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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:21-CV-03970**
VERSUS	**JUDGE TERRY A. DOUGHTY**
XAVIER BECERRA ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM RULING

The issue before this Court is whether the Plaintiff States[1] are entitled to a preliminary injunction against the Government Defendants[2] as a result of a COVID-19 CMS vaccine mandate ("CMS Mandate") implemented by the Government Defendants on November 5, 2021. 86 Fed. Reg. 61555-01. The CMS Mandate requires the staff of twenty-one types of Medicare and Medicaid healthcare providers to receive one vaccine by December 6, 2021, and to receive the second vaccine by January 4, 2022. Failure to comply with the CMS Mandate may result in penalties up to and including "termination of the Medicare/Medicaid Provider Agreement." 86 Fed. Reg. at 61574.

According to the CMS, the CMS Mandate regulates over 10.3 million health care workers in the United States. *Id.* at 61603. Of those 10.3 million, 2.4 million healthcare workers are currently unvaccinated. *Id.* at 61607.

Implicit in determining whether a preliminary injunction should be granted is determining whether the Government Defendants have the statutory and/or constitutional authority to implement the CMS Mandate. Finding that the Government Defendants do not have

[1] Plaintiff States consist of Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio.
[2] The Government Defendants consist of Xavier Becerra, in his official capacity as Secretary of Health and Human Services, The U.S. Department of Health and Human Services ("DHH"), Chiquita Brooks–Lasure, in her official capacity as Administrator of the Center for Medicare and Medicaid Services ("CMS").

the authority to implement the CMS Mandate, this Court GRANTS Plaintiff States' Motion for Preliminary Injunction [Doc. No. 2] and IMMEDIATELY ENJOINS and RESTRAINS the Government Defendants from implementing the CMS Mandate.

I. BACKGROUND

This case is about COVID-19 vaccine mandates. The CMS Mandate requires over 10.3 million healthcare workers to be fully vaccinated with one of the COVID-19 vaccines in two months. The first of two COVID-19 vaccines is required by December 6, 2021, and the second by January 4, 2022. The factual statements made herein should be considered as findings of fact and legal conclusions should be considered conclusions of law. This Court's job is to examine the appropriate statutes and/or constitutional authority for the Government Defendants to issue the specific CMS Mandate discussed herein. The opinion expressed hereto is legal, not political or personal.

On March 13, 2020, President Trump declared the COVID-19 pandemic a national emergency. On March 11, 2020, the World Health Organization ("WHO") declared COVID-19 a global pandemic.

On December 11, 2020, the U.S. Food and Drug Administration ("FDA") issued an Emergency Use Authorization ("EUA") for the Pfizer-BioNTech vaccine. The FDA issued an EUA for the Moderna COVID-19 vaccine on December 18, 2020, and issued an EUA for the Janssen COVID-19 vaccine on February 27, 2021.[3] The Pfizer-BioNTech COVID-19 vaccine received FDA approval on August 23, 2021 for individuals sixteen years of age and older.[4] On

[3] https://www.fda.gov>COVID19-fre.
[4] https://www.cdc.gov>vaccines.

November 19, 2021, the FDA authorized Pfizer-BioNTech and Moderna COVID-19 boosters for all adults ages eighteen and older.[5]

The first cases of COVID-19 in the United States were recorded in January 2020.[6] Cases began surging thereafter with the highest surge from October 2020 to February 2021. The seven-day average for cases in the United States recorded a high on January 12, 2021, at 250,512 cases. For the last ninety days, the seven-day average has declined from 164,374 on September 2, 2021, to 94,335 on November 23, 2021.[7]

In response to the pandemic, CMS issued six previous rules with regard to COVID-19. These rules were issued on April 6, 2020, May 8, 2020, September 2, 2020, November 6, 2020, May 13, 2021, and June 21, 2021. 86 Fed. Reg. at 61561. These previous actions dealt with revision of regulations, data reporting, and infection control requirements to protect healthcare workers from exposure to COVID-19. The June 21, 2021, Healthcare Emergency Temporary Standard ("ETS") required healthcare workers to develop a plan for each workplace, which included patient screening, protective equipment, aerosol procedures, physical distancing, physical barriers, cleaning and disinfecting, ventilation, health screening, training, recordkeeping, and reporting. *Id.*

A. November 5, 2021 CMS Mandate

On November 5, 2021, CMS issued the disputed Interim Final Rule ("IFR"), which contained the requirements for mandating COVID-19 vaccines. The IFR was described by CMS as "revises the requirements that Medicare and Medicaid certified providers and suppliers must meet to participate in the Medicare and Medicaid Programs."

[5] https://www.nbcnews.com>health.
[6] https://www.history.com>first-conf.
[7] https://www.nytimes.com>us>cov.

The Mandate was effective on November 5, 2021, and established COVID-19 vaccination requirements for staff, and this included Medicare and Medicaid – certified providers and suppliers. The Mandate implemented the COVID-19 vaccinations in two phases. The first vaccine is to be required by December 6, 2021, and the second vaccine is to be required by January 4, 2022. The CMS Mandate went into effect immediately; there was no notice and comment under the Administrative Procedures Act 5 U.S.C. 553.

The mandate applies to the employees of Medicare and Medicaid providers and suppliers listed. 86 Fed. Reg. at 61556. CMS claimed authority to issue the mandate pursuant to §§ 1102, 1863, and 1871 of the Social Security Act. 86 Fed. Reg. at 61560, 61567. The reasoning for the mandate was: "In light of our responsibility to protect the health and safety of individuals providing and receiving care and services from the Medicare and Medicaid certified providers and suppliers, and CMS's broad authority to establish health and safety regulations, we are compelled to require staff vaccinations for COVID-19 in these settings." 86 Fed. Reg. 61560.

CMS indicated its mandate was "complementary to the OSHA ETS",[8] which also requires mandatory vaccinations. (Occupational Safety and Health Administration ("OSHA")). CMS admittedly has not previously required any vaccinations. 86 Fed. Reg. 61567. The mandate discussed the potential effect of health care workers choosing to leave their jobs rather than be vaccinated but concluded[9] there was insufficient evidence to quantify and compare adverse impacts on patient and residential care associated with temporary staffing losses. 86 Fed. Reg. at 61569.

[8] The United States Court of Appeals for the Fifth Circuit has stayed the implementation of the OSHA ETS pending adequate judicial review of the motions for preliminary injunction. *BST Holding's LLC v. Occupational Safety and Health Administration* 21-60845 (November 12, 2021).

[9] Despite approximately 2.4 million unvaccinated healthcare workers.

Like the OSHA mandate,[10] the CMS mandate is described as a "common set of provisions for each applicable provider and supplier as there are no substantive regulatory differences across settings." 86 Fed. Reg. at 61570.

The CMS mandate also requires that the medical providers and suppliers "track and securely document" the vaccination status of each staff member, including storing staff members' medical records showing proof of vaccination. 86 Fed. Reg. 61572. The CMS mandate allows exemptions that are based upon existing Federal law. The mandate specifically states that it "preempts" the applicability of any state or local law providing for exemptions. 86 Fed. Reg. 61572.

In not inviting notice and comment pursuant to the Administrative Procedures Act, 5 U.S.C. 553, CMS found "good cause" that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest based upon the reasons set out at 86 Fed. Reg. 61583 to 61585.

B. The Executive Branch's Vaccine Policy

President-Elect Biden initially did not think vaccines should be mandatory[11]. On September 9, 2021, President Biden changed his mind announcing his intention to impose a national mandate[12].

Both the OSHA Mandate and the CMS Mandate were imposed approximately two months later on November 5, 2021.

[10] Described by the Fifth Circuit as a "one size-fits-all sledgehammer." *BTS Holdings, LLC* 21-60145@8.
[11] Jacob Jarvis Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020, Newsweek (Sept. 10, 2021), https://bit.ly/3ndyTn.5
[12] Kevin Liptak & Kaitlan Collins, Biden Announces New CMS Mandates that could cover 100 Million Americans, CNN (Sept. 9, 2021).

C. Medicare and Medicaid

Medicare is a federal program that pays for healthcare for the elderly. Medicaid is a cooperative state-funded program that helps States finance medical care for their poor and disabled citizens. The Secretary of Health and Human Resources is charged through the Social Security Act with administrative responsibilities related to maintaining the Medicare and Medicaid Programs. 42 U.S.C. 301, et al.

The Social Security Act also delegates to the Secretary certain rule-making authority. As relevant here, 42 U.S.C. 1302(a) gives the Secretary the authority to make and publish rules and regulations that may be necessary to the efficient administration of the functions with which the Secretary is charged.

II. JURISDICTION

The Government Defendants maintain this Court does not have jurisdiction to hear the Plaintiff States' claims based upon the Medicare Act's channeling requirement, 42 U.S.C. 405(g) as incorporated by 42 U.S.C. 1395ii. The Government Defendants argue that Medicare and Medicaid's exclusive review scheme bars pre-enforcement challenges. The Government Defendants further claim the Plaintiff States are required to go through the statute's administrative review scheme and have an administrative hearing before filing suit in district court. Plaintiff States' claims arise under both the Medicare and Medicaid statutes, the United States Constitution, the Administrative Procedure Act, and the Congressional Review Act.

The Government Defendants cite *Shalala v. Illinois Council on Long Term Care, Inc.,* 529 U.S. 1 (2000) for the proposition that any "arising under" jurisdictional claims must undergo the SSA's administrative process and that Congress made the review exclusive.

However, both 42 U.S.C. 405(g) and 42 U.S.C. 1395ii do not apply in this case. 42 U.S.C. 405(h) states that the SSA administrative process only applies to actions "to recover on any claim arising under this subchapter." The "subchapter" refers to claims for benefits under the SSA. It does not apply to a claim for declaratory and injunctive relief as to the authority of CMS to make regulations. Plaintiff States are neither "institutions" nor "agencies" who are "dissatisfied" with the Secretary's determination regarding eligibility or receipt of benefits. The channeling requirement does not apply to "state governments." Since Plaintiff States would be unable to use this statutory scheme (even if they wanted to) it would mean "no review at all" under *Shalala*, which would allow Plaintiff States to have jurisdiction in this Court.

