittee of the Advisory Committee on Civil Rules
United States District Judge
1030 Daniel Patrick Moynihan
U.S. Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Campbell and Judge Koeltl:

This letter provides the comments of the Department of Justice on the December 2012 version of the Duke Subcommittee Rules Sketches provided to the Committee on Rules of Practice and Procedure (the "Standing Committee") prior to its January 3-4, 2013 meeting. The Department understands that the Duke Subcommittee will refine the proposed rules amendments in the Sketches and plans to provide to the Civil Rules Committee a final package for the Committee to consider, and possibly approve, at its April 11-12, 2013 meeting, for submission to the Standing Committee for publication for public comment later in the year. The Department appreciates this opportunity to participate in the Subcommittee's important work.

As you know, the Department has followed the progress of the Duke Rules Sketches since their inception, and we have provided informal comments on specific provisions of earlier versions even before our review was complete. The Department supports the Subcommittee's commitment to explore reasonable means of increasing the effectiveness of the federal civil litigation process. Like the Subcommittee, the Department is concerned about cost and delay in civil litigation. The Department also shares the Subcommittee's objective of developing practical means, through Civil Rules amendments, to accomplish that objective. The Department hopes that its perspective on

the issues being considered by the Subcommittee will be helpful to this ongoing work. I ask that you share this letter with other members of the Subcommittee.

## Summary

The Department supports a substantial number of the Subcommittee's proposals.[1] First, the Department supports the Subcommittee's efforts to refine the scope of permissible discovery, including its objective of incorporating the "proportionality" principle more explicitly into Rule 26(b)(1), and the proposal to eliminate the dichotomy between discovery directed at the claims or defenses in the case and "subject matter" discovery. The Department supports the Subcommittee's recommendation that the pre-motion conference procedure may be a subject for inclusion, on a voluntary basis, in an individual scheduling order. The Department also supports the Subcommittee's proposal to amend Rule 16(b)(3) and Rule 26(f)(3) to include the preservation of information and agreements reached under Federal Rule of Evidence 502(e) as subjects for the Rule 16 order. The Department urges the inclusion in the proposed amendment to Rule 16(b)(1)(B) the clarification that conferences can be conducted by telephone, rather than only in the court. Finally, the Department generally supports the Subcommittee's proposed clarifications to Rule 34(b)(2), which would require a party responding to document requests to describe any documents being withheld pursuant to objections and to say when it will produce responsive materials.

The Department, however, has serious concerns with the proposals that would shorten the time for the parties to prepare at the start of the case. In our judgment, these changes will make it less likely that parties will be able to narrow the scope of discovery at the outset, resulting in longer, less efficiently-conducted cases. The Department's most significant objections are to the acceleration of the issuance of the Rule 16(b) scheduling order and the abrogation of Rule 26(d)'s moratorium on discovery before the "meet and confer" process. The Department also has concerns about the proposal to amend Rule 4(m) to reduce from 120 to 60 days the time to serve the complaint.

Finally, the Department opposes the proposed quantitative limits on various forms of discovery. The Department concludes that the limits not only will fail to result in appreciable reductions in litigation costs, but also will substantially impair the ability of parties to conduct needed discovery, particularly in complex cases, and that the limits

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[1] This letter does not comment on various aspects of several previous Subcommittee proposals – *i.e.*, the development of a uniform rule on categories of cases that would be exempted from Rule 26(a)(1) initial disclosures, cost shifting under Rule 26(c), the certification of discovery under Rule 26(g), and the timing of contention discovery – because the Department understands that the Subcommittee is not pursuing those proposals at this time. The Department, however, is continuing to examine the Rule 26(a)(1) issue and may provide comments to the Subcommittee concerning that issue in the future.

will have a pronounced adverse effect on the Department's ability to conduct discovery in a significant portion of its public interest litigation.

## Discussion

### 1. Scope of Discovery, Proportionality, and Cooperation

The Department supports the Subcommittee's efforts to refine the scope of permissible discovery, including its objective of incorporating the "proportionality" principle more explicitly into Rule 26(b)(1). The Department understands that, in transferring the "calculus" of the factors in current Rule 26(b)(2)(C) into Rule 26(b)(1), the Subcommittee does not intend to modify the scope of permissible discovery. The Department, for example, would be concerned if the placement of phrases such as the "amount in controversy" or the "parties' resources" are intended to place more weight on those factors than is now applied in their current placement in the Rule. For example, the Department's resort to what could be broad discovery in its enforcement of federal laws in specific cases may be wholly reasonable notwithstanding the fact that the monetary amount of the case may be relatively small or a specific defendant may have limited resources. In much of the Department's affirmative litigation, there is no monetary relief in the case or the value to the government and the public of the equitable relief secured in the case greatly exceeds the monetary award. Moreover, in the Department's defensive litigation under the Administrative Procedure Act there is, by definition, no amount in controversy because only injunctive relief is available. The factor of the "importance of the issues at stake in the litigation" therefore must take into account such factors as the impact of the injunctive relief sought in the case and the public's interest in the enforcement of the law at issue. Similarly, in litigation against the United States, federal agencies have limited resources to apply to individual cases, and such constraints, which include protection of the public fisc, may warrant imposing limits on discovery. Certainly, there must be a fact-specific analysis of the circumstances of each case, not a general examination of the resources of a party like the federal government. The Department recommends that the Committee Note include an explanation of these factors.

