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By Electronic Submission

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

05-CR- 015

Re: Proposed Amendments to Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure—Comments of Public Citizen Litigation Group

Dear Mr. McCabe:

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure. If you or any Committee member has any questions or concerns, do not hesitate to contact me. Thank you.

Sincerely,

s/ Gregory A. Beck
Gregory A. Beck

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Comments of Public Citizen Litigation Group on the Proposed Amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure

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Introduction

Public Citizen Litigation Group ("PCLG") is filing these comments on the proposed amendments to the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure that were published for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on August 15, 2005.

PCLG is a ten-lawyer public interest law firm located in Washington, D.C. It is a division of Public Citizen, a nonprofit advocacy organization with more than 100,000 members nationwide. Since its founding in 1972, PCLG has worked toward improving the administration of justice in the courts. It has submitted proposals to amend the civil and appellate rules and has frequently commented on proposed amendments to these rules. Collectively, PCLG's lawyers have litigated hundreds of cases in the federal courts and have appeared before the Supreme Court of the United States, every federal circuit (in most of them, on many occasions), many federal district courts across the country, and

the courts of many states. As a result, PCLG's lawyers have considerable experience with the rules and issues that are the subject of the proposed amendments. In addition, PCLG has extensively litigated cases involving both consumer privacy and public access to judicial records, and is thus qualified to address the balancing process that must occur when attempting to accommodate these sometimes competing interests.

In general, PCLG supports the proposed amendments. As the courts move to make more records available online, it is critical that they scrupulously protect private information. We have concerns, however, about the way the proposed rules reconcile these admittedly important privacy interests with the interest of the public in access to court filings. In particular, certain provisions in the proposed rules will lead to overprotection of privacy interests at the expense of the public's interest in access to judicial records. We suggest several changes to the proposed rules that would ameliorate these concerns.

I. Proposed Federal Rule of Civil Procedure 5.2

PCLG strongly supports the protection of private information in court filings. The proposed rule generally does a good job of protecting this information by requiring in subdivision (a) the partial redaction of Social Security numbers, tax identification numbers, names of minors, birth dates, and financial account numbers. The rule also properly allows the court to order redaction of additional private information in particular cases pursuant to subdivision (e). However, we believe that the proposed rule in several

ways goes too far in restricting access to filings.

A. Limitations on Remote Access in Social Security and Immigration Cases

PCLG opposes proposed subdivision (c), which bars *all* remote electronic access by the public to filings in Social Security appeals and immigration cases. The committee note to the proposed rule contends that "[t]hose actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings." With one exception, however, we do not agree that these considerations warrant the special treatment given to these types of cases. Indeed, as explained further below, the proposed rule would have the unfortunate effect of blocking socially beneficial use of the courts' files, while leaving the most private and sensitive information, including unredacted Social Security and financial account numbers, freely available to identity thieves and data brokers at the courthouse.

The first reason given for the rule—the prevalence of sensitive information—does not justify the imposition of the bar on remote electronic access. Many other kinds of cases may contain information just as sensitive (such as civil suits over health benefits, claims of workplace discrimination, and civil claims regarding violence against women or the sexual abuse of minors), but are given no special protection under the rule. Bankruptcy cases, in particular, often involve detailed private financial information, but will continue to be available online under the proposed rule. In general, we believe that

private information in Social Security and immigration cases should be protected in the same way as in these other types of litigation—through application of subdivisions (a), (d), and (e) of the proposed rule—rather than by carving out a specific and total exemption for these two particular categories of cases.

We recognize, however, that the administrative record in Social Security and some immigration cases might raise particular privacy concerns not present in other cases because, for example, the record may contain private identifiers that are exempt from the redaction requirement pursuant to subdivision (b)(2), or health and financial information that would be both private and not of interest to the general public. These files are generally kept confidential at the agency level, and we support continuing to restrict electronic access to the files in the district court absent a court's decision to the contrary. This restriction would not constitute a substantial change from current practice; administrative records are frequently exempt from electronic filing requirements under local rules, because the rules provide either a specific exception for administrative records or a more general exception for filings that are particularly large or difficult to convert to electronic form.[1]

Other documents, such as the briefs of the parties, may also contain private information, but this information would be limited in scope to issues relevant to deciding

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[1]The administrative record in Social Security cases, along with the rest of the record, is not currently available online pursuant to the Judicial Conference's policy on public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm.

the case. In addition, these filings would be subject to the redaction requirement of subdivision (a) and would thus not contain the kinds of private information that could subject parties to identity theft. In particular cases, the court could also allow redaction of other private information pursuant to subdivision (e)(1). And in cases where private information is too extensive for redaction to be practical, the court could either order redaction of the parties' names, or limit remote access to the record pursuant to subdivision (e)(2). These decisions, however, should be narrowly tailored and made on a case-by-case basis instead of pursuant to a categorical exception. Courts have traditionally relied on such case-by-case decisionmaking to decide questions regarding public access to records and are guided in this process by well-defined case law.[2]