Additionally, the Medicare Act's channeling requirement only applies to Medicare and not to Medicaid claims. *Avon Nursing & Rehab. V. Becerra*, 995 F.3d 305, 311 (2d. Cir. 2021).

Therefore, this Court has jurisdiction to hear these claims.

III. STANDING

Although the Plaintiff States' standing has not been challenged by the Government Defendants, this Court must next determine whether it has judicial power to hear the case. The United States Constitution limits exercise of judicial power to certain "cases" and "controversies." U.S. Constitution Article III Section 2.

Under the doctrine of "standing," a federal court can exercise judicial power only where a plaintiff has demonstrated that it (1) suffered an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. *Id*. at 561.

The Plaintiffs in this case are fourteen (14) states. States are not normal litigants for purposes of invoking federal jurisdiction. *Massachusetts v. E.P.A.,* 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). Rather, a state is afforded "special solicitude" in satisfying its burden to demonstrate the traceability and redressability elements of the traditional standing inquiry whenever its claims and injury meet certain criteria. *Id*. at 520; *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015), *as revised* (Nov. 25, 2015). Specifically, a state seeking special solicitude standing must allege that a defendant violated a congressionally accorded procedural right that affected the state's "quasi-sovereign" interests in, for instance, its physical territory or lawmaking function. *Massachusetts*, 549 U.S. at 520–21; *Texas*, 809 F.3d at 151–55.

Plaintiff States have standing under the normal inquiry because they are entitled to special solicitude. Plaintiff States have standing to challenge the CMS Mandate because the Government Defendants' actions harm Plaintiff States' sovereign, proprietary, and *parens patriae* interests.

In *State of Florida v. Becerra*, __ F. Supp. 3d _, 2021 WL 2514138 (M.D. Fla. June 18, 2021) the State of Florida attacked a Centers for Disease Control and Prevention ("CDC") "conditional order," which required a series of steps before cruise ships were allowed to sail. The Court found Florida had standing to protect its proprietary interests and its sovereign interests.

The State of Texas was found to have standing in a suit against the U.S. Dept. of Homeland Security's 100 day pause of the removal of illegal aliens in *Texas v. U.S.*, 524 F. Supp. 3d 598 (S.D. Tex., February 23, 2021). In *State v. Biden*, 10 F. 4th 538 (5th Cir. 2021), the State of Texas was also found to have standing based on "special solicitude." (Injunction request against the U.S. Dept. of Homeland Security to suspend its Migrant Protection Protocols.)

Texas was again found to have standing under "special solicitude" in *Texas v. U.S.*, 809 F. 3d 134 (5th Cir. 2015). Texas sued to prevent implementation of a DAPA Program by the Department of Homeland Security. The Fifth Circuit further noted that, pursuant to their sovereign interest, states may have standing based on federal assertions of authority to regulate matters they believe they control, federal preemption of state law, and interference with the enforcement of state law. *Id.* at 153.

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), the U.S. Supreme Court held Puerto Rico, like a state, had "*parens patriae*" standing to bring an action against east coast apple growers for allegedly violating federal law in preferring domestic laborers over foreign temporary workers. Puerto Rico was found to have a "quasi-sovereign" interest on behalf of its residents.

In *Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433 (5th Cir. 2019), the Fifth Circuit found standing for Texas after there was an increased regulatory burden, pressure to change state law, and deprivation of a procedural right to protect its concrete interests.

A. Injury in Fact

A plaintiff seeking to establish injury in fact must show that it suffered "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id*. at 1548. A "concrete" injury must be "de facto," that is, it must "actually exist." "Concrete" is not, however necessarily synonymous with "tangible." Intangible injuries can nevertheless be "concrete." *Id.,* at 1548-49.

This Court finds the Plaintiff States' alleged injuries are both particularized and concrete. Plaintiff States have a "*parens patriae*" standing and/or a quasi-sovereign interest in protecting its citizens from being required to submit to vaccinations. Additionally, the Plaintiff States have standing to regulate matters they believe they control, to attack preemption of state law by a federal agency, and to protect the enforcement of state law. The CMS Mandate specifically preempts state laws with regard to COVID-19 Vaccine requirements and/or exemptions.

The Plaintiff States also have standing and injury, based upon the alleged loss of jobs, loss of businesses, loss of tax revenue, and other damages allegedly resulting from employees being fired for refusing the vaccine and/or providers being terminated by CMS from the Medicare/Medicaid provider agreement.

B. Traceability

Plaintiff States must show a "fairly traceable" link between their alleged injuries and the CMS Mandate. As a general matter, the causation required for standing purposes can be established with "no more than de facto causality." *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2556, 204 L. Ed. 2d 978 (2019). The plaintiff need not demonstrate that the defendant's actions are "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169–70, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

Here, there is an obvious link between the CMS Mandate and the Plaintiff States' alleged injuries. All of the above alleged injuries are "fairly traceable" to CMS's Mandate.

C. Redressability

The redressability element of standing to sue requires a plaintiff to demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *El Paso Cty., Texas v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020).

The Plaintiff States have demonstrated a substantial likelihood that the requested relief would remedy the alleged injury in fact. If Plaintiff States are successful in having the CMS Mandate declared invalid, this would redress their alleged injuries.

4. Special Solicitude

Although this Court has found that Plaintiff States have proven standing through the normal inquiry, they also can establish standing as a result of special solicitude. Plaintiff States assert a congressionally bestowed procedural right, the Administrative Procedures Act ("the APA"), and the government action at issue affects the Plaintiff States' quasi-sovereign interests (damage to citizens, loss of jobs, businesses, loss of tax funding and/or protection of State laws). *Massachusetts,* 549 U.S. at 519–20.

Therefore, any infirmity in Plaintiff States' demonstration of traceability or redressability are remedied by the Plaintiff States' special solicitude.

IV. PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy never awarded of right. *Benisek v. Lamone,* 138 S. Ct. 1942, 1943, 201 L. Ed. 2d 398 (2018). In each case, the courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

The standard for a preliminary injunction requires a movant to show (1) the substantial likelihood of success on the merits, (2) that he is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Benisek*, 138 S. Ct. at 1944. The party seeking relief must satisfy a cumulative burden of proving each of the four elements enumerated before a temporary

restraining order or preliminary injunction can be granted. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). None of the four prerequisites has a quantitative value. *State of Tex. v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975).

A. Likelihood of Success on the Merits

Plaintiff States argue that (1) the Government Defendants issued the CMS Mandate without following statutorily required processes (5 U.S.C. 553), (2) the CMS Mandate is beyond the authority of the Government Defendants, (3) the CMS Mandate is contrary to law, (4) the CMS Mandate is arbitrary and capricious in violation of 5 U.S.C. 706(2)(A), and (5) the CMS Mandate violates the Spending Clause, Tenth Amendment and Anti-Commandeering Doctrine.

BST Holdings, LLC v. OSHA

It is not often a Court has such a recent Circuit Court case addressing an almost identical issue. We do here. In *BST Holdings, LLC v. Occupational Safety and Health Administration*, No. 21-60845 17 F.4th 604 (5th Cir. November 12, 2021), the Fifth Circuit addressed a request for a stay as to the OSHA vaccine mandate which was put into place by way of an EST on November 5, 2021. The OSHA vaccine mandate required employees of covered employers to undergo a COVID-19 vaccination or to take weekly COVID-19 tests and wear a mask.[13]

The Court initially stayed the OSHA Mandate because of perceived grave statutory and Constitutional issues pending briefing and an expedited judicial review.[14] The Court, after conducting the expedited judicial review, reaffirmed the initial stay. Many of the issues are similar to the issues here included in the CMS Mandate. The factors the Court evaluate for a stay are similar to factors that are evaluated for a preliminary injunction, including a strong

[13] 86 Fed. Reg. 61402 (Nov. 5, 2021).
[14] 2021 WL 5166656.

likelihood of success on the merits, irreparable injury to the applicant, and where the public interest lies .[15]

In finding the applicants were likely to succeed on the merits, the Court made the following findings:

1) the OSHA Mandate was both overinclusive ("one-size-fits-all sledgehammer") and underinclusive (did not apply to employers with 98 or fewer workers;[16]

2) the OSHA Mandate was not an "emergency" response under 29 U.S.C. 655, since OSHA spent nearly two months (September 9, 2021 to November 5, 2021) responding to it;

3) the OSHA Mandate grossly exceeded OSHA's statutory authority, No. 21-60845 at 7.

The Court stated the Applicants had made a compelling argument that, although 29 U.S.C. 655 gave broad authority to OSHA, to avoid "giving unintended breadth to Acts of Congress" the Court should use the principle of "*noscitur a sociis*" – meaning, a word is known by the company it keeps – to limit OSHA's authority.[17]

The Court also found the COVID-19 pandemic was not the type of grave danger 29 U.S.C. 655 contemplates, noting that the OSHA Mandate made no attempt to explain why OSHA and the President were against CMS Mandates previously. The Court noted it is generally "arbitrary and capricious" to depart from a prior policy without providing a detailed explanation.

The Court further noted the OSHA Mandate raised serious constitutional concerns that either make it more likely that the petitioners will succeed on the merits, or at least counsel

[15] No. 21-60845 of 5.
[16] "The underinclusive nature of the Mandate implies that the Mandate's true purpose is not to ensure workplace safety, but instead to ramp up vaccine uptake by any means necessary. No. 21-60845 at 15.
[17] Neighboring phrase of "toxicity" and "poisonousness" in the statute did not give OSHA authority to mandate vaccines.

against adopting OSHA's broad reading of Section 655(c) as a matter of statutory interpretation. The "serious Constitutional concerns" found by the Court in *BST Holdings* are some of the same ones at issue in the case at bar.

The "serious Constitutional concerns" noted by the Court in *BST Holdings* were:

(a) that the OSHA Mandate exceeded the federal government's authority under the Commerce Clause because it regulated noneconomic inactivity (person's choice to remain unvaccinated) that falls squarely within the State's police power;

(b) that separation of powers principles ("the major questions doctrine")[18] casts doubt over the OSHA Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation.

Additionally, the Court found "irreparable harm" to the petitioners' liberty interests[19] of having to choose between their jobs and the vaccine. The Court noted that the loss of constitutional freedoms for even minimal periods of time constitutes irreparable injury.[20]

The Court also found a stay of the OSHA Mandate to be in the public interest in maintaining the country's constitutional structure and maintaining the liberty of individuals and to make intensely personal decisions, even when those decisions frustrate government officials.