The Department supports the Subcommittee's proposal to eliminate the dichotomy between discovery directed at the claims or defenses in the case and "subject matter" discovery that is permissible based on a "good cause" showing by the proponent of the discovery. Creating a unitary standard for the scope of permissible discovery that focuses on discovery relevant to the claims or defenses should result in less cost and burden in the discovery process and, at the very least, will simplify the discovery process.

The Department understands that the Subcommittee proposes to eliminate a familiar sentence from Rule 26(b)(1): "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Subcommittee proposes to revise the Rule to state either that "Information need not be admissible in evidence to be discoverable," or that "Information within the scope of discovery need not be admissible in order to be discoverable." The

Department questions why the Subcommittee proposes changes to this long-standing and well-known aspect of the rule, which expresses an important principle defining the appropriate scope of discovery. Elimination of the existing language will be viewed by some parties and practitioners as a significant narrowing of the proper scope of discovery, and disagreements as to the implications of its removal from the existing Rule will lead to unnecessary motions practice. The Department recommends that the Subcommittee retain the existing language.

Finally, the Department supports the Subcommittee's initiative to incorporate principles of cooperation into the litigation process. The Department, however, is not convinced that Rule 1 should incorporate cooperation in the text of the Rule so as to make cooperation an enforceable duty of counsel. The Department believes that the principle of cooperation is better incorporated in the Committee Note, which appears to be the Subcommittee's current position.

2. Reduction of Time to Serve the Complaint under Rule 4(m)

Rule 4(m) now requires dismissal of a complaint if it is not served within 120 days after filing of the complaint. The Subcommittee proposes to reduce that period to 60 days.[2]

The Department recognizes the Subcommittee's concern that, in some cases, the 120-day period may result in a delay in the disposition of civil cases. Whatever the extent of that problem, however, the Department concludes that this magnitude of reduction may interfere with the efforts of plaintiffs to obtain service in situations in which defendants seek to evade service. For example, the Department encounters many situations in which defendants evade service of process in tax enforcement cases. The problem is particularly acute in cases involving individuals who challenge the fundamental authority of the federal tax system.

Second, an unintended consequence of shortening the 120-day period might be to discourage plaintiffs from attempting to use Rule 4(d)(1)(F) and (d)(3) provisions for waiver of service. When the Tax Division seeks a waiver of service and the other party does not consent or simply neglects to return the form, the period to locate and personally serve the defendant is effectively shortened by at least 30 days, leaving the Tax Division with no more than 90 days to accomplish personal service. Shortening the 120-day period might well make it impractical to consider the waiver option, thus making litigation more expensive.

The Department therefore recommends that the Subcommittee not reduce the deadline in the existing Rule, or that it evaluate whether there should be a less severe reduction in the time permitted under the current Rule to accomplish service.

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[2] The proposal is connected, at least in part, to the Subcommittee's proposal to accelerate the issuance of the scheduling order. If, however, that proposal does not go forward, there would be less reason to amend Rule 4(m).

Finally, we note that the proposed amendment may create confusion with respect to its potential effect on condemnation practice, which is governed by Rule 71.1. The procedure for dismissal of condemnation cases is governed by Rule 71.1(i). The proposed amendment could exacerbate a problem that sometimes occurs in the existing Rules – the confusion over the applicability of Rule 4(m) to condemnation cases. The Department recommends a clarifying amendment to Rule 4(m) that explains that the dismissal of condemnation cases is exclusively controlled by Rule 71.1(i).

3. Acceleration of the Scheduling Order under Rule 16(b)

Under current Rule 16(b), the district court must enter a scheduling order "as soon as practicable, but in any event," either "within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." In contrast, the Subcommittee's December 2012 proposal would reduce those time periods, *i.e.*, the scheduling order must issue "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." The deadlines would not apply if "good cause is found" for delay of the order.

a. Background: The Rationale for the Existing Rule

In 1993, when Rules 16(b) and 26(f) were amended and incorporated into the Civil Rules, the Rules Committee understood that the issuance of the scheduling order and the parties' "meet and confer" process should be structured to permit the parties – and defendants in particular – sufficient time to analyze the case. The premise of this approach was that a scheduling order would reflect the results of a thorough Rule 26(f) "meet and confer" process, *i.e.*, a proposed case management plan for the court to consider and incorporate into its scheduling order. The "meet and confer" process would include the parties' plans for discovery (and quantitative limits on that discovery, if appropriate); any proposed deadlines for joinder of parties and the amendment of pleadings; proposed deadlines for the filing of dispositive motions; the result, if any, of the parties' discussions as to the prospect for settlement; and proposed deadlines for pre-trial and trial activities. *See* Form 52 (Report of the Parties' Planning Meeting). As the Committee explained, "a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself." Fed.R.Civ.P. 16 Advisory Committee Note (1993).