Although it may be simpler to allow parties and courts to skip case-by-case decisionmaking in favor of a presumption of secrecy, such a system would close almost *all* filings in these cases to the public. Parties in most cases have no incentive to argue that the record should be available on the Internet, so motions to make cases available online would rarely, if ever, be made. If the default rule were a restricted file, this default therefore would almost never be overridden unless the court independently undertook to

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[2]The public benefits from allowing access to filings even in cases that primarily involve private matters because such access discourages abuse of the system by both parties and courts. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (noting that openness "giv[es] assurance that the proceedings were conducted fairly for all concerned, and [] discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality").

examine the privacy interests at stake. In contrast, parties have a strong self-interest in protecting themselves from identity theft and invasions of privacy, and can be expected to vigorously enforce these interests by demanding additional protection in cases that truly raise such concerns. A rule that provides a presumption of openness therefore ensures appropriate levels of protection in cases raising genuine privacy issues, while at the same time assuring that the public will properly have access to filings in the remainder of cases. In contrast, the proposed rule risks a slippery slope of categorical exceptions—if Social Security and immigration cases should not be available online, what about, for example, bankruptcy cases? The presumption should favor public access whenever possible.

Even if the Committee is inclined to retain an exception for Social Security cases, the rules should not treat immigration cases the same way. Unlike Social Security cases, which are already exempted from online availability pursuant to the Judicial Conference's policy on public electronic access to files, no such exception is currently followed in immigration cases. Eliminating the proposed immigration exception therefore would not entail a change in policy or risk unpredictable effects. Although immigration files may well contain some information that the participants would prefer to keep private, they often do not involve the detailed financial and health documentation that is regularly part of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection. For example, immigration benefits cases can involve private financial information, and aliens in certain removal cases would face potential danger if their

identities were revealed in the public record. But in these cases the court can readily address the problem under subdivisions (d) and (e) without blocking remote access to all other immigration filings.

Moreover, barring remote electronic access to the records of district courts, which review agency decisions, would shield problems at the agency level from the public eye and thereby undermine the watchdog function of the public and press. Courts have recognized serious problems in the agency adjudication of immigration cases resulting from clogged dockets, biased immigration judges, and summary affirmances by the Board of Immigration Appeals. *See, e.g.*, Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1. As a consequence of these problems, the U.S. Court of Appeals for the Seventh Circuit in one recent opinion noted that "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Public access to government records serves as a key check against the arbitrary use of power that can occur when government operations are allowed to proceed in secret. *See, e.g.*, *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) ("Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."). Indeed, public access to the record in immigration cases is even more important than in many other types of cases because of

the critical nature of the litigation to the lives of the participants. Immigration removal orders can involve literally life-and-death decisions about whether to send aliens back to countries where they may be persecuted or killed.

To be sure, the continued availability of these files at the courthouse goes some way toward allowing the public to engage in its oversight role. But the E-Government Act of 2002, pursuant to which these rules were proposed, was enacted on the premise that public availability of documents on the Internet is necessary "to provide increased opportunities for citizen participation in government" and "[t]o make the Federal Government more transparent and accountable." Pub. L. No. 107-347, § 2(b)(2) & (9). There is a legitimate public interest in remote electronic access to the court's files in many cases. Reporters based in distant cities, for example, may not have easy access to the courthouse to review the paper version of filings. Remote electronic access is also extremely useful, if not essential, for academics conducting research into court files that are scattered throughout the country. And lawyers and pro se litigants often use filings in other cases to use as a model when crafting their own arguments or to gauge the bases for decisions in other cases. Indeed, all the policy concerns that mandate public access to files at the courthouse also support making public access *easier* by making the files available on the Internet.

Nor does proposed subdivision (c)(2)'s allowance for online access to the court's ultimate disposition satisfy the public's interest in openness, because access to the filings

of the parties is often necessary to an understanding of the court's decision. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (noting that court documents "often provide important, sometimes the only, bases or explanations for a court's decision"). Potentially dispositive filings such as motions for summary judgment are the foundation on which the court's resolution of a case is based, and should remain open to the public "absent the most compelling reasons." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004). Without access to records that influenced a judge's decision, "[h]ow else are observers to know what the suit is about or assess the judges' disposition of it?" *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002).