1. Statutorily Required Processes – 5 U.S.C. 553

The Court will now address Plaintiff States' five arguments. Title 5 U.S.C. 553 of the Administrative Procedures Act requires federal agency rules to undergo notice and comment unless they are exempt. The federal agency is required to give general notice of proposed rulemaking to be published in the Federal Register not more than thirty days before the proposed rules' effective date and to give interested persons an opportunity to participate in the rule

[18] The "major questions doctrine" holds that Congress must speak clearly if it wishes to assign to an agency, decisions of vast economic and political significance. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).
[19] In addition to the free religious exercise of certain employees.
[20] *Elrod v. Burns* 427 U.S. 347, 373 (1976).

making through submission of written data, views, or arguments. Failure to give required notice and comment requires the rule to be vacated.

This "notice and comment" procedure does not apply to interpretive rules, general statements of policy, rules of agency organization, procedure, or practice, or when the agency finds "good cause" for not requiring notice and comment. The Government Defendants did not go through the notice and comment process with regard to the CMS Mandate. The CMS Mandate became effective on November 5, 2021, which is the same day it was published in the Federal Register.

The vaccine mandate is not alleged to be an interpretive rule, a general statement or policy, or a rule of agency organization, procedure, or practice. The failure to perform the required notice and comment is entirely based upon the "good cause" exception.

Title 5 U.S.C. 553(b)(3)(B) states**:**

(B) this section does not apply -- when the agency for good cause finds (and incorporates the finding and a brief statement of reasons thereafter in the rules issued) that notice and public procedure therein are impracticable, unnecessary, or contrary to the public interest.

In failing to perform the notice and comment procedure, CMS found good cause. 86 Fed. Reg. 61583-86. The reasons given by CMS for failing to perform the notice and comment procedure were:

1. 2021 outbreaks associated with the SARS-Cov-2 Delta variant have shown that current levels of vaccination coverage have been inadequate, requiring no delay;

2. Encouraging vaccinations through public education campaigns and through State and employer-based efforts among healthcare staff to has been inadequate;

3. The COVID-19 pandemic continues to strain the U.S. healthcare systems, most of which patients are unvaccinated;

4. Although hospitalizations and deaths have begun to trend downward, there are emerging indications of potential increases during the upcoming colder months;

5. The upcoming 2021-2022 influenza season could be more severe than normal, and vaccinations would decrease stress on the U.S. health care system;

6. The upcoming 2021-2022 influenza season could result in infections of both influenza and COVID-19, which would result in more severe medical outcomes;

7. Since health care workers were among the first groups provided access to the vaccinations, many did not get vaccinations due to the initial emergency use authorization. Now that one of the vaccines (Pfizer-BioNTech) has been fully approved by the FDA, more healthcare workers will want to get the vaccine;

8. The estimates of healthcare workers deaths and/or positive tests for COVID-19 have likely been underestimated since healthcare workers status has only been reported in approximately 18% of cases;

9. Healthcare workers who are unvaccinated may pose a direct threat to patients;

10. The COVID-19 vaccines have been shown to be highly effective in preventing COVID-19 cases and severe outcomes;

11. The COVID-19 vaccines have been shown to be highly effective in preventing infections; and

12. It would be impracticable and contrary to the public interest to delay imposing the CMS Mandate due to a combination of all factors.

The "good cause" exception in 5 U.S.C. 553 is read narrowly in order to avoid providing agencies with an escape clause from the ADA notice and comment requirements. *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011). Circumstances justifying reliance on this exception are "indeed rare." *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C.C. 1981). The good cause exception was described in *Sorenson Communications, Inc. v. F.C.C.*, 755 F.3d 702 (D.C.C. 2014) as "meticulous and demanding," "narrowly construed," "reluctantly countenanced," and evoked only in "emergency situations."

Due to this stringent standard, the good cause exception to notice and comment is rarely upheld. See *U.S. v. Johnson* 632 F.3d 912, 928 (5th Cir. 2011) (need for immediate guidance under the Sex Offender Registration and Notification Act and in prior attempts to protect the public were not good cause); *Mack Trucks, Inc. v. E.P.A.* 682 F.3d 87, 94-95 (D.C. Cir. 2012)

(EPA interim final rule requiring penalties for sellers of non-compliant diesel engines not good cause when one manufacturer would be unable to sell the engines without the interim rule); *Sorenson Communications, Inc. v. F.C.C.,* 755 F.3d 702, 706-07 (D.C. N.Y. Cir. 2014) (FCC did not have good cause to issue interim and final rules for reimbursement for telecommunication services due to potential depletion of the fund used to pay for reimbursement); *State v. Becerra,* _ F.Supp. 3d _, 2021 WL 2514138 at 35-36 (M.D. Florida, June 18, 2021) (CDC did not have good cause for a rule issuing a conditional sailing order for cruise ships due to COVID-19); *Regeneron Pharmaceuticals, Inc. v. United States Dept. of Health and Human Resources*, 510 F.Supp. 3d, 29, 48 (S.D. NY. December 30, 2020) (CMS's rule regulating drug prices based on the Most Favored Nation Rule was not good cause where reasons were general risks of high drug prices and the COVID-19 pandemic); *Regeneron Pharmaceuticals, Inc. v. United States Dept. of Health and Human Resources*, 510 F.Supp. 3d, 29, 48 (S.D. NY. December 30, 2020) (not good cause where reasons by DHS for an interim final rule regarding prevailing wages with regard to the VISA program were based on the COVID-19 pandemic and economic consequences of it); *Chamber of Commerce of the United States v. United States Dept. of Homeland Security*, 504 F. Supp. 3d 1077, 1094 (N.D. Cal., December 1, 2020); *Association of Community Cancer Centers v. Azar*, 509 F. Supp. 3d 482, 496 (D. Maryland, December 23, 2020) (not good cause where CMS claimed reduced costs would help alleviate financial instability caused by the COVID-19 pandemic).

There are fewer cases where the good cause exception was upheld. In *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), calling it an "extremely close case," the Court upheld the Secretary of Labor postponing the implementation of Mine Safety and Health Adm. Regulations dealing with self-contained self-rescuers which provided

oxygen to miners after a cave-in. The deadline was extended for six months due to only a small number of the devices being available, the agency acted with diligence, it was deferred for a very short period of time, and circumstances were beyond the agency's control.

It should be noted that this issue was discussed in *BST Holdings* at 8, but OSHA had authority for a six-month "emergency temporary standard" ("ETS") pursuant to 29 U.S.C., 655(a)(1). Although the notice and comment requirements of 5 U.S.C. 553 did not apply, the Court did not believe COVID-19 posed the kind of grave danger required for an ETS. The Court stated:

> The Mandate's stated impetus – a purported "emergency" that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to-is unavailing as well.

No. 21-60845 at 7.

Government Defendants maintain they had "good cause" for the reasons set forth by CMS in the CMS Mandate. The Government Defendants argue that the Secretary is entitled to deference as to his predictive judgment that COVID-19 cases would increase during the winter months and put a burden on the healthcare system.

After reviewing the reasons listed by CMS for bypassing the notice and comment requirement, the Court finds Plaintiff States are likely to succeed on the merits on this claim. It took CMS almost two months, from September 9, 2021 to November 5, 2021, to prepare the interim final rule at issue. Evidently, the situation was not so urgent that notice and comment were not required. It took CMS longer to prepare the interim final rule without notice than it would have taken to comply with the notice and comment requirement. Notice and comment would have allowed others to comment upon the need for such drastic action before its implementation.

It does not appear to this Court that the Government Defendants will be able to meet the stringent requirements for the good cause exception in 5 U.S.C. 553 to apply.

2. Authority of The Government Defendants

Plaintiff States maintain that the CMS Mandate must also be enjoined because it exceeds the Government Defendants' authority. The U.S. DHH and the CMS are a part of the Executive Branch of the government.

Only Congress, as the Legislative branch, has the authority to make laws.[21] The Executive branch must take care that the laws be faithfully executed.[22] Because the Executive branch cannot make laws, it is given its powers through Acts of Congress.

The CMS claims authority to issue the CMS Mandate through Sections 1102 and 1871 of the Social Security Act. 86 Fed. Reg. at 61560. Sections 1102 and 1871 are set out in 42 U.S.C. 1302 and 42 U.S.C. 1395hh. Title 42 U.S.C. 1395hh gives the Secretary authority to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter." The remaining portions of 1395hh deal with procedure for the regulations.

> 42 U.S.C. 1302 states:
>
> (a) The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

Additionally, the Government Defendants reference "Table 1: Authorities for All Providers and Suppliers," 86 Fed. Reg. at 61567, which sets out statutory authority for each specific category of Provider/Supplier.

[21] Article I, Section 8, United States Constitution.
[22] Article II, Section 3, United States Constitution.

Sections 1102 and Section 1871 are general authorizations to prescribe rules and regulations that may be necessary to carry out the Medicaid and Medicare programs. The Statutes listed in Table 1 are also general authority to specify "standards" for the various types of providers and suppliers. None of these statutes give the Government Defendants the "superpowers" they claim. Not only do the statutes not specify such superpowers, but principles of separation of powers weigh heavily against such powerful authority being transferred to a government agency by general authority.

Major Questions Doctrine

The "major questions doctrine" requires that Congress must "speak clearly if it wishes to assign to an agency, decisions of vast economic and political significance." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). In *Utility Air*, the U.S. Supreme Court found that EPA exceeded its authority when the EPA adjusted levels set forth in the Clean Air Act regarding greenhouse-gas emissions.

Like the present case, EPA used general authority to expand its power. Justice Scalia wrote:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, 120 S. Ct. 1291, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign an agency decision of vast "economic and political significance." 573 U.S. at 324.

This is exactly what has occurred in this case. Government Defendants have used general authority statutes to mandate COVID-19 vaccines for over 10.3 million healthcare workers. Certainly, this is a decision of vast economic and political significance.