Existing Rule 16(b) incorporates this understanding. Rule 16 also contemplates that there will be situations in which expedited disposition of the case is appropriate. To the extent that a district judge determines that a specific case warrants accelerated scheduling, the judge already has that authority today under Rule 16(a)(1) and (b)(2). Under this Rule, the parties also can ask the court to alter the schedule to permit expedited discovery or early court intervention to address specific issues.

b. The Subcommittee's Proposal

The premise of the Subcommittee's proposal is that earlier case scheduling will reduce delays in the disposition of the case. The Department does not disagree, in principle, with the premise that active judicial case management, particularly at the early stage of the case, is generally effective in reducing delay, but the Department concludes that the acceleration of the court's scheduling order, as now proposed, ultimately will be counter-productive to the Subcommittee's objective of attaining a more efficient and more cost-effective case management process. As we explain below, the acceleration proposal likely would substantially harm the overall orderly conduct of pretrial discovery. While the Department believes that the proposed time-lines will be particularly problematic for its litigators, the Department also believes that the changes would cause similar problems for other litigants, including state and local government agencies, and that providing additional time at the outset of the case would benefit all parties and the court.

i. The Department's principal concern is that, in many cases, the scheduling orders issued under the accelerated time-lines will have been developed without sufficient time for the parties to discuss and plan proposed discovery and other case-related activities. Moving the case forward more rapidly through an accelerated scheduling order invariably will mean some reduction in the ability of the parties to develop a comprehensive, carefully crafted case management proposal. That is because the accelerated time-line will have reduced the parties' opportunity to learn about the case and the discovery issues it might present, and to engage in productive "meet and confer" sessions. With less time to discuss the issues, the parties may reach fewer agreements; the court may be asked to resolve disputes that could have been avoided. Because of the press of time, the parties also may provide less detail in their proposed plan, which will limit the court's understanding of the case. To the extent to which the parties are less precise in their agreements, there is a greater potential for future misunderstandings. Finally, if counsel, based on limited information or understanding of the case, commits its client to specific case deadlines, it will be more difficult for counsel to address and correct that problem after the scheduling order is issued. Given the importance of the meeting of counsel to develop a workable pretrial schedule and the relatively high burden of demonstrating "good cause" to modify the pretrial order, it is in all parties' interests to have as much information as possible in developing the pretrial discovery plan.

ii. The Department concludes that the acceleration problem will be particularly pronounced in more factually complicated cases and in cases in which electronically stored information (ESI) may be produced. Under Rule 26(f)(3)(C), the parties must confer and provide their proposals as to "any issues about disclosure or discovery" of

ESI, "including the form or forms in which it should be produced."[3] To do so, the counsel need to have sufficient opportunity to understand their client's information systems, to be able to identify relevant ESI sources, to determine, at least preliminarily, what ESI sources might be searched, and to decide "whether the information is reasonably accessible . . ., including the burden or cost of retrieving and reviewing the information." Fed.R.Civ.P. 26 Advisory Committee Note (2006). Acceleration of the scheduling order will reduce counsel's ability to conduct these important tasks.

iii. To the extent that the parties are expected to discuss the possible settlement of the case, the compressed time period will make it more difficult for the parties to undertake that analysis before the submission of the scheduling order. The existing Rule provides the needed time for counsel to consult with their clients and to determine the feasibility of settlement, including alternate dispute resolution options.

iv. The acceleration of the scheduling order presents unique challenges for the federal government (although state and local governments likely face similar issues). We are concerned that the acceleration proposal will adversely affect the ability of Department attorneys to represent the interests of the United States and its agencies and officials most effectively. If the scheduling order must issue within 90 days of service of the complaint, or 60 days after the United States has appeared in the action, Department litigators will have to prepare for and attend the Rule 26(f) "meet and confer" sessions with their opposing counsel quite early in the case. The Department attorney presumably will have had some opportunity to become familiar with the case. But given the challenges posed by the size and complexity of the federal government, the acceleration proposal realistically will mean less opportunity for the attorney to be knowledgeable on the many issues to be addressed at the "meet and confer" sessions.

Moreover, after the filing of a complaint against the United States or a federal agency, the Department must determine whether the case will be handled by a United States Attorney's Office or by a Department litigation component, what office will represent the federal agency, and whether the specific case poses particular issues involving multi-agency coordination. Officials at client agencies also must undertake a

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[3] The Committee Note explains that, when a case involves ESI discovery, the parties will need to address those issues "depend[ing] on the nature and extent of the contemplated discovery and of the parties' information systems." Fed. R. Civ. P. 26 Advisory Committee Note (2006). The Note also explains that "[i]t may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems." *Id.* Courts repeatedly have stressed the importance of counsel for the parties being educated about ESI issues and being able to address those issues in the "meet and confer" process to plan proposed ESI discovery. *E.g.*, *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 360 n.3 (D. Md. 2008); *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 653, 655 (M.D. Fl. 2007).

similar analysis as to the respective roles of their headquarters or local office personnel and their general counsel's office. Resolving these issues can take considerable time, which, in turn, affects when individual attorneys are assigned to the case.