The remaining justification for the proposed rule—the volume of filings—is also inadequate to justify restricting remote access to Social Security or immigration cases. Subdivision (c)(2) contemplates that the files will in any case have to be accessible in electronic form from computers at the courthouse, and making the same documents also available over the Internet would not pose a substantial additional burden on the resources of the courts or parties. Furthermore, judges would not be significantly burdened because parties can be expected to flag privacy issues on their own without significant judicial involvement, and because judges have long experience with the familiar process of balancing privacy concerns against the public interest in open access. Although the government would be put to the additional burden of redacting the information specified by subdivision (a) from its filings, this requirement is unlikely to be overwhelming given

subdivision (b)'s exclusion from the redaction requirement of the records of administrative agencies.[3] We do not believe any extra burden on the government imposed by requiring it to redact its own original filings justifies overriding the public's compelling interest in remote access.

Ironically, to accommodate the government's interest in avoiding the burden of redaction in these two categories of cases, the proposed rule excepts from the redaction requirement even private information like Social Security numbers, birth dates, and financial account numbers—the very types of information most likely to be used for identity theft. Although paper filings, in addition to electronic submissions, are required to be redacted pursuant to subdivision (a), subdivision (b)(5) exempts Social Security and immigration cases from this requirement. This private information would be fully accessible from paper files and public computer terminals at the courthouse, and would thus receive even *less* privacy protection than the same information in other cases. Determined identity thieves cannot be expected to be deterred merely because they are unable to access court files from their personal computers at home. In addition, restricting remote access enhances the market value of data brokers who could obtain private information from the courthouse and disseminate it for a fee.

Finally, one other potential quirk in the language of the proposed rule deserves

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[3]In immigration cases, the burden of redaction would not be a new one, since the Judicial Conference's current policy on public access to electronic case files does not, as noted above, exclude immigration cases from public access and redaction requirements.

mention. Subdivision (c)(2) provides that the public "may have *electronic* access to the full record at the courthouse." However, because the proposed rule purports to govern the privacy of both paper and electronic filings, the rule's failure to mention public access to the paper version of the court's files might be read to prohibit by implication this traditional form of public access. Allowing only electronic access to the files would prohibit *all* public access to those filings that are filed only in paper form. We therefore recommend that the proposed rule be revised to recognize the public's right to access the court's "physical and electronic" files.

To satisfy fully the goals of the E-Government Act, the rules should ensure that the public has access to judicial records to the greatest extent consistent with privacy concerns. This can best be achieved by modifying subdivision (c) to prohibit only remote non-party access to the administrative record, and to leave other privacy concerns to be resolved under subdivisions (d) and (e). Subdivision (c)(2) could thus be re-worded as follows: "any other person may have physical and electronic access to the full record at the courthouse, but may not have remote access to the administrative record." Subdivisions (c)(2)(A) and (B) could then be eliminated.

B. Filings Made Under Seal

Subdivision (d) of the proposed rule provides that a "court may order that a filing be made under seal without redaction." This subdivision allows the court to order an unredacted document to be filed *as a substitute* to the redacted filing, thus ensuring that

no public version of the filing will be available unless the court subsequently orders that such an additional filing be made. The text of the proposed rule does not limit the type of "filing" covered by the rule, and thus appears to allow the court to order a document to be filed under seal regardless of whether the filing contains private information that would ordinarily require redaction under subdivisions (a) or (e). Because the rule prohibits access to paper versions at the courthouse in addition to online versions, the rule appears to grant the courts a general authority to seal any filing for any reason.

Such a general grant of power is unnecessary because, as recognized by the committee note to the proposed rule, the courts already have the inherent power to seal documents pursuant to their supervisory authority over their own records and files. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). In cases where the court seals a document under this authority, the E-Government Act would then prohibit the document from being made available online. Pub. L. No. 107-347, § 205(c)(2). The judicial power to seal documents, however, is tempered by requirements that the court adopt certain procedural protections and carefully balance the public's strong presumption of access against the privacy interests involved. *See, e.g., Press Enter. Co. v. Superior Ct.*, 464 U.S. 501, 510-11 (1984); *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005).

To be sure, the committee note goes some way toward clarifying the impact of the proposed rule by stating that it is not intended to limit or expand traditional doctrines

governing sealing, but merely to "reflect the possibility that redaction may provide an alternative to sealing." The committee note, however, does not have the force of law, *Ross v. Marshall*, 426 F.3d 745, 752 n.13 (5th Cir. 2005), and the text of the rule itself appears to suggest the opposite—providing *sealing* as an alternative to *redaction*. Under the judicial doctrines for sealing documents, courts are traditionally required to consider alternatives such as redaction *prior* to sealing documents. *See, e.g.*, *Buchanan*, 417 F.3d at 429.

Given the recognized authority of the courts to seal filings in appropriate circumstances, subdivision (c) of the proposed rule is unnecessary and should be stricken. At a minimum, however, we recommend that the proposed rule be amended by adding the clause "When authorized by law," to the start of the first sentence of subdivision (d). This amendment would help ensure that courts do not construe the provision as a general grant of authority to seal documents unmoored from traditional restrictions on that authority and would implicitly limit invocation of the rule to those cases where sealing is necessary to protect privacy interests that outweigh the public's compelling interest in open court files.