The Fifth Circuit Court of Appeals found the same with the similar OSHA Vaccine Mandate in *BST Holdings.* Judge Engelhardt wrote:

> There is no clear expression of Congressional intent in Section 655(c) to convey OSHA such broad authority, and this Court will not infer one. Nor can the Article II executive breathe new power into OSHA's authority – no matter how thin patience wears. No. 21-60845, at 18.

See also *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 159 (2000); *Alabama Association of Realtors v. Dept. of Health and Human Resources*, 141 S.Ct. 2485, 2489 (2021); *Tiger Lily, LLC v. United States Department of Housing and Urban Development*, 5 F.4th 666, (6th Cir. 2021); *Paul v. United States*, 140 S.Ct. 342 (2019); *State of Florida v. Becerra*, 2021 WL 2514138 at 20 (M.D. Fla. June 18, 2021); and *King v. Burwell*, 576 U.S. 473, 486 (2015).

The Government Defendants maintain this general authorization gives them authority to mandate vaccines to 10.3 million healthcare workers arguing CMS can do almost anything the Secretary feels is necessary to ensure the health and safety of patients. The "major questions doctrine" is not addressed.

Alabama Association of Realtors supra warrants discussion. In finding the nationwide eviction moratorium enacted by the CDC beyond the CDC's authority, the CDC had a statute that was more broadly worded than the ones the CMS uses in this case. The Supreme Court called the expansive authority of CDC "unprecedented," and stated "Section 361(a)[23] is a wafer-thin reed on which to rest such sweeping power." 141 S.Ct. at 2489.

There is no question that mandating a vaccine to 10.3 million healthcare workers is something that should be done by Congress, not a government agency. It is not clear that even

[23] The statute used for CDC's authority.

an Act of Congress mandating a vaccine would be constitutional. Certainly, CMS does not have this authority by a general authorization statue.

Plaintiff States are likely to succeed on their claim that the Government Defendants exceeded their authority in enacting the CMS Mandate.

3. Contrary to Law

The Plaintiff States additionally claim that the CMS Mandate is contrary to law, arguing that it violates additional provisions in the Social Security Act. The first provision Plaintiff States claim the mandate violates is 42 U.S.C. 1395z, which requires the Secretary to consult with appropriate state agencies relating to conditions of participation by providers of services. The Government Defendants concede that the CMS Mandate was issued without complying with this directive, but state they will meet with the State agencies FOLLOWING the issuance of this rule.[24]

The second provision Plaintiff States claim the mandate violates is 42 U.S.C. 1395, which provides that nothing in the Social Security Act shall be construed to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the situation, tenure or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person. Plaintiff States argue these provisions prohibit the dictation of the hiring and firing policies of these institutions for unvaccinated workers. The statute also prohibits supervision and control over both the "selection" and "tenure" of unvaccinated employees.

[24] 86 Fed. Reg. at 61567.

The third provision Plaintiff States claim the mandate violates is 42 U.S.C. 1302(b)(1), which requires that whenever the Secretary publishes a general notice of proposed rulemaking for any rule or regulation proposed that "may" have a significant impact on the operations of a substantial number of small rural hospitals, an initial regulatory impact analysis is to be conducted. Plaintiff States argue the CMS Mandate "may" have a significant impact on a substantial number of small rural hospitals due to loss of workers and/or income due to the CMS Mandate. No regulatory impact analysis for rural hospitals was conducted in this case.

Because the Government Defendants did not comply with any of the above provisions, the Plaintiff States are likely to succeed on the merits that the CMS Mandate is contrary to law.

4. Arbitrary and Capricious

Federal administrative agencies are required to engage in reasoned decision-making. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998). The Plaintiff States allege the CMS Mandate is arbitrary and capricious under Title 5 U.S.C. 706(2)(A).

If an administrative agency does not engage in reasoned decision making, a court, under the APA, shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A).

The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. *Sec. & Exch. Comm'n v. Chenery Corp.,* 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

Plaintiff States argue Government Defendants' CMS Mandate ignores the Social Security Act's focus on patient wellbeing and instead focuses on the health of healthcare providers. The Plaintiff States further maintain the goal of the CMS Mandate is to increase individual vaccine rates, which will actually have the effect of harming patient well-being due to staff shortages of providers and suppliers.

This is backed up by a number of declarations of various individuals that verify healthcare worker shortages, a significant number of healthcare workers that remain unvaccinated, and the harm that will be caused to these facilities in the event that even a few of the unvaccinated healthcare workers quit or are fired as a result of the CMS Mandate.[25] Some of the declarations also verify the huge percentage of money paid to these facilities through the Medicare and Medicaid Programs, showing these facilities would have to shut down or severely cut back on healthcare services if funding is cut off by the Government Defendants to these facilities.[26] The Plaintiff States also provided a declaration which shows the increased enforcement costs that would result if required to survey and enforce the CMS Mandate.[27]

In other words, the Plaintiff States maintain that although the purpose of the Social Security Act is to help healthcare patients, the CMS Mandate would have the opposite effect due to the loss of healthcare workers and funding to healthcare facilities. This is not the "reasoned decision-making" required by the APA. Requiring COVID-19 vaccinations to healthcare workers covered by the mandate would hurt the patients the Social Security Act was meant to help.

[25] Doc. No. 2-2, 2-3, 2-6, 2-7, 2-8, 2-9, 2-10, 2-11, 2-12 and 2-16.
[26] Doc. No. 2-4, 2-5, 2-15.
[27] Doc. No. 2-14.

Additionally, the Plaintiff States argue the Government Defendants failed to consider or arbitrarily rejected obvious alternatives to the CMS Mandate. These alternatives include daily or weekly COVID-19 testing, wearing masks or shields, natural immunity and/or social distancing. The Plaintiff States maintain the apparent rejection of these alternatives to COVID-19 vaccines is unsupported by evidence. The Declaration of Tracy Gruber[28] declares that since July 2021, employees at the Utah State Hospital and Utah State Development Center have been required to be vaccinated or take a weekly COVID-19 test. That alternative has caused no apparent harm to patients or staff.

The rejection of natural immunity as an alternative is puzzling. Natural immunity is the immunity of people who have been infected with the COVID-19 virus. In rejecting this alternative, the CMS Mandate stated:

> While a significant number of healthcare staff have been infected with SARS-Co-V2, evidence indicates their infection-induced immunity, also called "natural immunity" is not equivalent to receiving the COVID-19 vaccine.

86 Fed. Reg. at 61559.

The "evidence" CMS relied upon in rejecting that alternative is not provided. The Declaration of Dr. Jay Bhattachary,[29] Director of Stanford University's Center for Demography and Economics of Health and Aging disputes CMS's assertion that natural immunity is not equivalent to receiving a COVID-19 vaccine. Citing studies from *Qatar* (which tracked 927,321 individuals for six months after COVID-19 vaccinations), California (which tracked the infection rates from over 5 million patients vaccinated with two Pfizer doses), and U.S. Veterans (which tracked 620,000 vaccinated U.S. Veterans), Plaintiff States assert these studies overwhelmingly

[28] Doc. No. 2-8.
[29] Doc. No. 2-13.

conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by COVID-19 vaccines.

The CMS Mandate does not yet require boosters to the COVID-19 vaccines. However, the CDC recently recommended boosters.[30] If boosters are needed six months after being "fully vaccinated," then how good are the COVID-19 vaccines, and why is it necessary to mandate them?

Additionally, the Plaintiff States provided evidence in the Declaration of Dr. Peter A. McCullough[31] that the COVID-19 vaccines do not prevent transmission of the disease among the vaccinated or mixed vaccinated/unvaccinated populations, and that mandatory COVID-19 vaccines for hospitals do not increase safety for employees or hospital patients. McCullough declared that additional treatment with other drugs and supplements has resulted in an 85% reduction in hospitalizations and death of high-risk individuals presenting with COVID-19.

Of note, Dr. McCullough declared the Delta variant of SARS-Cov-2 accounts for 98.9% of the present cases in the United States, United Kingdom, and Israel. Dr. McCullough further declared that because of the progressive mutation of the spike protein, the virus has achieved an immune escape from COVID-19 vaccines. He stated the Delta variant is not adequately covered by the vaccines. In other words, even if you are fully vaccinated, you still may become infected with the COVID-19 virus[32].

The Plaintiff States further argue that CMS failed to adequately explain its departure from its prior position of not requiring mandatory vaccines. An agency must provide a more detailed justification when a new policy rests upon factual findings that contradict those which

[30] cdc.gov (November 19, 2021).
[31] Doc. No. 2-17.
[32] CDC also noted the WHO (World Health Organization) has classified a new variant named Omicron, cdc.gov (November 29, 2021).

underlay its prior policy. *State v. Biden,* 10 F.4th 538, 554 (5th Cir. 2021); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Although CMS spent pages and pages attempting to explain the need for mandatory COVID-19 vaccines, when infection and hospitalizations rates are dropping, millions of people have already been infected, developing some form of natural immunity, and when people who have been fully vaccinated still become infected, mandatory vaccines as the only method of prevention make no sense.

The Plaintiff States also argue that CMS's rationale is flagrantly pretextual. The Government Defendants say it is not pretextual, but it is obvious that the mandate was enacted as a result of President Biden's September 9, 2021, declaration of his intention to impose a national CMS Mandate.[33] Both the CMS and OSHA vaccine mandates were published on the same day, November 5, 2021. However, the 46-page CMS Mandate does not even mention President Biden's declaration of a national vaccine mandate. The presence of pretext is enough to render a rule arbitrary and capricious.[34]

The Plaintiff States also argue the CMS Mandate ignores the Plaintiff States' overwhelming reliance interests in their Medicare and Medicaid programs. The CMS Mandate is arbitrary and capricious if CMS ignores those reliance interests. *DHS v. Regents of the University of California*, 140 S.Ct. 1891, 1913-14 (2020). The Plaintiff States have substantial reliance interests in those programs.[35] The threatened cutoff of federal funding would be devastating to the Plaintiff States' healthcare facilities. CMS's plan to meet with the appropriate state agency after the rule is issued (86 Fed. Reg. at 61567) would be too late. By that time,

[33] See FN 11.
[34] *Department of Commerce v. New York*, 139 S.Ct. at 2575-76.
[35] No. 2-4.

unwilling healthcare employees would have had to decide whether to take the vaccine or quit their jobs.