The problem of adequate preparation for the "meet and confer" sessions would be accentuated in cases brought against government employees in their individual capacities (*e.g.*, *Bivens* suits), in which the Department must first determine the propriety of representation for these federal officials before authorizing Department attorneys to begin preparation of their defenses. Deciding whether to represent federal officials includes resolving a number of issues, including whether the employee acted in the scope of employment and whether the employee's representation is in the government's interest, and determining whether there might be conflicts between the legal or factual positions of multiple employee defendants such that a government attorney may not represent all of them. *See* 28 C.F.R. § 50.15. Especially in potential-conflict cases, resolving these issues requires time, and often the 60 days provided in Rule 12(a)(3) is not sufficient. If a conflict is identified among employees who otherwise qualify for Department of Justice representation, the usual course is resort to private counsel at government expense. An accelerated meet and confer deadline will compound these problems, particularly in cases in which Department attorneys must evaluate whether they will represent multiple federal-official defendants.

Finally, in districts in which actions under the Administrative Procedure Act are not exempted from Rule 16(b) under the applicable local rules, shortening the time for issuance of the order would have the unintended result of requiring Department attorneys to prepare for the "meet and confer" sessions before the attorneys have had sufficient time to develop an understanding of the size or breadth of the administrative record (if one has not already been compiled). It also can take a considerable period of time to compile, review, index, and lodge an administrative record with the court. In such cases, the attorneys need time to develop appropriate proposals for the structure of, and schedule for, merits briefing because of the nature of the court's review of the action on that record.

The Department attorneys who handle defensive litigation and who have reviewed the proposal conclude that the acceleration of the scheduling order will not result in any appreciable improvement in case processing time – or, for that matter, in the parties' efficient handling of their cases. Department attorneys who handle affirmative civil litigation foresee, at most, a minimal benefit from the acceleration of the scheduling order. Even in some of those cases, Department attorneys will need to coordinate with the relevant federal agencies in order to gather information that may be relevant to discovery and, as a result, the acceleration proposal could negatively affect the conduct of these cases as well.

c. A "Good Cause" Exception

The Subcommittee has proposed that, in an individual case, the district court may decide not to apply the accelerated scheduling order deadline if "good cause" exists for such "delay." While the Department appreciates this attempt to introduce flexibility into the proposed amendment, the Department concludes that the potential availability of that exception would not remedy the problems caused by the acceleration proposal, at least to any significant or sufficient extent.

The terminology of the provision – "unless good cause is found for delay" – conveys the presumption that a case *is* improperly delayed if there is any departure from the deadlines set in the Rule. The terminology signals to the court and the parties that a departure is clearly disfavored. In addition, the party seeking an alteration of the scheduling order will have the burden to demonstrate "good cause," but it is not clear what factual or other circumstances will constitute such good cause.[4]

While the "good cause" exception, in some cases, may alleviate the problems posed in litigation against the United States, the Department questions whether the exception, as a practical matter, will be applied with sufficient flexibility to address these issues. The Department's concern is that relief from the accelerated scheduling deadlines will be granted quite infrequently, perhaps in only exceptional cases. For example, a district judge may decide that a Department attorney's request for additional time based, *inter alia*, on the demands of handling multiple cases or because the attorney has encountered delays in resolving case-handling issues within the federal government is insufficient to grant an exception from the ordinary scheduling rule. Moreover, the party's request to be relieved from the ordinary scheduling order deadlines will require motions practice and the expenditure of additional attorney or client time and resources. The acceleration proposal also will give the opposing party the opportunity to seek undue advantage or "leverage" in the case by opposing the request for additional time by the Department attorney.

For these reasons, the Department respectfully asks that the Subcommittee withdraw the acceleration proposal. If however, the Subcommittee decides not to do so, the Department requests in the alternative that the scheduling deadlines specified in existing Rule 16(b)(2) continue to apply to litigation in which the federal government is a party and that the Subcommittee's proposed amendment apply to other civil litigation. In other contexts, the Rules acknowledge the special circumstances of litigation involving the federal government. *See, e.g.*, Fed.R.Civ.P. 4(i) (service of process on the United States), 5.1 (notice of constitutional challenge to a federal statute), 12(a)(2), (3)(time to respond to a complaint or other pleading), 55(d) (default judgments).

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[4] It is not clear, for example, whether a "good cause" standard will differ, or in what manner or degree, from the "diligence" standard that now applies when a party requests modification of a scheduling order. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011) (citing 3 Moore's Federal Practice § 16.14[1][b]); Fed.R.Civ. P. 16 Advisory Committee Note (1983).

4. Conferences By Telephone Under Rule 16(b)(1)(B)

The Department asks that the Subcommittee clarify that Rule 16 conferences can be conducted by telephone, as opposed to being conducted only in court. Language concerning the option of conference by telephone has been stricken from the current proposal, although the Subcommittee acknowledges in its description of the proposal that holding a conference by telephone fulfills the Rule's purpose. The Department strongly supports the option of conferences by telephone, particularly in cases in which counsel otherwise may have to travel, and incur travel costs and loss of productive time in travel, or in which there are other issues that would make in-court attendance difficult. The Department asks the Committee to restore language to the Rule, with an accompanying Note, that explicitly recognizes the conference by telephone as a means of holding the Rule 16 conference.

5. Pre-Motion Conferences Under Rule 16(b)(3)(B)(v)

The Department understands that the Subcommittee has withdrawn an earlier proposal under which pre-motion conferences would be mandatory and, instead, the Subcommittee now recommends that the pre-motion conference procedure may be a subject for inclusion, on a voluntary basis, in an individual scheduling order. The Department has no objection to that latter approach. The Department recognizes that such pre-motion conferences may often be useful.

