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Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Ladies and Gentlemen:

I am writing to comment on proposed Federal Rule of Bankruptcy Procedure (Bankruptcy Rule or Rule) 3001(c). Proposed Rule 3001(c) deals with what one court has characterized as the "hotly debated topic . . . of what information and attached documents are required to be submitted with proofs of claims."[1] As it is currently drafted, I believe the Proposed Rule is somewhat ambiguous, and, on some readings, would be subject to challenge as violative of the Bankruptcy Rules Enabling Act, which requires both that a Bankruptcy Rule (1) not conflict with the Bankruptcy Code; and (2) not "abridge, enlarge, or modify any substantive right."[2]

1. Background Regarding Rule 3001

It has often been stated that no person can serve two masters. However true that may be of people, Federal Rule of Bankruptcy Procedure 3001 has long and faithfully served two masters: (1) it has functioned as a pleading requirement that imposes a typical, minimal burden to give the debtor notice of a claim against the estate, in accord with 11 U.S.C. § 101(5)'s definition of "claim"; and (2) it has functioned in an evidentiary capacity, to permit a claim that is filed with sufficient documentation – documentation that "substantially conforms" with the requirements of the Official Form – to constitute evidence, indeed, *prima facie* evidence, of both the validity and amount of the claim. *See* 11 U.S.C. § 502(a) and (b); Fed. R. Bankr. P. 3001(f).

I will discuss these two roles that the "proof of claim" under Rule 3001 has served over the years in more detail. Before doing so, however, I note that I construe some recent cases and the proposed amendments to Bankruptcy Rule 3001 as attempting to make Rule 3001 serve yet a third master – to serve as a "required disclosure" or "initial disclosure" rule, akin to the disclosure requirements of Fed. R. Civ. P. 26(a)(1).[3] Proposed Rule 3001(c) even includes a discovery sanction similar to that imposed for failure to provide initial disclosures under the Federal Rules of Civil Procedure -- Proposed Bankruptcy Rule 3001(c)(2)(D) seems to provide that, in most cases, a claimant will be prevented from using omitted information or documents in any subsequent hearing or submission, absent a showing that the omission was substantially justified or harmless, which parallels the discovery sanction in Fed. R. Civ. P. 37(c)(1).[4]

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[1] In re Burkett, 329 B.R. 820, 825 (Bankr. S.D. Ohio 2005).

[2] 28 U.S.C. § 2075.

[3] Fed. R. Civ. P. 26(a)(1) requires that, in most cases filed in federal court, all parties must disclose certain information without a discovery request or court order, including information about witnesses and documents that a party may use to support its claims or defenses, damage computations, and potentially available insurance.

[4] Fed. R. Civ. P. 37(c)(1) provides the following sanctions for failure to disclose or to supplement initial disclosures: the party will not be permitted to use information as evidence in the case unless the failure was substantially

I consider that proposed Rule 3001(c) is "akin to" the required initial disclosures of the Federal Civil Rules because, if my reading of the proposed Rule is correct, unlike Civil Rule 26(a)(1), which imposes disclosure requirements on *all* parties to a case, Proposed Bankruptcy Rule 3001 would impose disclosure requirements and, hence, disclosure/discovery sanctions on only one party – the claimant. While courts have concluded that the proof of claim (POC) has an informative function – it should permit a party in interest to challenge a claim without undue expense – that function arises in a claims context that attempts to ensure a process that is simplified and fair and inexpensive for all parties, including claimants. Because the context of the POC differs from that of disclosures in civil litigation, the sanction for omission of information in Rule 3001(c) should fit the bankruptcy claims process context. It is in trying to make Proposed Rule 3001(c) function as a one-way discovery/disclosure requirement imposed only on claimants and similar to disclosure under the Federal Rules of Civil Procedure that Rule 3001 may have reached the limits of its elasticity. Further, creation of a broad-reaching, civil disclosure-like requirement does not seem necessary to serve the purpose of ensuring, when claimants are bulk purchasers of debt (or debtors otherwise need additional information), that the debtor may obtain sufficient information about claims without incurring excessive cost.