Lastly, the Plaintiff States allege the "scope" of the CMS Mandate is arbitrary and capricious. The Plaintiff States argue that the CMS Mandate applies to all ages, even to psychiatric residential treatment facilities for individuals under twenty-one years of age,[36] which is not related to CMS's asserted interest in protecting elderly and infirm patients from COVID-19 transmissions.[37] As noted by the Court in *BST Holdings* in regard to the OSHA Mandate:

> The Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly "grave danger" the Mandate purports to address.

No. 21-60845 at 8.

The Plaintiff States have made a substantial showing that they are likely to succeed on the merits of their arbitrary and capricious claim.

5. Other Constitutional Issues

Other arguments made by the Plaintiff States are based upon a violation of the States' police power, violation of the Spending Clause, violation of the Tenth Amendment and violation of the Anti-Commandeering Doctrine.

(a) Police Power/Tenth Amendment

In the federal system, the federal government has limited powers. The States and the people retain the remainder.[38] The States have broad authority to enact legislation for the public good ("police power"), but the federal government has no such authority, and can only exercise the powers granted to it, including the power to make all laws which may be necessary and

[36] 86 Fed. Reg. at 61576.
[37] 86 Fed. Reg. at 61610.
[38] 10th Amendment to the United States Constitution.

proper for carrying into execution the enumerated powers. If the federal government would radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it. The Supreme Court will not be quick to assume Congress has meant to effect a significant change into the sensitive state and federal relations. Congress does not normally intrude upon the police power of States. *Bond v. United States*, 572 U.S. 844, 857-58 (2014).

Absent a clear statement of intention from Congress, there is a presumption against statutory construction that would significantly affect the federal-state balance. *Boelens v. Redman Homes, Inc.* 748 F.2d 1058, 1067 (5th Cir. 1984).

The CMS Mandate specifically preempts state and local law. 86 Fed. Reg. at 61572. As noted by the Fifth Circuit in *BST Holdings:*

> First, the Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forego regular testing is noneconomic inactivity. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J. concurring); see also *Id.* at 652-53 (Scalia, J., dissenting). And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power. *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination"); *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905) (Similar). No. 21-60845 at 16-17.

The Plaintiff States make a strong case that the CMS Mandate violates the States' police power.

(b) Anti-Commandeering Doctrine

The Anti-Commandeering Doctrine is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States. Congress cannot command a state government to

enact state legislation. The Tenth Amendment confirms that all other power is reserved to the States. *Murphy v. National Collegiate Athletics Ass'n.*, 138 S.Ct. 1461, 1476 (2018).

In *Printz v. U.S.*, 521 U.S. 898, 928 (1997), the Court held invalid a federal law that commanded state and local enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks.

Although many of the health care facilities required to track and regulate the CMS Mandate are private, many are likely run by some or all of the Plaintiff States, which could result in violation of the Anti-Commandeering Doctrine. As this Court is unable to tell (at this point) whether and/or how many of the providers and suppliers are run by states, there is no evidence to prove the violation.

(c) Non-Delegation Doctrine

Under the Non-Delegation Doctrine, Congress lacks the authority to delegate "unfiltered power" over the American economy to an executive agency. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675 (2001).[39]

This is a similar doctrine to the Major Questions Doctrine, but if the Government Defendants have the power and authority they claim (to mandate vaccines for 10.3 million workers), these government agencies would have almost "unfiltered power" over any healthcare provider, supplier, and employees that are covered by the CMS Mandate. If CMS has the authority by a general authorization statute to mandate vaccines, they have authority to do almost anything they believe necessary, holding the hammer of termination of the Medicare/Medicaid Provider Agreement over healthcare facilities and suppliers.

The Plaintiff States are likely to succeed on the merits of this claim.

[39] There is a serious constitutional question of whether Congress could even transfer "unfettered power" to a government agency. *Paul v. United States* 140 S.Ct. 342 (2019) (Kavanaugh, J. Statement).

(d) Spending Clause

The Spending Clause protects the status of States as independent sovereigns in our federal system. Under the Spending Clause,[40] Congress may use its spending power to create incentives for states to act in accordance with federal policies, but when the pressure turns into compulsion, the legislation runs contrary to our system of federalism. The Constitution simply does not give Congress the authority to require the States to regulate. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012).

In *NFIB*, a provision in the Affordable Care Act which required States that participated in Medicaid to expand their Medicaid programs with the threatened loss of all Medicaid funds to states that refused to expand was held to be unconstitutionally coercive. Since it is unclear at this time whether there is state involvement with the providers, suppliers or employers, the Plaintiff States are at this time not likely to succeed on the merits of this issue.

B. Irreparable Injury

The second requirement for a preliminary injunction is irreparable injury. The Plaintiff States must demonstrate "a substantial threat of irreparable injury" if the injunction is not issued. *Texas v. U.S.,* 809 F.3d 134, 150 (5th Cir. 2015). For injury to be "irreparable," plaintiffs need only show it cannot be undone through monetary remedies. *Burgess v. Fed. Deposit Inc., Corp.*, 871 F.3d 297, 304 (5th Cir. 2017).

Being deprived of a procedural right to protect its concrete interests (by violation of the ADA's notice and comment requirements) is irreparable injury. *Texas v. EEOC,* 933 F.3d 433, 447 (5th Cir. 2019).

[40] Article I, Section 8, United States Constitution

The Plaintiff States will suffer irreparable injury by not being able to enforce their laws which have been preempted by the CMS Mandate, by incurring the increased cost of training and of enforcing the CMS Mandate, and by having their police power encroached. The Plaintiff States' citizens will suffer irreparable injury by having a substantial burden placed on their liberty interests because they will have to choose between losing their jobs or taking the vaccine. Additionally, the health care facilities and suppliers will be burdened with the task of tracking and enforcing the mandate or else face the loss of Medicare and Medicaid funding

The Plaintiff States have shown irreparable injury.

C. The Balance of Equities and The Public's Interest

The Plaintiff States have satisfied the first two elements to obtain a preliminary injunction. The final two elements they must satisfy are that the threatened harm outweighs any harm that may result to the Government Defendants and that the injunction will not undermine the public interest. *Valley v. Rapides Par. Sch. Bd.,* 118 F.3d 1047, 1051 (5th Cir. 1997). These two factors overlap considerably. *Texas,* 809 F.3d at 187. In weighing equities, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24. The public interest factor requires the court to consider what public interests may be served by granting or denying a preliminary injunction. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997–98 (8th Cir. 2011).

This Court believes the balance of equities and the public interest favors the issuance of a preliminary injunction. The public interest is served by maintaining the constitutional structure and maintaining the liberty of individuals who do not want to take the COVID-19 vaccine. This interest outweighs Government Defendants' interests. It is very important that the public's

interest be taken into account by the Court before allowing the Government Defendants to mandate the vaccines.

V. CONCLUSION

If the separation of powers meant anything to the Constitutional framers, it meant that the three necessary ingredients to deprive a person of liberty or property – the power to make rules, to enforce them, and to judge their violations – could never fall into the same hands. *Tiger Lily, LLC v. United States Housing and Urban Development*, 5 F.4th 666 (6th Cir. 2021). (Thapar, J. Concurrence). If the Executive branch is allowed to usurp the power of the Legislative branch to make laws, two of the three powers conferred by the Constitution would be in the same hands.

If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency. *Does 1-3 v. Mills*, _ S.Ct. _, 2021 WL 5027177 at 3 (October 29, 2021) (Gorsuch, J. dissenting).

During a pandemic such as this one, it is even more important to safeguard the separation of powers set forth in our Constitution to avoid erosion of our liberties. Because the Plaintiff States have satisfied all four elements required for a preliminary injunction to issue, this Court has determined that a preliminary injunction should issue against the Government Defendants.

This matter will ultimately be decided by a higher court than this one. However, it is important to preserve the status quo in this case. The liberty interests of the unvaccinated requires nothing less.

In addressing the geographic scope of the preliminary injunction, due to the nationwide scope of the CMS Mandate, a nationwide injunction is necessary due to the need for uniformity. *Texas,* 809 F.3d at 187-88. Although this Court considered limiting the injunction to the fourteen Plaintiff States, there are unvaccinated healthcare workers in other states who also need

protection. Therefore, the scope of this injunction will be nationwide, except for the states of Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, Wyoming, North Dakota, South Dakota, since these ten states are already under a preliminary injunction order dated November 29, 2021, out of the Eastern District of Missouri.

This Court will additionally address security under Fed. R. Civ. P. 65. The requirement of security is discretionary. *Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624, 628 (5th Cir. 1996). Plaintiff States are fourteen sovereign states. This Court will not require Plaintiff States to post security for this Preliminary Injunction.

For the reasons set forth in this Court's ruling, Plaintiff States' Motion for Preliminary Injunction [Doc. No. 2] is **GRANTED**. Therefore, the U.S. Department of Health and Human Services and the Center for Medicare and Medicaid Services, along with their directors, employees, Administrators and Secretaries are hereby **ENJOINED** and **RESTRAINED from implementing the CMS Mandate** set forth in 86 Fed. Reg. 61555-01 (November 5, 2021) as to all healthcare providers, suppliers, owners, employees, and all others covered by said CMS Mandate.

This preliminary injunction shall remain in effect pending the final resolution of this case, or until further orders from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court.

No security bond shall be required under Federal Rule of Civil Procedure 65.

MONROE, LOUISIANA, this 30th day of November 2021.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:21-cv-01329-MTS
	)	
JOSEPH R. BIDEN, JR., *in his official capacity as the President of the United States of America, et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

This case concerns the Centers for Medicare and Medicaid Services' ("CMS") federal vaccine mandate on a wide range of healthcare facilities. On November 5, 2021, CMS issued an Interim Final Rule with Comment Period ("IFC") entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination" (the "mandate"), 86 Fed. Reg. 61,555 (Nov. 5, 2021), revising the "requirements that most Medicare- and Medicaid-certified providers and suppliers must meet to participate in the Medicare and Medicaid programs." 86 Fed. Reg. 61,555–601. Specifically, the mandate requires nearly every employee, volunteer, and third-party contractor working[1] at fifteen[2] categories of healthcare facilities to be vaccinated against SARS-

[1] The mandate applies to a wide-range of people working at the facilities, including, employees, trainees, students, volunteers, or *contractors*, who provide any care, treatment, or *other* services for the facility. 86 Fed. Reg. at 61,570 (emphasis added).