6. Topics for Inclusion in Rule 16 Orders

The Subcommittee also proposes to amend Rule 16(b)(3) and Rule 26(f)(3) to include the preservation of information and agreements reached under Federal Rule of Evidence 502(e) as subjects for the order. The Department supports that proposal.

7. Service of Discovery Before the Issuance of the Scheduling Order

The Subcommittee has considered several proposals under which a party can serve discovery on another party very early in the case, either at the time of filing of the complaint or during a specified period thereafter. The December 2012 proposal would permit the service of Rule 34 requests at any time more than 21 days after service of the complaint "on any defendant." The proposal would deem the requests "to be served at the [first] Rule 26(f) conference." As a result, it would appear that a party's obligation to respond to the requests would occur, absent an agreed-extension of time or a court order, 30 days after the conference (assuming in-hand service).[5]

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[5] The proposal contains bracketed text that suggests that the date for calculation of service of the requests might be the "first" of the parties "meet and confer" sessions, as opposed to a subsequent session, and the proposal contains bracketed text that leaves unclear whether a party can serve the discovery on a party who has *not* been served with the complaint.

The Subcommittee's stated objective is to facilitate earlier discussions between the parties on the anticipated scope of the discovery in the case, including specific requests for documents and information. The Department agrees that early discussion between the parties about anticipated discovery is to be encouraged within the Civil Rules framework. The Department concludes, however, that the proposal, if implemented in its current form, will result in problems that would outweigh the benefits to be gained by promoting earlier party communications about discovery. The Department therefore respectfully asks the Subcommittee to withdraw the proposal permitting discovery before the Rule 26(f) conference and to maintain the existing Rule 26(d) discovery moratorium.

a. Existing Rule 26(d) establishes a "moratorium" on the service of discovery until the parties have conferred under Rule 26(f), although discovery can proceed earlier, as warranted, in specific types of cases. Rule 26(d), which has been in effect since 1993, is premised on the understanding that the parties will exchange their views and/or proposals as to formal discovery during the "meet and confer" process, and that the parties ultimately will submit those proposals to the court for resolution and incorporation into the scheduling order.[6] Under the existing Rule, the expectation is that the parties are to confer about proposed discovery with the shared objective of providing an agreed discovery plan to the court. After these discussions, the parties acquire a better understanding of what discovery will be relevant to the case and are better able to streamline discovery requests. In addition, under the existing Rule, discovery in the case is informed by the parties' initial disclosures, which are designed to streamline the pre-trial process. The Department is not aware of any overall problem in how this process is working under the existing Rule.

The Department believes that, to the extent that there is inadequate communication about proposed discovery in the current practice, the more tailored solution would be to require more specificity of discovery planning within the existing Rule 26(f) process. Instead of permitting the parties to serve Rule 34 discovery before the "meet and confer" session, a less-burdensome, more useful alternative would be to require that each party's proposed discovery plan, already expressed in Rule 26(f)(3)(B), describe the specific forms (interrogatories, Rule 34 requests, etc.) and the subjects of discovery that may be sought. That alternative would facilitate the discussion of specific discovery, but without requiring either party to expend substantial resources in preparing or responding to the early discovery requests.

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[6] The 1993 Committee Note explains that "it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted more efficiently and economically." Fed.R.Civ.P. 26 Advisory Committee Note (1993). The Note also explains that, after the parties submit their proposals for a discovery plan they can begin "formal discovery." *Id.*

b. We are concerned that, under the Subcommittee's proposal to allow service of Rule 34 discovery requests before the "meet and confer" process, the discovery may be less-tailored or more burdensome than the discovery that would result from the "meet and confer" process. A party that serves discovery before the "meet and confer" process will have missed the opportunity to confer with the other party concerning the potential relevance, or burden, of that discovery and to negotiate appropriate parameters (and limits) for the formal discovery each party will propose. Once a party serves its discovery, it may become committed to requiring the opposing party to respond, even though consultation would have resulted in a more-tailored or more reasonable request. *See* Rule 26(g), Fed. R. Civ. P. (when a party formally serves discovery, it certifies that the discovery "is neither unreasonable nor unduly burdensome or expensive"). The early service of discovery also creates an immediate obligation of the other party to review the proposed discovery, in order to anticipate the ease (or burden) of compliance. Permitting the early discovery will impose unnecessary costs on that party. In some instances, opposing counsel may seek to gain a tactical advantage by imposing early (and perhaps onerous) discovery requests on the other party, and that such requests ultimately will prolong, and increase the cost of, the litigation due to, for example, the filing of otherwise unnecessary motions for a protective order.