a. *The "Pleading" Function of Rule 3001*

As indicated above, Rule 3001(a) and (c) have long has served the notice-giving function of a rule of pleading. In assessing creditors' claims for compliance with this "pleading" or notice-giving role, courts have aptly recognized that the "pleading" function is satisfied if a claimant's filing "fairly alerts" the debtor estate of the claim. Thus, a POC "need only 'provide[] adequate notice of the existence, nature, and the amount of the claim as well as the creditor's intent to hold the estate liable."[5] And bankruptcy case law has even permitted (1) the filing of "informal" proofs of claim, not coming close to the requirements of current or proposed Rule 3001(c), as well as (2) liberal amendment of a POC. Thus, in accord with the procedure for amending civil pleadings, "[l]eave to amend a POC should be 'freely given when justice so requires."[6] The proposals to "require" more documentation with a POC would, of course, be more than necessary to give the debtor notice of a claim against its estate, and the new sanction section in Proposed Rule 3001(c)(2)(D) would be simply an inappropriate sanction for a pleading lapse.[7]

b. *The "Evidentiary" Function of Rule 3001*

As noted, however, Rule 3001(a) and (c), have also long served an evidentiary function – if sufficient documentation is attached to the POC, then the POC is entitled, under 11 U.S.C. § 502(a) and Bankruptcy Rule 3001(f), to be accorded *prima facie* validity – that is, it is entitled to be considered *prima facie*

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justified or harmless. Further, in addition to or in lieu of the sanction of evidence preclusion, the court may order reasonable expenses, including attorney fees, or other appropriate sanctions.

[5] *Gens v. Resolution Trust Corporation*, 112 F.3d 569, 575 (1st Cir. 1997) (citing Unioil, Inc. v. H.E. Ellege (In re Unioil, Inc.), 962 F.2d 988, 992 (10th Cir. 1992); *Biscayne 21 Condominimum Association, Inc. v. South Atalntic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985).

[6] *Gens*, 112 F.3d at 574-75 (citing Fed. R. Bankr. P. 7015).

[7] The Supreme Court has held that procedural rules "which *incidentally* affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." Business Guides, Inc. v. Chromatic Communications Enterprises, inc., 498 U.S. 533, 551-52 (1991) (citing Burlington Northern R. Co. v. Woods, 480 U.S. 1 (1987) (emphasis in *Business Guides*)). Proposed Rule 3001(c)(2)(D) provides as follows: "If the holder of a claim fails to provide any information required by this subdivision (c), the holder shall be precluded from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless. In addition to or in lieu of this sanction, the court may, after notice and hearing, award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." In general, failure to plead sufficiently results in leave to amend if justice so requires. These proposed sanctions of Rule 3001(c)(2)(D) would, in most instances, be inappropriate for insufficient pleading.

evidence of the validity and amount of the creditor's claim.[8] So, a POC that "conform[s] substantially" to Official Form 10, is deemed allowed absent objection by a party in interest, *see* 11 U.S.C. § 502(a), and is entitled, under Rule 3001(f), to be construed as *prima facie* evidence of the validity and amount of a claim. Courts have, however, differed as to what will constitute substantial conformity, with some courts holding that, on some facts, very little is required.[9] Courts have also held that a POC that is not entitled to *prima facie* validity is, nevertheless, on some facts, still some evidence that must be rebutted by an appropriate objection.[10] Once a claim is determined to be *prima facie* valid (whether because in substantial conformance with Official Form 10 or for other reasons), a classic burden of production-shifting framework is triggered: The burden of production shifts to a party in interest to object to the claim, *see* 11 U.S.C. § 502(a), and that party must introduce evidence to rebut the presumptive validity of the claim. If the party in interest carries that burden, the burden of production regarding the validity and amount of the claim shifts back to the claimant.[11] Further, if an objection is made, § 502(b) of the Bankruptcy Code provides that a court, after notice and a hearing, "shall" allow the claim, unless one of a finite list of reasons for disallowing the claim, as set forth in § 502(b), is established.[12] The Bankruptcy Code and Rule 3001, thus, create a summary procedure or expedited procedure to resolve creditor claims quickly and inexpensively, if possible. In this framework, which attempts to balance the rights of creditors and debtors and to establish an expedited hearing process for claims against a debtor's estate, Rule 3001 "requires" creditors to attach sufficient supporting documentation for claims so that a debtor or trustee can evaluate claim validity without discovery or significant expense, but it also attempts to provide a simplified process that is fair and inexpensive for all, including creditors.[13]

It is in trying to strike this balance that courts have concluded that "no bright line test [for sufficient documentation] is possible."[14] Courts have also concluded that creditors should be given an opportunity to supplement or amend a POC to include sufficient documentation.[15] In this framework, most courts conclude that the current "penalty" or consequence for failing to meet the documentation requirements of Rule 3001(c) or failing to otherwise establish the *prima facie* validity of a claim, is significant, yet

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[8] *See, e.g.*, In re Garner, 246 B.R. 617, 620-21 (9th Cir. BAP 2000).

[9] *See infra* note 21.