[2] The CMS vaccine mandate covers fifteen categories of Medicare- and Medicaid-certified providers and suppliers: (1) Ambulatory Surgical Centers (ASCs); (2) Hospices; (3) Psychiatric residential treatment facilities (PRTFs); (4) Programs of All-Inclusive Care for the Elderly (PACE); (5) Hospitals (acute care hospitals, psychiatric hospitals, long term care hospitals, children's hospitals, hospital swing beds, transplant centers, cancer hospitals, and rehabilitation hospitals); (6) Long Term Care (LTC) Facilities, generally referred to as nursing homes; (7) Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID); (8) Home Health Agencies (HHAs); (9) Comprehensive Outpatient Rehabilitation Facilities (CORFs); (10) Critical Access Hospitals (CAHs); (11) Clinics,

CoV-2 ("COVID") and to have received at least a first dose of the vaccine prior to December 6, 2021. *See id.* at 61,573. On November 10, 2021, Plaintiffs, the States of Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire (collectively, "Plaintiffs") filed a Complaint challenging the mandate. Doc. [1]. The Complaint seeks preliminary and permanent injunctive and declaratory relief. On November 12, 2021, Plaintiffs filed a motion for a preliminary injunction, Doc. [6], requesting that this Court issue a preliminary injunction enjoining Defendants from imposing the mandate.

Having fully reviewed the administrative record and submitted material, the Court finds that a preliminary injunction is warranted here.

II. DISCUSSION

A. **The Court has jurisdiction.**

Defendants argue that this Court "lacks jurisdiction" over Plaintiffs' claims because "Congress has withdrawn federal-question jurisdiction over claims like this one that arise under the Medicare statute," citing 42 U.S.C. § 405(h), as incorporated by 42 U.S.C. § 1395ii. Doc. [23] at 15–19. The Court does not agree. As Defendants readily concede, "State governments" such as the Plaintiff States are neither "institution[s]" nor "agenc[ies]" "dissatisfied" with the Secretary's determination regarding eligibility or receipt of benefits under 42 U.S.C. § 1395cc(h)(1) and, therefore, "the States[3] themselves could not use that statute's vehicle for judicial review." *Id.* at 19; *see Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that § 405(h) does not apply if application "would mean no review at all"). In

rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services; (12) Community Mental Health Centers (CMHCs); (13) Home Infusion Therapy (HIT) suppliers; (14) Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs); and (15) End-Stage Renal Disease (ESRD) Facilities. 86 Fed. Reg. at 61,569–70.

[3] The Plaintiff States bring their claims in a number of capacities: sovereign, quasi-sovereign/*parens patriae*, and proprietary. *See, e.g.*, Doc. [1] ¶¶ 5, 7, 9.

addition, Plaintiffs' claims that arise under the Medicaid Act—as opposed to the Medicare Act—are not subject to the § 405(h)'s jurisdictional bar. *See Avon Nursing & Rehab. v. Becerra*, 995 F.3d 305, 311 (2d Cir. 2021) ("Unlike the Medicare Act, the Medicaid Act does not incorporate the Social Security Act's claim-channeling and jurisdiction-stripping provisions, 42 U.S.C. § 405(g) and (h). Federal courts thus have jurisdiction over claims arising under the Medicaid Act pursuant to 28 U.S.C. § 1331."). Thus, all aspects of the mandate that purport to change a Medicaid regulation are clearly not barred, even under Defendants' arguments. Nonetheless, the Court finds that it has jurisdiction over claims arising under both Medicare and Medicaid.

B. **A preliminary injunction is warranted here.**

Plaintiffs seek a preliminary injunction of the mandate's enforcement pending a full judicial review of the mandate's legality. The Court addresses their request today. Whether a court should issue a preliminary injunction involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "While no single factor is determinative, the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (internal quotations and citations omitted).

Each of these factors favors a preliminary injunction here.

a. Plaintiffs demonstrate a likelihood of success on the merits.

i. **Congress did not grant CMS authority to mandate the vaccine.**

Plaintiffs are likely to succeed in their argument that Congress has not provided CMS the authority to enact the regulation at issue here. "[A]n agency literally has no power to act, let alone

pre-empt[4] the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). While the Court agrees Congress has authorized the Secretary of Health and Human Services (the "Secretary") *general* authority to enact regulations for the "administration" of Medicare and Medicaid and the "health and safety" of recipients, the nature and breadth of the CMS mandate requires clear authorization from Congress—and Congressed has provided none.[5] *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) ("It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened."). Courts have long required Congress to speak clearly when providing agency authorization if it (1) intends for an agency to exercise powers of vast economic and political significance; (2) if the authority would significantly alter the balance between federal and state power; or (3) if an administrative interpretation of a statute invokes the outer limits of Congress' power. Any one of those fundamental principles would require clear congressional authorization for this mandate, but here, all three are present. Even in exigency, the Secretary cannot "bring about an enormous and

[4] CMS intends for the mandate to preempt any arguably inconsistent state and local laws regarding vaccination. *See, e.g.*, 86 Fed. Reg. at 61,568 ("We intend . . . that this nationwide regulation preempts inconsistent State and local laws applied to Medicare- and Medicaid-certified providers and suppliers.").

[5] The Court notes that Congress has provided the Secretary of Health and Human Services (the "Secretary") authority to enact regulations "necessary to the efficient administration" of the Social Security Act and regulations "necessary to carry out the administration of" of Medicare. 42 U.S.C. §§ 1302(a), 1395hh(a)(1). Among the regulations the Secretary may promulgate under its power of "administration" is the setting of things like "standards," "criteria," or "requirements" for specific facilities. *See, e.g.*, *Id.* at § 1396d(h)(1)(B)(i) (governing Psychiatric Residential Treatment Facilities ("PRTFs") and mentioning "standards as may be prescribed in regulations by the Secretary"); *Id.* at § 1395i–4(e) (governing Critical Access Hospitals ("CAHs") and mentioning "criteria as the Secretary may require"); *Id.* at § 1395rr(b)(1)(A) (governing End-Stage Renal Disease ("ESRD") facilities and mentioning "requirements as the Secretary shall by regulation prescribe"). For some facilities, Congress has authorized the Secretary to set rules or conditions necessary to, or that will ensure, the "health and safety" of recipients of services. *See, e.g.*, *Id.* at § 1395i–3(d)(4)(B) (addressing LTC facilities and mentioning "requirements relating to the health, safety, and well-being of residents . . . as the Secretary may find necessary"); *Id.* at § 1395x(e)(9) (addressing hospitals and mentioning "requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services"). However, the Court need not decide whether those regulations are properly interpreted by CMS to confer it authority to issue the vaccine mandate that it has. Instead, and irrespective of that determination, the Court's inquiry focuses on whether Congress specifically authorized such action, for reasons discussed above.

transformative expansion in [his] regulatory authority without clear congressional authorization." *See Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

1. ***Given the vast economic and political significance of this vaccine mandate, only a clear authorization from Congress would empower CMS to act.***

First, Congress must "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Reg.*, 573 U.S. at 324). The mandate's economic cost is overwhelming. CMS estimates that compliance with the Mandate—just in the first year—is around 1.38 billion dollars. 86 Fed. Reg. at 61,613. Those costs, though, do not take into account the economic significance this mandate has from the effects on facilities closing or limiting services and a significant exodus of employees that choose not to receive a vaccination.[6] Likewise, the political significance of a mandatory coronavirus vaccine is hard to understate, especially when forced by the heavy hand of the federal government. Indeed, it would be difficult to identify many other issues that currently have more political significance at this time. Had Congress wished to assign this question fraught with deep economic and political significance to CMS, "it surely would have done so expressly." *See King v. Burwell*, 576 U.S. 473, 486 (2015). "It is especially unlikely that Congress would have delegated this decision to [CMS], which has no expertise in crafting" vaccine mandates. *Id.*

2. ***Because this mandate significantly alters the balance between federal and state power, only a clear authorization from Congress would empower CMS.***

Second, Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting

[6] Medicare and Medicaid programs "touch[] the lives of nearly all Americans" and are two of the "largest federal program[s]" in the country. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). Even "minor changes" to the way those programs are administered "can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate." *Id.* at 1816.

United States Forest Service v. Cowpasture River Preservation Assn., 140 S. Ct. 1837, 1850 (2020)); *see also United States v. Bass*, 404 U.S. 336, 349 (1971). The regulation at issue alters that balance because it requires vaccination, which CMS has never attempted to do, for millions of individuals who would otherwise be outside the reach of the federal government. This concern is "heightened" since CMS's "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). It has long been the states' power to legislate health—including vaccination. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting "health laws of every description" belong to the states); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, ---, 2021 WL 5279381, at *7 (5th Cir. 2021) (citing *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination")). Sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for an agency's action. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012). With such a history of exclusive state power, the Court is far from certain that Congress intended the *Center for Medicare and Medicaid Services* to require mandatory vaccinations for millions of Americans. *See Bond v. United States*, 572 U.S. 844, 858 (2014) (noting "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers" (internal quotations omitted)).

Truly, the impact of this mandate reaches far beyond COVID.[7] CMS seeks to overtake an area of traditional state authority by imposing an unprecedented demand to federally dictate the

[7] Of course, this situation is novel and messy in that COVID has created a "unique pandemic scenario," 86 Fed. Reg. at 61,568, but equally problematic is that it remains unclear that COVID-19—however tragic and devastating the pandemic has been—poses the kind of grave danger that justifies the federal government trampling on sovereign state

private medical decisions of millions of Americans. Such action challenges traditional notions of federalism, as discussed above. "The independent power of the States [] serves as a check on the power of the Federal Government: by denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *NFIB*, 567 U.S. at 536 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). This is especially true, since "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

3. ***In the absence of a clear indication that Congress intended for CMS to invoke such significant authority, the Court will not infer congressional intent.***

Third, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," Congress must provide "a clear indication that [it] intended that result." *Solid Waste*, 531 U.S. at 172. This "requirement" stems from the "prudential desire not to needlessly reach constitutional issues."[8] *Id.* And this requirement is "heightened" here since CMS's claim "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* Whether Congress itself could impose the vaccination requirement is a tough question, cf. *BST Holdings*, 17 F.4th at ---, 2021 WL 5279381, at *7 (Duncan, J., concurring), one that CMS would force to its crisis. But even if Congress has the power to mandate the vaccine

rights. Regardless, disrupting this balance of power must have been expressly authorized by Congress, and as discussed, Congress has not.