In cases involving the discovery of ESI, the Department also is concerned that the premature service of Rule 34 requests will impair, not improve, the parties' opportunities to confer on the proper scope of proposed ESI discovery, including their evaluation of whether any ESI might be costly to discover or unduly burdensome to search and produce. The "meet and confer" process also is an opportunity for the parties to discuss, *inter alia*, preservation issues, search methodology and search terms, and other issues that would ensure that the burdens of discovery of ESI are proportionate to the stakes in the litigation. It would be inconsistent with the objective of obtaining proportionality in discovery and the effective operation of the "meet and confer" process to permit parties to serve Rule 34 requests that sweep broadly, *e.g.*, to request all ESI concerning the matter in dispute, or to unilaterally prescribe search methodology or search terms, specific forms of production, or other aspects of ESI discovery, particularly because the Rules contemplate that these issues will be discussed at the Rule 26(f) conference.

c. Premature service of Rule 34 discovery would also be inconsistent with the Rule 26(a)(1) initial disclosure process. Under Rule 26(a)(1)(C), the parties are to provide such disclosures at or within 14 days after their "meet and confer" session. In our judgment, it is counter-intuitive to permit the service of discovery before or at the same time that the initial disclosures are being prepared and served. Rule 26(d)'s moratorium on discovery permits the initial disclosures to proceed. The "meet and confer" session is the parties' opportunity to define the issues, *i.e.*, the specific claims and defenses asserted in the case, so that appropriate disclosures can proceed, with formal discovery requests to be served afterwards. As the 1993 Committee Note explained, the disclosure provisions are intended, *inter alia*, "to eliminate certain discovery" and to "help focus the discovery that is needed," and, with respect to the nature and location of potentially relevant documents and records, the disclosures should be sufficient to enable the other parties "(1) to make an informed decision concerning which documents might

need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests." Fed. R.Civ.P. 26 Advisory Committee Note (1993). Permitting parties to serve early Rule 34 discovery is at odds with the efficient operation of the initial disclosure process. A party's discovery requests may be obviated, at least in part, or refined by the parties' ultimate agreement as to what will constitute the initial disclosures for the case.

d. The proposal would place an early, onerous, and unnecessary burden on the federal government (as well as on other litigants). The proposal would require federal agencies to search for documents and to locate document custodians at the outset of the case. In our judgment, a federal agency should not be required to undertake the considerable burden and expense of analyzing compliance with preliminary discovery demands at such an early stage in the case. Moreover, in a substantial number of government cases, little or no discovery will be appropriate, either because there may be an available jurisdictional or other threshold defense suitable for resolution through a Rule 12(b)(1) or (b)(6) motion, or because the action is to be a review based on an administrative record. We can anticipate that state or local government agencies would encounter the same problem. Department attorneys who conduct affirmative civil litigation advise that they perceive at most a minimal benefit from the ability to serve early discovery on the opposing parties.

The proposal will pose problems in cases in which there are any defendants in addition to the United States or a federal agency, *e.g.*, a state or local agency or a private entity. As noted above, the proposal could permit early discovery on the federal agency once any defendant has been served, even before the United States has been properly served. In our judgment, it would not be appropriate to serve discovery until after the specific defendant who is the recipient of the discovery has been served. We can envision situations in which there will be problems in the receipt of such discovery by the appropriate Department and/or agency officials and resulting uncertainties about their obligations to respond to that discovery. We urge the Subcommittee not to permit early discovery on any party unless and until that party has been served.

e. The proposal also would trigger the party's obligation to respond to the discovery by reference to the parties' "meet and confer" sessions and, under one formulation, the obligation would be triggered by the timing of the first party conference. We recommend that the Subcommittee not adopt that alternative. Because, in many cases, the parties may have a series of sessions, it would be premature to permit discovery until the "meet and confer" process has reached its conclusion.

8. Quantitative Limits on Discovery

The Subcommittee is considering several possible amendments that would impose specific quantitative limits on discovery. The December 2012 proposal would specify new limits on Rule 33 interrogatories (reducing the number permitted from 25 to 15), Rule 34 requests (imposing a new limit of 25), Rule 36 requests to admit (imposing a new limit of 25, except as to requests regarding the authenticity of documents), and Rule

30 depositions (reducing the number permitted from 10 to 5 and the duration of a deposition from 7 hours to 4 hours). We understand that, based on a February 1, 2013 conference call, the Subcommittee is likely to recommend changing the maximum duration of depositions from 7 hours to 6 hours, and that it also may withdraw the Rule 34 proposal. While the most recent proposed change in deposition length would be a less rigid limit, we summarize the Department's concerns with the proposals presented to the Standing Committee.

The Department shares the Subcommittee's concern that reasonable limits should be imposed on discovery in federal civil litigation. As explained above, the Civil Rules already incorporate various quantitative limits on some forms of discovery. Those limits probably work well in most civil cases – because the cases require little or no discovery, or because the parties, aware of the existing limits, tailor their discovery requests so that they do not exceed the limits, or because the parties ask the district court for a relaxation of the limits to permit additional discovery. Accordingly, the current presumptive limits do not unduly constrain the legitimate discovery needs of those cases. The parties and the courts also take into account that there are many complex cases that merit an exemption from the existing quantitative limits. The Department is not aware of any empirical data showing that the current rules have resulted in undue burden or cost in any substantial number of cases. And, of course, district court judges have the discretion to further limit discovery where appropriate. In the Department's experience, the parties and the court are in the best position to determine whether, given the nature of the case (simple, standard, or complex), discovery limits, if any, are to be imposed. The Department concludes that imposing additional quantitative limits on discovery, at least in the manner prescribed by the current version of the Sketches, will not accomplish the Subcommittee's objective of reducing discovery costs.