[10] *See, e.g*, In re Heath, 331 B.R. 424, 435-36 (9th Cir. BAP 2005); In re Dove-Nation, 318 B.R. 147, 152 (8th Cir. BAP 2004); In re Chalakee, 385 B.R. 771, 779, 781-82 (Bankr. N.D. Okla. 2008); In re Cluff, 313 B.R. 323, 337-38, 340 (Bankr. D. Utah 2004); In re Mazzoni, 318 B.R. 576, 578-79 (Bankr. D. Kan. 2004).

[11] *See, e.g.*, In re Harford Sands Inc., 372 F.3d 637, 640 (4th Cir. 2004).

[12] *See infra* note 26 (listing cases). Courts have differed on whether failure to attach documents required by Rule 3001(c) may constitute an additional reason, not specified in § 502(b), for claim disallowance, with most holding it may not, absent demonstration of need for the information.

[13] *See infra* note 18.

[14] *See, e.g.* In re Heath, 331 B.R. at 432-34; In re Sampson, 392 B.R. 724, 733-34 (Bankr. N.D. Ohio 2008); In re Taylor, 363 B.R. 303, 309-11 &.8 (Bankr. M.D. Fla. 2007); In re Burkett, 329 B.R. at 829-30; In re Cluff, 313 B.R. at 334-36; In re Moreno, 341 B.R. 813, 817-18 (Bankr. S. D. Fla. 2006); In re Sandifer, 318 B.R. 609, 611 (M.D. Fla. 2004); *but see* In re Henry, 311 B.R. 813, 817-818 (Bankr. W.D. Wash. 2004); In re Kemmer, 315 B.R. 706, 714-16 (Bankr. E.D. Tenn. 2004); In re Relford, 323 B.R. 669, 674 (Bankr. S.D. Ind. 2004). In concluding that there can be no bright line determination of what must be included in every POC, courts have noted that the principles of equity that guide a bankruptcy court should require that "technical considerations not prevent substantial justice from being done" and that the claims resolution process should remain "simpler, expedited proceedings without the trappings of normal civil litigation." *See, e.g.*, In re Shank, 315 B.R. 799, 814 (Bankr. N.D. Ga. 2004).

[15] *See, e.g.*, In re Stoecker, 5 F.3d 1022, 1027-28 (concluding that a claimant should not be "forever barred from establishing the claim [based on failure to attach Rule 3001(c) documents to a POC]. Nothing in the principles or practicalities of bankruptcy or in the language of any rule or statute justifies so disproportionate a sanction for a harmless error. Forfeiture of valuable claims, and other heavy sanctions, should be reserved for consequential or easily concealed wrongs"); In re South Atlantic Financial Corp., 767 F.2d 814, 819 (11th Cir. 1985); In re Taylor, 363 B.R. at 310.

appropriate -- the creditor cannot rely on a presumption that its claim is valid.[16] Instead, upon an appropriate objection from a party in interest, the creditor is put to its proof.

c. *The Proposed "Creditor Discovery/Disclosure" Function*

The proposed new sanction of Rule 3001(c)(2)(C) could be generally "appropriate" only if Proposed Rule 3001(c) were to be treated as a discovery or disclosure provision similar to disclosure under the Federal Rules of Civil Procedure.[17] As set forth below, the additional information and sanction provisions of proposed Rule 3001(c) are somewhat ambiguous. If construed, however, (1) to require a particular quantum of information in support of every POC; (2) to impose a penalty of choice of precluding a claimant from ever introducing "required," but omitted, documentation unless the claimant establishes that the omission was substantially justified or harmless; *and* (3) to require neither corresponding evidence disclosure by debtors nor even an indication from debtors that they need the documentation on the facts of the case, I would conclude that the proposed sanction presents issues under the Rules Enabling Act. The "unless substantially justified or harmless" language of the proposal does not cure the problem because it requires an additional "showing" by the claimant, absent any good faith objection by a party in interest.

Although the Bankruptcy Code and Rule 3001 anticipate that a claimant's POC will provide sufficient information for a party in interest to evaluate a claim, that informative purpose occurs in the context of the following equally important purposes of the claims procedure: (1) the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding" for all parties, including creditors; and (2) the procedures should provide an expedited hearing process.[18] A failure to provide information "required" by Rule 3001, thus, warrants a different "remedy" than a failure to meet the dual, required disclosure provisions of the Federal Rules of Civil Procedure.[19]

2. Discussion of Proposed Amendments to Rule 3001(c)

a. *"Mandatory" Information Requirements of Proposed Rule 3001(c)*

Bankruptcy Rule 3001(a) requires that a POC "shall conform substantially" to the appropriate Official Form, and that form permits claimants to attach summaries in some instances. Rule 3001(c), by contrast, has provided that, for claims based on a writing, the original or duplicate of the writing "shall" be filed