[8] A court—especially a district court—should be reluctant to opine on an unsettled constitutional issue when the court can resolve a case on an alternative ground. *See Xiong v. Lynch*, 836 F.3d 948, 950 (8th Cir. 2016) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 (1988)) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). And, at the very least, the Court should "pause to consider the implications of the [State's] arguments" when confronted with such new conceptions of federal power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550 (2012) (quoting *Lopez*,115 S. Ct. at 1624).

and the authority to delegate such a mandate to CMS—topics on which the Court does not opine today—the lack of congressional intent for this monumental policy decision speaks volumes.

In conclusion, even if Congress's statutory language was susceptible to CMS's exceedingly broad reading—which it is most likely not—Congress did not clearly authorize CMS to enact the this politically and economically vast, federalism-altering, and boundary-pushing mandate, which Supreme Court precedent requires.

ii. **CMS improperly bypassed notice and comment requirements.**

Even if CMS has the authority to implement the vaccine mandate—which the Court finds is unlikely, as discussed above—the mandate is likely an unlawful promulgation of regulations. Both the Administrative Procedure Act ("APA") and the Social Security Act ordinarily require notice and a comment period before a rule like this one takes effect.[9] 5 U.S.C. § 553; 42 U.S.C. § 1395hh(b)(1). Failure to allow notice and comment, where required, is grounds for invalidating the rule. *Iowa League of Cities v. EPA*, 711 F.3d 844, 876 (8th Cir. 2013) (vacating a rule based on an administrative agency's failure to abide by the APA's notice and comment procedure). The notice and comment requirements do not apply if "good cause" establishes that they "are impracticable, unnecessary, or contrary to the public interest" under the circumstances. 5 U.S.C. § 553(b)(B). The exception is read narrowly and only used in "rare" circumstances. *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (noting that the good cause exception should be "narrowly construed and only reluctantly countenanced"); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) (noting "circumstances justifying reliance on [the good cause] exception are indeed rare and will be accepted only after the court has examined closely proffered rationales justifying the elimination of public procedures" (internal quotations omitted)).

[9] The parties do not dispute that the notice and comment requirements applied to the mandate. 86 Fed. Reg. at 61,583.

CMS concedes it did not follow these requirements but attempts to justify its omission under the "good cause" exception. 86 Fed. Reg. at 61,583. Here, Plaintiffs are likely to succeed in their argument that CMS unlawfully bypassed the APA's notice and comment requirements.

1. ***CMS's own delay undermines its "emergency" justification for bypassing notice and comment requirements.***

Use of the "good cause" exception is "limited to emergency situations" and is "necessarily fact-or context-dependent." *Thrift Depositors of Am., Inc. v. Off. of Thrift Supervision*, 862 F. Supp. 586, 591 (D.D.C. 1994). Here, CMS's delay in requiring mandatory vaccination undermines its contention that COVID is an emergency such that it has the "good cause" necessary to dispense with notice and comment requirements. In justifying the good cause exception, CMS stated that "[t]he data showing the vital importance of vaccination" indicates that it "cannot delay taking this action" to protect peoples' health and safety. 86 Fed. Reg. at 61,583. Yet, CMS's good cause claim is undermined by its *own* delay in promulgating the mandate. *See United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) ("[C]oncern for public safety further is undermined by [the Attorney General's] own seven-month delay in promulgating the Interim Rule."); *Chamber of Com. v. United States Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077, 1089 (N.D. Cal. 2020) (finding an agency's six-month delay in promulgating rules relating to COVID precluded presumption of urgency); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2nd Cir. 2018) ("Good cause cannot arise as a result of the agency's own delay, because otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." (internal quotations and

alterations omitted)). The CMS mandate was announced nearly two months[10] before the agency released it, and the mandate itself prominently features yet another one-month delay. Moreover, two vaccines were authorized under Emergency Use Authorization ("EUA")[11] more than ten months before the CMS mandate took effect, and one vaccine was fully licensed by the FDA well over two months before.[12] It is also worth mentioning that since the onset of COVID, CMS has issued five IFC mandates, such as the one here; the most recent on May 13, 2021. 86 Fed. Reg. at 61,561. One could query how an "emergency" could prompt such a slow response; such delay hardly suggests a situation so dire that CMS may dispense with notice and comment requirements[13] and the important purposes they serve.

The COVID pandemic is an event beyond CMS's control, yet it was completely within its control to act earlier than it did. *See* 86 Fed. Reg. at 61,583 ("CMS initially chose, among other actions, to encourage rather than mandate vaccination[.]"); *see id.* (explaining CMS had authority to impose vaccination requirements even when the only vaccines available were those authorized under EUAs in December 2020). The mere desire or need to have the mandate does not suffice for good cause. *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621 (D.C. Cir. 1980) ("[G]ood cause to suspend notice and comment must be supported by more than the bare need to have regulations."); *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009) ("A desire to provide

[10] On September 9, 2021, the President announced his intention to promulgate federal vaccinate mandates, including the CMS vaccine mandate challenged here.

[11] The FDA issued vaccines under Emergency Use Authorization ("EUA") for two COVID vaccines on December 11, 2020 and December 18, 2020. According to CMS, the agency *could have* imposed a vaccine requirement, even when the only vaccines available are those authorized under EUAs. *See* 86 Fed. Reg. at 61,583.

[12] On August 23, 2021, the FDA licensed the first COVID vaccine.

[13] The Court also takes note that CMS reviewed several communications from stakeholders in *favor* of the mandate. Thus, CMS apparently found it quite possible to consult with the interested parties it selected. *See, e.g.*, 86 Fed. Reg. at 61,565.

immediate guidance, without more, does not suffice for good cause."). And good cause is not automatically created based on an agency's conclusion that bypassing the notice and comment requirements is necessary to protect public safety.[14] *See Brewer*, 766 F.3d at 889 (finding agency's stated reason of "protecting the public safety" was insufficient to waive notice and comment requirement); *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("To accord deference to an agency's invocation of good cause would be to run afoul of congressional intent."). COVID cannot be a compelling justification forever, *Does 1-3 v. Mills*, --- S. Ct. ---, 2021 WL 5027177, at *3 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting), and CMS's evidence shows COVID no longer poses the dire emergency it once did. *See, e.g.*, 86 Fed. Reg. at 61,583 (noting "newly reported COVID-19 cases, hospitalizations, and deaths have begun to trend downward at a national level"). Notably, today, there are three widely distributed vaccines. Additionally, there are several therapeutics and treatments, and as CMS states, more are on the horizon. *See, e.g.*, *id.* at 61,609. Thus, CMS's purported "emergency"[15]—one that the entire globe has now endured for nearly two years, and to which CMS itself demonstrated ease in responding to—is unavailing. *United States v. Reynolds*, 710 F.3d 498, 512–13 (3rd Cir. 2013) ("Most, if not all, laws passed . . . are designed to eliminate some real or perceived harm. If the mere assertion that such harm will continue while

[14] Other circuits, like the Eighth, have held that protecting the public, without more, is insufficient to waive procedural requirements. *United States v. Reynolds*, 710 F.3d 498, 509 (3rd Cir. 2013); *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Valverde*, 628 F.3d 1159, 1168 (9th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 421–24 (6th Cir. 2009).

[15] CMS also asserted that there is an "emergency" *now* (such that CMS must immediately implement the mandate) because "the 2021–2022 influenza season" will soon begin. 86 Fed. Reg. at 61,584. CMS offered this justification while simultaneously admitting that "the intensity of the upcoming 2021-2022 influenza season cannot be predicted" and that "influenza activity during the 2020-2021 season was low throughout the U.S." *Id.* For a "risk of future harm" to "justify a finding of good cause," the "risk must be more substantial than a mere possibility." *Brewer*, 766 F.3d at 890. Thus, CMS did not find a concrete "threat" to remedy but rather speculated as to a mere possibility of harm, and there is a "difference between addressing present legal uncertainty and addressing the possibility of future legal uncertainty." *Id.* Notably, CMS did not mandate flu vaccines, despite mentioning that the flu has been daunting the healthcare system, that recent studies show approximately half of healthcare workers refuse the flu vaccine, *id.* at 61,568, and that CMS has evidence that influenza vaccination of health care staff is directly associated with declines in nosocomial influenza in hospitalized patients and nursing home residents. *Id.* at 61,557.

an agency gives notice and receives comments were enough to establish good cause, then notice and comment would always have to give way.").

2. ***CMS failed to meet its "good cause" burden, especially in light of the unprecedented, controversial, and health-related nature of the mandate.***

CMS also failed to meet its burden based on the unprecedented, controversial, and health-related nature of the mandate. *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (holding that the inquiry into an agency invoking "good cause proceeds case-by-case, sensitive to the totality of the factors at play"). CMS had the burden "to establish that notice and comment need not be provided." *Nat. Res. Def. Council*, 894 F.3d at 113–14. In a situation like here, where there is significant and known opposition to the mandate, "good cause" is even more important than usual. *See, e.g.*, *Asbestos Information Ass'n of N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984) (explaining that rules "may be more uncritically accepted after public scrutiny, through notice-and-comment rulemaking, especially when the conclusions it suggests are controversial"). The fact that this mandate effects issues relating to health[16] increases the importance even further. *See Nat'l Ass'n of Farmworkers*, 628 F.2d at 621 ("Especially in the context of health risks, notice and comment procedures assure the dialogue necessary to the creation of reasonable rules."); *Cmty. Nutrition Inst. v. Butz*, 420 F. Supp. 751, 754 (D.D.C. 1976) (noting that "when a health-related standard such as this is involved, the good cause exemption may not be used to circumvent the legal requirements designed to protect the public"). Accordingly, CMS's argument that undertaking normal notice and comment requirements would be "contrary to the public interest" based on delaying the mandate, *id.* at 61,586, is unavailing in light of the circumstances. *Alcaraz*, 746 F.2d at 612. Rather, these requirements "serve the public

[16] CMS acknowledges that "[s]erious adverse reactions [] have been reported following COVID-19 vaccines." 86 Fed. Reg. at 61,565.

interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decision making." *Id.* They are far from "mere formalities." *Id.*

Moreover, the failure to take and respond to comments feeds into the very vaccine hesitancy CMS acknowledges is so daunting. 86 Fed. Reg. at 61,559, 61,568. Besides fostering reasoned decision making, notice and comment "provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (Thomas, J., dissenting). Requiring already hesitant individuals to get the vaccine—without giving them an opportunity to be heard—undermines the democratic process that the APA's procedural safeguards are intended to protect and exacerbates the underlying hesitancy problem. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (according notice and comment great importance because it "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"). Far from being "good cause" for circumventing the normal rulemaking requirements, the unprecedented and controversial mandate affecting personal health constitutes a compelling reason to utilize those procedures, and CMS failed to provide the good cause necessary to overcome these factors.