a. Limits on Depositions

i. The proposed reduction of the presumptive deposition limit from 10 to 5 will create substantial problems, including in litigation in which the United States is a party. Under the current rules, Department attorneys generally do not experience difficulty in obtaining leave of court to request more than 10 depositions in cases that require that amount of discovery, although we are aware of situations in which the courts have refused such requests or granted them reluctantly. If the presumptive limit for depositions is reduced from 10 depositions to 5 depositions, however, we can foresee increased difficulty in convincing a court that it should permit more than 10 depositions, because that it will be an even greater increase in the number prescribed in the amended rule. The lower limit will become the presumptive "norm" and the party seeking additional discovery may face great difficulty in obtaining the court's approval to depart from that new norm, particularly when the opposing party raises an objection. We can anticipate more disputes with respect to such requests under the proposed quantitative limits because those limits will be set much lower than the existing ones. The problem also will be more pronounced with respect to cases involving the depositions of non-parties and in cases involving expert witnesses.

The 5-deposition limit would disadvantage the Department's important public-interest litigation. The limit would impair, for example, the Civil Division's pursuit of complex health care and procurement fraud cases brought under the False Claims Act. In addition, the Department's enforcement of civil rights laws involves very fact-specific inquiries, and often requires proof of a "pattern or practice" of civil rights violations. Such cases require not only a greater volume of evidence, but also the testimony of decision-makers at a managerial level, with whom the Department generally cannot have *ex parte* contacts. Most civil rights statutes do not provide administrative subpoena authority to the Attorney General, which means that civil discovery is the only method by which the Civil Rights Division can develop relevant evidence of civil rights violations. Depositions, therefore, are among the principal means of discovery in a wide range of cases handled by that Division.

Similarly, in litigation handled by the Antitrust Division, courts, for the most part, have permitted depositions above the current 10 deposition limit, but the proposed change could prove troublesome because reducing the presumptive limit to 5 signals courts to be more restrictive and sets the norm at a level not connected with the needs of an antitrust case.

ii. The Department also has very serious concerns about the proposed presumptive 4-hour limits. Such a short time for depositions of fact witnesses would be very impractical in a substantial number of cases handled by Department attorneys, in both affirmative and defensive litigation, and the 4-hour limit would not be realistic for the depositions of many expert witnesses.

The proposed 4-hour limit would pose an extraordinary problem in the Antitrust Division's complex cases. Even in its most complex civil cases, the Division is generally bound by the current 7-hour rule. The Division needs sufficient discovery to define and prove relevant product and geographic markets(s), prove that the activity being challenged is anticompetitive and address efficiency, entry and other defenses. The challenged conduct often took place over several years and depositions focus on the origins, implementation and effect of business practices throughout the entire period. It is difficult to see how this can be done under the 4-hour limitation being contemplated. The problem caused by reducing the presumptive length of a deposition to 4 hours is magnified when there are parallel private damage actions that are consolidated with the Division's case for discovery purposes. A court could interpret the limit to apply to all plaintiffs in the consolidated proceeding, greatly prejudicing the United States' opportunity to obtain discovery if it has to share with all other plaintiffs.

Similar concerns arise in the Civil Division's complex health care and procurement fraud cases. These cases may involve multiple defendants, and may also involve situations in which the United States has intervened in some, but not all, claims raised by a *qui tam* relator. Since the relator generally has a statutory right to pursue non-intervened claims within the same civil action, the proposed rule could require the United States to share a smaller number of depositions and deposition hours with one or more

relators, thereby substantially impeding the Department's ability to prosecute fraud on government programs.

The same concern exists in cases handled by the Civil Rights Division. Expert testimony is an important form of evidence in many civil rights matters, including cases involving voting rights, disparate impact, school desegregation, and lending discrimination. The Division would be unable to thoroughly explore an expert's opinions, the contents of an expert report, and an expert's qualifications in a 4-hour deposition. In addition, the 4-hour time limit would hinder fact discovery in a variety of civil rights cases, including pattern and practice cases involving recipients of federal funding, state and local law enforcement agencies, courts, corrections systems, juvenile justice systems, hospitals, nursing homes, and a variety of non-governmental entities. The Division would be unable to adequately question key decision makers and witnesses about allegations of discrimination, an organization's decision making, the implementation of a challenged policy, or the non-discriminatory justifications offered by the defendant.

b. Limits on Interrogatories

The Department also concludes that the proposed new limits on the number of interrogatories will impair discovery in some of its litigation.

The Tax Division would encounter problems with the proposed quantitative limits on interrogatories in its litigation involving the Internal Revenue Service. Unlike other litigation, the Tax Division's cases do not involve readily-identifiable government employees who were parties to, or even familiar with, the transactions at issue in the litigation, which may have occurred years before the litigation is filed. Almost all of the pertinent facts and relevant documents are in the possession of the taxpayer or third-party witnesses. While the IRS may have conducted an audit or other investigation into the facts leading to the litigation, the documents and the witnesses who can testify about the relevant facts are not under its control. As a result, the Division must use discovery to gather the pertinent facts and it is not unusual for its attorneys to attend a scheduling conference without clarity as to the exact issues involved in a case or the number of depositions required for the case. Many of the Division's cases are fact-intensive, including cases involving trust fund recovery penalty cases, dischargeability cases, tax return preparer cases, and bankruptcy cases. In the Division's opinion, it would be difficult, if not impossible, to secure the necessary facts in such cases through 15 interrogatories. (The Division also can predict difficulties in obtaining needed information if the number of depositions is reduced from its current limit).