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[16] *See, e.g.*, In re Stoecker, 5 F.3d 1022, 1027-28 (7th Cir. 1993); In re Heath, 331 B.R. at 433; In re Garner, 246 B.R. 617, 622-23 (9th Cir. BAP 2000); In re Los Angeles Intern. Airport Hotel Associates, 196 B.R. 134, 139 (9th Cir. BAP 1996) (dicta); In re Kincaid, 388 B.R. 610, 617 (Bankr. E.D. Pa. 2008); In re Taylor, 363 B.R. at 307-308; In re Cluff, 313 B.R. at 331, 337-38; In re Burkett, 329 B.R. at 829-30; In re Shank, 315 B.R. at 810. *See also* B-Line LLC v. Wingerter, ___ F.3d ___, 2010 WL 252184 (6th Cir. January 25, 2010) (noting, in dicta, that ramifications for not complying with Rule 3001(c) are well-established and do not include sanctions). Some courts also hold that if no documentation is attached to a POC and the claimant fails to later amend the POC, the claim may be disallowed. *See, e.g.*, In re Kirkland, 572 F.3d 838, 840-41 (10th Cir. 2009) (holding that a *trustee's* objection to a claim based on a lack of documentation accompanying a POC, would result in claim disallowance when the claimant failed to provide information subsequently); In re Henry, 311 B.R. at 813; In re Blue, 2004 WL 1745786 (W.D. Ill July 30, 2004).

[17] When courts determine to impose such a disclosure requirement by procedural Rule, however, it is typical to impose disclosure on all parties.

[18] *See, e.g.*, In re Taylor, 363 B.R. 303, 309-10 (Bankr. M.D. Fla. 2007); In re Burkett, 329 B.R. 820, 827 (Bankr. S.D. Ohio 2005); In re Shank, 315 B.R. 799, 813-14 (Bankr. N.D. Ga. 2004); In re Cluff, 313 B.R. 323, 331 (Bankr. D. Utah 2004).

[19] Even the minority of courts that have held that failure to attach documents to a POC may result in claim disallowance have generally permitted claimants an opportunity to amend the POC or later produce documentation in support of their claims.

with the POC. Proposed Bankruptcy Rule 3001(c) would add to the information that "shall" be filed with a POC and, thus, seems also to "require" that claimants *must* include more information than previously required in a POC. [20] It seems also to change from the requirement of substantial conformity required by most courts[21] to one of strict conformity[22] (although the use of the ambiguous term "shall" makes this unclear).

The sufficiency of the POC in the context of bulk purchasers of debt that attach minimal documentation to POCs has trained renewed attention on the documentary "requirements" of Rule 3001(a) and (c). The dilemma is that, in some instances, a debtor will need the information listed in Rule 3001, but, in many instances, a debtor will have as much information about the claim as a claimant. The majority of courts have, thus, concluded that the purported "mandatory" documentation requirement of Rule 3001(c), are mandatory only in the sense that they must be met if a claimant seeks to ensure the *prima facie* validity of its claim, and that failing to attach documents purportedly required by Rule 3001 is not, by itself a basis for claim disallowance.[23] This is particularly the case if a debtor makes no substantive objection to the claim or the amount of the claim, but makes a bare objection to the lack of documentation.[24] The blunt tools of evidence preclusion or claim disallowance for a bare failure to include the listed documentation with the POC are unwarranted, and additional penalties ought to be targeted to the particular harm at issue – unnecessary debtor expense in assessing a claim. If a debtor can demonstrate need for the omitted information, such as a good faith theory that might require claim disallowance or reduction, or a good faith need for the material to permit inquiry into the claim's validity or amount, courts have been more willing to consider sanctions.[25]

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[20] Proposed Rule 3001(c)(1) newly provides, among other things, that, "[w]hen a claim is based on an open-end or revolving consumer credit agreement, the last account statement sent to the debtor prior to the filing of the petition shall also be filed with the proof of claim." Proposed Rule 3001(c)(2)(A) provides that in cases in which the debtor is an individual, "[i]f in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim." At some point, Rules that heighten the requirements to establish a "proof of claim," which courts have concluded is not subject to bright-line determination, will "abridge, enlarge, or modify" the claimants ability to plead or to establish the *prima facie* validity of its claim.