C. Filings Subject to Protective Orders

We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings. We also generally support the language in the rule allowing

these restrictions only in cases where "necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a)." However, we believe that the word "sensitive" sets too low of a bar for information entitled to protection. Companies, for example, frequently desire to shield "sensitive" commercial information from competitors and the public, but courts recognize that "this desire [] cannot be accommodated . . . without seriously undermining the tradition of an open judicial system." *Brown & Williamson*, 710 F.2d at 1180; *see Baxter Int'l*, 297 F.3d at 545, 547 (denying motion to seal "commercially sensitive information," and holding that "many litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed"). Similarly, courts have rejected the government's attempt to shield information from public view on claimed grounds of national security. *See Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (noting that "[e]ven disputes about claims of national security are litigated in the open"). Courts therefore properly restrict public access to information only when it is a legitimate trade secret, is covered by a recognized privilege, or is required by statute to be maintained in confidence. *Baxter Int'l*, 297 F.3d at 546. We strongly urge, therefore, that the rule be strictly limited to information that is truly *private*, i.e., not merely sensitive.

In addition, the proposed subdivision (e) currently does not require consideration of the public interest prior to restricting access to judicial records. In many cases, neither

party has a motivation to advocate for the public interest in open proceedings. For example, defendants in product liability cases often demand, and are willing to pay a premium for, secrecy as a condition of settlement; and plaintiffs, who will receive the premium, generally have little interest in defending the public's right to access court files at the cost of a lower settlement for themselves. As a result, courts are frequently faced with unopposed motions to seal the record and can be expected to receive similar motions under proposed subdivision (e). The rule should therefore specify that the court is required to consider the public interest prior to restricting access to filings. *See Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process . . . ."). In the absence of these safeguards, we are concerned that large swaths of documents may be subjected to redaction, and many other documents taken offline, based on vague claims of commercial secrecy, personal privacy, national security, and "sensitivity."[4]

These concerns can best be addressed by rewording the first sentence of subdivision (e) as follows: "If necessary to protect private information that is not

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[4]As noted above, PCLG recommends that the Committee delete proposed subdivision (d). If the Committee is inclined to retain the subdivision, however, PCLG's suggestion to limit subdivision (d) to cases "authorized by law" would incorporate the judge-made rules governing sealing that already require the court to balance privacy interests in the case against the public right of access. These traditional limitations would not necessarily be recognized, however, in the context of a decision about whether to redact additional information or to restrict remote access to a file. For this reason, the consideration of the public interest should be explicitly written into subdivision (e).

otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a court may by order in a case: . . . ."

II. Proposed Federal Rule of Criminal Procedure 49.1

PCLG's comments regarding proposed Federal Rule of Civil Procedure 5.2(d) and (e) apply equally to the corresponding sections of proposed Federal Rule of Criminal Procedure 49.1. We note only that public access to judicial records is even more critical in the criminal context. *See Press Enter. Co.*, 464 U.S. at 508-09.

III. Proposed Federal Rule of Bankruptcy Procedure 9037

PCLG's comments regarding proposed Federal Rule of Civil Procedure 5.2(d) and (e) apply equally to the corresponding sections of proposed Federal Rule of Bankruptcy Procedure 9037.

IV. Proposed Federal Rule of Appellate Procedure 25

PCLG generally supports the protection of private information on appeal to the same extent it is protected in the district court. However, the public availability of filings in the court of appeals is especially critical "because the appellate record normally is vital to the case's outcome." *Baxter Int'l*, 297 F.3d at 545. Filings in a court of appeals are also less likely to contain private information than filings in the district court because the issues on appeal are often narrower in scope and legal rather than factual in nature. Although the record on appeal under Federal Rule of Appellate Procedure 10(a) consists of all papers and exhibits filed in the district court, original *filings* in the court of appeals,

including the joint appendix, are typically focused on the narrow questions at issue on appeal. In addition, courts have recognized that parties have the ability to "pare down the appellate record" by sending irrelevant documents back to the district court. *Baxter Int'l*, 297 F.3d at 548.

For this reason, the categorical exception in proposed FRCP 5.2(c) for Social Security and immigration cases does not make sense as a rule on appeal. If the Committee is inclined to retain FRCP 5.2(c), PCLG therefore supports adding a provision specifying that the rule does not apply to filings in the court of appeals. At a minimum, however, we believe that the rule should provide that appellate briefs and potentially dispositive motions should be remotely available to the public in these cases, absent a court's decision to the contrary. Lawyers and pro se litigants rely on their ability to view these filings in order to craft arguments in other cases and to appreciate the bases of a court's decision, and these documents are also necessary to enable the public and press to understand the court's ultimate disposition of the case. In those filings that do raise privacy concerns, courts can deal with the problem under FRCP 5.2(d) and (e).