The Department's Environment Division has noted that, in both its environmental enforcement and condemnation litigation, the cases can be complex and there will be intensive discovery. Some courts are reluctant under the existing Rules to permit service of additional interrogatories beyond the current 25-interrogatory limits. The additional restrictions could have the unintended effect of delaying discovery because additional time and resources are needed for parties to seek leave of court before engaging in

additional and necessary discovery. The Civil Rights Division has expressed the same concerns.

c. Other Possible Quantitative Limits

The Department does not support proposed quantitative limits on the number of Rule 34 or Rule 36 requests. The Department does not believe that imposing such limits will result in reduced litigation costs or more efficient discovery. With respect to Rule 34 requests, it would be artificial to reduce the number of requests, particularly in complex cases or in cases that involve large organizations that may be subject to broad discovery. Limiting the number of document requests will not limit the number or scope of documents that can be requested. Imposing a quantitative limit also would result in broader document requests that may be less tailored to the needs of the case and more burdensome to fulfill than more-refined requests for discrete categories of documents.

With regard to Rule 36 requests for admission, the Department notes that the principal purpose of this discovery method differs from the other methods for which quantitative limits have been considered. Requests for admission are sometimes not considered "discovery," as they are primarily a tool for narrowing issues for trial.[7] As a result, limitations on requests for admission must be balanced against the possibility of increased trial time. The Department has handled many cases (affirmative and defensive) in which securing responses to more than 25 requests for admission has been useful to narrow the claims or defenses. The use of such requests can resolve many factual issues and streamline the case (with fewer depositions, for example) for a bench trial. If limits were to be adopted to prevent particularly abusive practice, they definitely should be set at a number higher than 25. For example, the Southern District of New York adopted a 50 request limit for its ongoing complex case pilot project. *See* S.D.N.Y. Pilot Project Regarding Case Management Techniques for Complex Civil Cases at II(F) (Oct. 2011).

* * *

For these reasons, the Department urges the Subcommittee not to proceed with the proposed quantitative limits. If however, the Subcommittee decides to proceed with that proposal, the Subcommittee should amend the Rule text to provide that exceptions to the limits should be freely allowed by the court when appropriate to the circumstances of the case. The Subcommittee also should draft a Committee Note explaining that departures from the presumptive limits should be granted liberally where the needs of the case require, including in public interest cases in which the government enforces statutory rights or obligations.

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[7] *See* Fed.R.Civ.P. 36 Advisory Committee Note (1970) ("Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.")

9. Rule 34 issues

The Subcommittee proposes to amend Rule 34 in two respects, to respond to concerns that responses to Rule 34 requests sometimes lack specificity: whether the responding party has withheld information from its production, or when the responding party will complete its document production.

Amended Rule 34(b)(2)(C) would require the producing party to state that it has withheld documents from the production, but the amendment does not explain what level of description will be sufficient. The Department concludes that, in principle, the proposed requirement may be reasonable because some litigants do not disclose to the requesting party that specific information (or categories of information) is being withheld from discovery. The Department recommends, however, that the proposed amendment should not create an overly-detailed disclosure requirement. Department attorneys frequently must respond to document requests, particularly requests made at the outset of discovery, when they are still gathering information about the categories of documents that will and will not be provided by the agency. The proposed amendment also should not require an itemized or document-by-document list of withheld information. The Department recommends that the Subcommittee refine its proposal to identify what level of description will be sufficient, taking these factors into account.

Second, amended Rule 34(b)(2)(B) would provide that if the responding party elects to produce copies of documents or ESI instead of permitting inspection, the response "must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response." Because the responding party is in a better position to determine what constitutes a reasonable period for the production of its documents, the Department believes that it may not be realistic to require it to produce documents by the date prescribed by the requesting party. The terminology of the rule – "a later reasonable time" – will engender disputes about whether a production has been unreasonably delayed.

Accordingly, the Department recommends that the word "reasonable" be stricken from the Rule. In the Department's experience, the parties frequently negotiate that productions will be made on a rolling basis as the documents are located and reviewed. Difficulties tend to arise in situations in which there is little or no communication, not because of the terms of the current Rule. To the extent that a party unreasonably delays production, the other party can seek to compel production under current Rule 37(a)(3)(B)(iv). Finally, the Committee Note should explain that parties often engage in "rolling productions" of documents or ESI, and as a result, the producing party will not necessarily produce information on or by a specific date.

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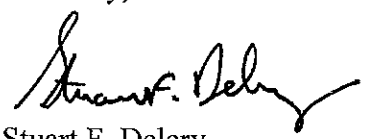
We appreciate the Subcommittee's continued work on these proposals and thank the Subcommittee for its consideration of the Department's comments. I would be pleased to discuss any of these points with you at your convenience.

Sincerely,



Stuart F. Delery
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