[21] *See, e.g.*, In re Dove-Nation, 318 B.R. at 147, 151-52 (8th Cir. BAP 2004); In re Heath, 331 B.R. 424, 432-33 (9th Cir. BAP 2005) (citing cases); In re Taylor, 363 B.R. 303, 309-10 (Bankr. M.D. Fla. 2007); In re Burkett, 329 B.R. 820, 828-29 (Bankr. S.D. Ohio 2005); In re Cluff, 313 B.R. 323, 334-36 (Bankr. D. Utah 2004) (noting that a range of documents can satisfy the Rule 3001(c) requirements). *But see* In re Blue, 2004 WL 1745786 (N.D. Ill. July 30, 2004) (substantial compliance with Rule 3001(c) requirement not sufficient).

[22] As noted above, this construction seems to treat the POC as serving a unilateral, claimant mandatory disclosure function as well as its traditional pleading and evidentiary functions.

[23] *See, e.g.*, In re Campbell, 336 B.R. 430, 434 (9th Cir. BAP 2005); In re Heath, 331 B.R. at 433-64 (discussing split in courts); In re Dove-Nation, 318 B.R. 150-52; In re Kincaid, 388 B.R. 610, 614 (E.D. pa. 2008); In re Chalakee, 385 B.R. 771, 778-81 (Bankr. N.D. Okla. 2008); In re Kendall, 380 B.R. 37, 43 & n.3 (Bankr. N.D. Okla. 2007); In re Taylor, 363 B.R. at 307-08; In re Burkett, 329 B.R. at 826-28 & n.2 (discussing "majority" and "minority" view and collecting cases); In re Guidry, 321 B.R. 712 (Bankr. N.D. Ill. 2005);In re Armstrong, 320 B.R. 97 (Bankr. N.D. Tex. 2005); In re Shank, 315 B.R. 799, 811 (Bankr. N.D. Ga. 2004); In re Kemmer, 315 B.R. 706, 713-14 (Bankr. E.D. Tenn. 2004); In re Jorczak, 314 B.R. 474, 480-81 (Bankr. D. Conn. 2004);In re Mazzoni, 318 B.R. 576, 579 (Bankr. D. Kan. 2004); In re Cluff, 313 B.R. at 331; *See also* B-Line, LLC v. Wingerter, ___ F.3d ___, 2010 WL 252184 (6th Cir. 2010). Some courts have held, to the contrary, that failure to meet the Rule 3001(c) requirements may result in disallowance of a claim. *See, e.g.*, In re Kirkland, 572 F.3d 838 (10th Cir. 2009) (*trustee's* objection to lack of documentation); In re Vann, 321 B.R. 734, 736-37 (Bankr. W.D. Wash. 2005); In re Blue, 2004 WL 1745786 (N.D. Ill. July 30. 2004); In re Henry, 311 B.R. 813, 818 (Bankr. W.D. Wash. 2004); *see also* In re Porter, 374 B.R. 471 (Bankr. D. Conn. 2007).

[24] *See supra* note 23.

[25] A number of courts have indicated in dicta that sanctions, including claim disallowance might be appropriate if a claimant does not produce the information promptly in response to a formal or informal request. *See, e.g.*, In re Heath, 331 B.R. at 436-37; In re Chalakee, 385 B.R. 771 (Bankr. N.D. Okla. 2008); In re Shank, 315 B.R. at 811, 816.

If the proposed documentation requirements of Proposed Bankruptcy Rule 3001(c) were construed to be "mandatory" in all cases, i.e., to "require" attachment of the information to the POC in every case, under penalty of evidence preclusion, absent claimant's showing of substantial justification or lack of harm, I would read the Proposed Rule to conflict with the Bankruptcy Code, which under § 501, permits the filing of a claim; under § 502(a) provides that a filed POC is deemed allowed absent objection by a party in interest; and under § 502(b) provides a limited list of reasons for claim disallowance, which list does not include failure to attach documents to the POC.[26]

The breadth of the Proposed Rules might also violate the substantive rights prohibition of the Rules Enabling Act. As cases have shown and commentators have noted, the Supreme Court now "takes substantive rights [under the Rules Enabling Act] seriously," construing existing Rules narrowly to avoid violating the Rules Enabling Act and carefully drafting proposed Rules to avoid violating substantive rights.[27] To accord with the proscription against abridging, enlarging, or modifying substantive rights, the Proposed Rule at issue should be clarified or redrafted to avoid unintentional conflict with the Bankruptcy Code or overbreadth. The "style projects" for the various Federal Rules have sought to eliminate use of the term "shall" when possible because of its ambiguity. To avoid ambiguity, it would be helpful for Proposed Rule 3001(c) to state what "shall" means in the context of Rule 3001(a) and Proposed Rule 3001(c). If the use of the word "shall" means only that a claimant *must* or *should* submit the listed documents for its claim to be *prima facie* valid, then the Proposed Rule would probably withstand scrutiny. If, however, the Proposed Rule uses "shall" to indicate that a claimant must submit the information, in every case, then I would read the Proposed Rule to conflict with the Bankruptcy Code and with much existing case law. Further, to the extent that the Proposed Rule is intended to require strict conformity as the new norm for attaching documents and information described in Proposed Rule 3001(c) to a POC, in all instances, even in instances in which no party in interest has made a good faith objection to the claim or the amount of the claim or otherwise established a need for the omitted information, the new requirements may "abridge" or "modify" the claimant's right to present a proof of claim, to provide some evidence of a claim, to establish the *prima facie* validity of its claim, and ultimately to prevail on a valid claim.

b. *Proposed Sanction in Proposed Rule 3001(c)(2)(D)*

i. *The Sanction of Proposed Rule 3001(c)(2)(D) Conflicts with the Bankruptcy Code and Abridges, Enlarges, or Modifies a Substantive Right*

Proposed Rule 3001(c)(2)(D), as currently drafted, appears to authorize, as appropriate, a sanction of precluding use of omitted documentation in any case in which a claimant fails to attach the "required" documents under Proposed Rule 3001(c), absent a claimant's showing that the omission is substantially justified or harmless. As a practical matter, imposition of this sanction would often be equivalent to claim disallowance. (The Proposed Rule would also permit shifting of attorney fees or

[26] *See, e.g.* In re Heath, 331 B.R. at 435; In re Dove-Nation, 318 B.R. at 150; In re Sampson, 392 B.R. 724, 727-28 (Bankr. N.D. Ohio 2008); In re Porter, 374 B.R. 471 (Bankr. D. Conn. 2007); In re Burkett, 329 B.R. at 826, 828; In re Guidry, 321 B.R. 712, 714 (Bankr. N.D. Ill. 2005); In re Cluff, 313 B.R. 323, 331-32 (Bankr. D. Utah 2004). Courts differ on this issue. *See, e.g.*, In re Plourde, 418 B.R. 495, 504 & n.12 (1st Cir. BAP 2009) (noting that courts differ on the issue, citing cases, but declining to take a position).

[27] *See, e.g.*, Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845-46 (1999); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bund Fund, Inc., 527 U.S. 308, 322-24 (1999); Amchem Products, Inc. v. Windsor, 52 U.S. 591, 628-29 (1997); *see also* Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 Notre Dame L. Rev. 1677, 1713-14, 1736-37 (2004); Bernadette Bollas Genetin, *The Power that Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 Baylor Law Review 587, 592 (2005).

other "appropriate" sanction, but it is not clear that, in many cases, any "sanction" other than the currently available loss of *prima facie* validity of claim and amount of claim under Rule 3001(f) would be "appropriate").[28] As so construed, I believe that the Proposed Rule would conflict with Bankruptcy Code § 502(a), under which claims are deemed allowed, absent appropriate objection, and § 502(b), which provides a finite list of reasons for claim disallowance and does not include failure to comply with Rule 3001(c).[29] The proposed sanction inappropriately shifts to a claimant, who has established a *prima facie* case or some evidence in support of the claim, the additional burden of "showing" that the failure to provide particular information is substantially justified or harmless, or to face evidence preclusion or other penalties, absent any objection. I also believe that the Proposed Rule would abridge, enlarge, or modify substantive rights of claimants and other parties in interest.[30]

ii. ***If Proposed Rule 3001(c)(2)(D) Is Construed to Permit Evidence Preclusion (or Other Penalties) Based Solely on Failure to Attach Documents to the Initial POC, the Proposed Sanction Will Abridge, Enlarge, or Modify Substantive Rights***

The sanction in Proposed Rule 3001(c)(2)(D) is appropriate in the case of the dual (or multi-party) disclosure requirements of the Federal Rules of Civil Procedure, in which disclosure is used as a precursor to subsequent general discovery and to enable the parties and the court to plan for the extended discovery of traditional civil litigation. The sanction does not appear generally appropriate in the context of a proposed unilateral, claimant disclosure requirement in the simplified bankruptcy claims resolution process.

Proposed Rule 3001(c)'s proposed new mandatory document requirements and sanctions appear aimed primarily at the issue of creditors' bulk purchases of debt and omission to attach "required" documentation to the POC. In some, but not all, instances in which a bulk purchaser of debt or other claimant asserts a claim, the debtors need additional information regarding the amount and nature of the claim asserted. In other instances, debtors have equivalent information, substantial information, or more information than claimants about asserted claims. The Proposed Rule sweeps too broadly, by appearing to "require" in all cases (absent an additional showing by claimant of substantial justification or lack of harm), that documents be attached to a POC and permitting imposition of the severe sanctions of evidence preclusion, attorney fees, or other "appropriate" penalty, in all cases, rather than just in cases in which a party in interest needs the information to pursue an objection to claim validity or amount or needs the information to investigate claim validity or amount. (The proposed penalty also seems to shift the burden of production on an objection from a party in interest to claimant to show substantial justification or lack of harm.) As Judge Posner concluded, for a panel of the Seventh Circuit, forever barring a creditor from establishing a claim is a disproportionate sanction for merely failing to attach documents to a POC:

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[28] *See, e.g.*, B-Line, LLC v. Wingerter, ___ F.3d ___, 2010 WL 252184 (6th Cir. 2010) (stating that the "ramifications for not complying with Rule 3001(c) are well established and do not include sanctions").

[29] *See supra* note 26.

[30] *See, e.g.*, In re Campbell, 336 B.R. 430, 435-36 (9th Cir. BAP 2005);In re Heath, 331 B.R. 424, 435 (9th Cir. BAP 2005); In re Dove-Nation, 318 B.R. 147, 151-52 & n.4 (8th Cir. BAP 2004); In re Burkett, 329 B.R. 820, 828 (Bankr. S.D. Ohio 2005); In re Guidry, 321 B.R. 712, 714 (Bankr. N.D. Ill. 2005); In re Cluff, 313 B.R. at 331-32; *see also* Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503-04 (2001) (construing Fed. R. Civ. P. 41(b) narrowly to avoid violating the Rules Enabling Act and stating that if Rule 41(b) were read to determine the effect to be given a judgment, it "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.'"). Although some cases would permit claim disallowance (and, by extension, evidence preclusion) for failing to attach documentation to a POC, no case that I have read has addressed the issue of whether construing procedural bankruptcy rules to permit or require claim disallowance would violate the Bankruptcy Rules Enabling Act. *See, e.g.*, In re Kirkland, 572 F.3d 838, 840-41 (10th Cir. 2009); In re Blue, 2004 WL 1745786 at *2 (N.D. Ill. July 30, 2004).

> If the documentation is missing [from a proof of claim], the creditor cannot rest on the proof of claim. It does not follow that he is forever barred from establishing his claim. Nothing in the principles or practicalities of bankruptcy or in the language of any rule or statute justifies so disproportionate a sanction for a harmless error. Forfeitures of valuable claims, and other heavy sanctions, should be reserved for consequential or easily concealed wrongs. A creditor should therefore be allowed to amend his incomplete proof of claim . . . to comply with the requirements of Rule 3001, provided that other creditors are not harmed by the belated completion of the filing.[31]

Because the sanction in Proposed Rule 3001(c)(2)(D) is not tailored to deal with the particular problem at issue – instances in which a debtor needs additional information to assert or investigate a legitimate dispute as to claim validity or amount -- but broadly creates a categorical sanction, it affects substantive rights more than incidentally, and it is not reasonably necessary to maintain the integrity of the process for resolving creditor claims against a bankruptcy estate.[32]

Courts have differed on whether, absent a good faith basis for asserting invalidity of claim or amount of claim or a good faith basis to assert that information is needed from the creditor to explore these issues, a failure of a claimant to attach documents required by Rule 3001(c) may be a basis for sanctions, such as disallowing a claim, with most holding that it may not.[33] Some courts have held that claim disallowance is available for merely failing to attach documents to a POC,[34] but claim disallowance, like evidence preclusion, seems a disproportionate penalty in most instances, in the claims context that seeks to resolve claims quickly, inexpensively, and fairly. Simply including a penalty in a Federal Rule of Bankruptcy Procedure, which cannot create substantive law, cannot cure its disproportionality. Proposed Rule 3001(c)(2)(D) would, therefore, in my view, exceed the jurisdictional limitations of procedural rules, if so construed.[35]

Appropriate consequences for failure to attach listed documentation to a POC exist, and include the following:

(1) loss of the Rule 3001(f) presumption of *prima facie* validity, which in many cases will result in claim disallowance if the claimant persists in declining to provide information in the face of an appropriate objection or request for information;

(2) imposition of criminal penalties under 18 U.S.C. §§ 152 and 3571;

(3) use of Fed. R. Bankr. P. 9011(b) in appropriate cases;[36] and

(4) potential disallowance of a claim in instances in which a debtor asserts that it needs the omitted evidence because of a good faith dispute regarding claim validity or amount or because the debtor credibly indicates that it needs the omitted information to investigate claim validity or amount.[37]

As currently drafted, Proposed Rule 3001(c)(2)(D) appears generally to permit a sanction of evidence preclusion – and, thus, for all practical purposes, claim disallowance -- or shifting of attorney fees and expenses, in any case in which a claimant fails to attach "required" documents, absent a

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[31] In re Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993).

[32] *See* Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 551-52 (1991).

[33] *See supra* note 23.

[34] *See supra* note 23.

[35] Indeed, the Sixth Circuit recently held, in a related context, that a bankruptcy court may not hold on a prospective and categorical basis that, to avoid sanctions under Rule 9011(b), the holder of purchased claims must always attach to a POC copies of the originating documents or explain their absence, since the issue of whether the claimant's conduct was reasonable under the circumstances is fact specific. *See* B-Line, LLC v. Wingerter, ___ F.3d ___, 2010 WL 252184 (6th Cir. January 25, 2010).

[36] *See, e.g.*, B-Line, LLC v. Wingerter, ___ F.3d ___, 2010 WL 252184 (6th Cir. January 25, 2010); In re Rogers, 391 B.R. 317, 323 (M.D. La. 2008).

[37] *See supra* note 39.

claimant's showing of substantial justification or harmlessness. The Proposed Rule is, thus, too far-reaching.

If additional sanctions are to be imposed, the Rule should be changed to provide a sanction that is tailored to deal with the problem at issue and that does not sweep within its reach all filings of POCs, even those for which debtors possess ample information about the POC.[38] It would be appropriate, for example, to formulate specific procedures for formal and/or informal request by a party in interest for additional information upon a demonstration of need.[39] The rule might also include (1) some mechanisms, such as affidavits or certifications, for ensuring the good faith of requests; and (2) additional sanctions for instances in which a claimant failed, upon request, promptly to produce the requested information.

3. **Conclusion**

Proposed Fed. R. Bankr. P. 3001(c) deals with sharply disputed issues regarding sufficiency of a POC and appropriate penalties for insufficient POCs. Against this background of court disagreement and in the current rulemaking context, in which the Supreme Court takes substantive rights in the Rules Enabling Acts seriously, I believe the Proposed Rule ought to be altered to reach no further than necessary to deal with the issue of instances in which a party in interest adequately demonstrates, formally or informally, that a POC provides insufficient information to assess a particular claim. Thank you for providing a forum for comment on these prospective rules.

Very truly yours,

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[38] Further, the fact that Proposed Rule 3001(c)(2)(D) contains lesser sanctions that may be imposed in lieu of or in addition to preclusion of evidence should not cause the Committee to preserve the Proposed Rule in its current form. Absent guidance, it is likely that many courts will believe, based on the current language, that document preclusion is an appropriate sanction in most or all instances in which a claimant may omit information "required" by Proposed Rule 3001(c).

[39] *See, e.g.*, In re Porter, 374 B.R. 471 (Bankr. D. Conn. 2007) (discussing potential procedures for debtors' and trustees' objections); In re Campbell, 336 B.R. 430, 436 (9th Cir. BAP 2005); In re Heath, 331 B.R. 424, 436-37 (9th Cir. BAP 2005); In re Kincaid, 388 B.R. 610, 615 & n.4 (Bankr. E.D. Pa. 2008). These and other cases have also indicated, in dicta, that if a party in interest demonstrates a good faith need for additional information, sanctions might be appropriate, and they have keyed on methods to ensure the good faith of debtors' objections. Some courts have indicated as well that a different standard might be appropriate when a *trustee* seeks additional information. The Committee might also want to consider procedures for this situation. *See, e.g.*, In re Kirkland, 572 F.3d 838 (10th Cir. 2009) (reversing a divided decision of Bankruptcy Appellate Panel of the 10th Circuit and permitting a trustee's objection for failure to comply with Bankruptcy Rule 3001(c)). Other courts have indicated in dicta that additional documents might be required on a lesser standard, if the objecting party were the trustee. *See, e.g.*, In re Cleveland, 396 B.R. 83, 93 & n.34 (Bankr. N.D. Okla. 2008); In re Sampson, 392 B.R. 724, 732-33 (Bankr. N.D. Ohio 2008); In re Guidry, 321 B.R. 712, 715 n.2 (Bankr. N.D. Ill. 2005); In re Cluff, 313 B.R. 323, 343 (Bankr. D. Utah 2004); In re Mazzoni, 318 B.R. 576, 579 & n. 14 (Bankr D. Kan. 2004).