In conclusion, because CMS's "emergency" does not justify use of the "good cause" exception, see *Thrift*, 862 F. Supp. at 591, and the unprecedented, controversial, and health-related mandate requires more good cause than CMS provided, *Alcaraz*, 746 F.2d at 612, Plaintiffs are likely to succeed in establishing that CMS improperly invoked the 5 U.S.C. § 553(b)(B) "good cause" exception.

iii. **The mandate is arbitrary and capricious.**

Finally, Plaintiffs are likely to succeed in establishing that the CMS vaccine mandate is arbitrary or capricious. Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) ("A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). Under this "narrow" and deferential standard of review, a court may not substitute its own policy judgment for that of the agency. *Id.* Rather, the court must ensure there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. ***The mandate is arbitrary and capricious because the record is devoid of evidence regarding the covered healthcare facilities.***

CMS lacks evidence showing that vaccination status has a direct impact on spreading COVID in the mandate's covered healthcare facilities. CMS acknowledges its lack of "comprehensive data" on this matter but attempts to "extrapolate" the abundant data that it does have on Long Term Care Facilities ("LTCs"), generally referred to as nursing homes, to the other dozen-plus Medicare and Medicaid facilities covered by the mandate. 86 Fed. Reg. at 61,585. However, CMS's path of analysis appears misguided and the inferences it produced are questionable. *State Farm*, 463 U.S. at 43 (finding that in an arbitrary and capricious challenge, the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). As CMS's own record shows, COVID disproportionally devastates LTC facilities.

Residents of LTC facilities—who make up less than 1-percent of the U.S. population—accounted for more than 35-percent of all COVID deaths during the first twelve months of the pandemic. 86 Fed. Reg. at 61,566. Equally staggering is that "[o]f the approximately 656,000 Americans estimated to have died from COVID through September 10, 2021, 30-percent are estimated to have died during or after an LTC facility stay." *Id.* at 61,601. Thus, CMS's decision to extrapolate LTC data to justify its lack of data regarding the other fourteen facilities covered is likely not reasonable. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (requiring agencies to engage in "reasoned decision making"); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) ("[A]n agency must give adequate reasons for its decisions."). While a wide-sweeping mandate might make sense in the context of LTCs, based on CMS's evidence, CMS presents no similar evidence for imposing a broad-sweeping mandate on the other fourteen covered facilities. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If [a] finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated[.]"). Although the Court appreciates its deferential review, the Court's duty is not to "rubber-stamp" administrative decisions devoid of reasonableness. *Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016) ("A court must not substitute its judgment for that of the agency, but also must not "rubber-stamp" administrative decisions.").

In general, the overwhelming lack of evidence likely shows CMS had insufficient evidence to mandate vaccination on the wide range of facilities that it did. Looking even beyond the evidence deficiencies relating to the specific facilities covered, the lack of data regarding vaccination status and transmissibility—in general—is concerning. Indeed, CMS states that "the effectiveness of the vaccine[s] to prevent disease transmission by those vaccinated [is] not

currently known."[17] 86 Fed. Reg. at 61,615.[18] CMS also admits that the continued efficacy of the vaccine is uncertain. *See, e.g.*, *id.* at 61,612 ("[M]ajor uncertainties remain as to the future course of the pandemic, including but not limited to vaccine effectiveness in preventing 'breakthrough' disease transmission from those vaccinated, [and] the long-term effectiveness of vaccination[.]"). No one questions that protecting patients and healthcare workers from contracting COVID is a laudable objective. But the Court cannot, in good faith, allow CMS to enact an unprecedented mandate that lacks a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) ("Under the APA . . . the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). The reasoned explanation and evidentiary requirement "of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). If judicial review is to be more than an "empty ritual," the Court here must demand something more than the explanation offered for the action taken by CMS here. *Id*.

2. ***The mandate is arbitrary and capricious because CMS improperly rejected alternatives to the mandate.***

CMS failed to consider or rejected obvious alternatives to a vaccine mandate without evidence. For example, CMS rejected daily or weekly testing—an option that even OSHA approved in its ETS—without citing any evidence for such a conclusion. 86 Fed. Reg. at 61,614.

[17] "As explained in various places within this RIA and the preamble as a whole, there are major uncertainties as to the effects of current variants of SARS-CoV-2 on future infection rates, medical costs, and prevention of major illness or mortality. For example, the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known." 86 Fed. Reg. at 61,615.

[18] Also, CMS has no data showing forced vaccinations in the healthcare industry has stopped the spread of COVID in hospitals.

Rather, it assured that it "reviewed scientific evidence on testing" but "found that vaccination is a more effective infection control measure." *Id.* at 61,614. As discussed elsewhere, this conclusion comes despite its admission that it lacks solid evidence[19] regarding transmissibility of COVID by the vaccinated. *Id.* at 61,615, 61,612. Although it is not the Courts duty to ask whether CMS's decision was "the best one possible" or even whether there were "better [] alternatives," *Federal Energy Regulatory Commission v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016), the Court must ensure there exists a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

As another example, CMS rejected[20] mandate alternatives in those with natural immunity by a previous coronavirus infection. 86 Fed. Reg. at 61,614 (noting "many uncertainties" about the immunity in those previously infected "compared to people who are vaccinated"). But, elsewhere, it plainly contradicts itself regarding the value of natural immunity. *Id.* at 61,604 ("[A]bout 100,000 a day have recovered from infection . . . . These changes reduce the risk to both health care staff and patients substantially, likely by about 20 million persons a month *who are no longer sources of future infections*.") (emphasis added). Such contradictions are tell-tale signs of unlawful agency actions. *See State Farm*, 463 U.S. at 43 (finding agency action arbitrary and capricious if the agency explained its decision in a way that "runs counter to the evidence before the agency"); *see also Bethesda Health, Inc. v. Azar*, 389 F. Supp. 3d 32, 41 (D.D.C. 2019) (setting aside as arbitrary and capricious agency action that contradicts its own regulations).

[19] Far from being reasonable to prohibit alternatives to vaccination, this constitutes a compelling reason to utilize, rather than reject, other alternatives before subjecting the public to a never-before CMS vaccine mandate.

[20] CMS also rejected natural immunity, despite an intense public debate and a trove of scientific data on the strength and durability of natural immunity from COVID-19—alone and compared to vaccine-induced immunity. *State Farm*, 463 U.S. at 43 (noting "the agency must examine the relevant data").

3. ***The mandate is arbitrary and capricious because of its broad scope.***

The broad scope of healthcare facilities covered by the mandate renders it arbitrary. The mandate applies equally to the varying healthcare facility types it covers, such as Psychiatric Residential Treatment Facilities ("PRTFs") for individuals under age twenty-one, *see* 86 Fed. Reg. at 61,576, and LTCs, *see id.* at 61,575. But, at the same time, CMS acknowledges that the risk of COVID to those in the former age group is markedly smaller. *See, e.g.*, *id.* at 61,610 n.247 (recognizing that "risk of death from infection from an unvaccinated 75-to 84-year-old person is 320 times more likely than the risk for an 18- to 29-years old person"); *id.* at 61,601 ("Among those infected, the death rate for older adults age 65 or higher was hundreds of time higher than for those in their 20s during 2020."); *id.* at 61,566 (noting those aged 65 years and older account for more than 80-percent of U.S. COVID-19 related deaths). What is more, besides applying to all facilities equally, the mandate applies to all facilities' staff equally, "*regardless of . . . patient contact*." *Id.* at 61,570 (emphasis added). The mandate goes so far as to cover a third-party vendor's "crew working on a construction project" whose members use the same bathrooms "during their breaks." *Id.* at 61,571. CMS provides no reasoned[21] explanation for this overbroad approach, and it further belies its asserted interest in protecting patients from COVID.[22] *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.").

[21] As explained in *infra* note 24, upping vaccination nation-wide is not a "reasonable" reason for CMS to enact its mandate because the agency's powers are limited to Medicare and Medicare—not federalizing healthcare and reaching the general public. Rather, the overbroad approach indicates the pretextual nature of this mandate.

[22] The Court also notes that recently, on November 12, 2021, CMS itself revised its pandemic guidance for nursing home visitation, specifically opening facility visitation *"for all residents at all times" by family and friends who are not required to be vaccinated*. This also belies CMS's asserted interest in protecting patients from COVID, and instead, shows that the mandate's overbreadth is to increase the national vaccination rate by any means necessary.

4. ***The mandate is arbitrary and capricious due to CMS's sudden change in course.***

CMS failed to adequately explain its contradiction to its long-standing practice of encouraging rather than forcing—by governmental mandate—vaccination. For years, CMS has promulgated regulations setting the conditions for Medicare and Medicaid participation; *never* has it required any vaccine for covered facilities' employees—despite concerns over other illnesses and their corresponding low vaccination rates.[23] As recent as this May, CMS adopted an IFC requiring education on COVID vaccines but again decided against forced vaccination.

It is generally "arbitrary or capricious" to depart from a prior policy *sub silentio*; when agencies contradict a prior policy, they must show "good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 510 (2014) (holding that agency "retained discretion to alter its course [under a regulation] provided it gave a reasonable explanation for doing so"). Here, CMS's purported reason for changing its policy is to force those unwilling or hesitant to receive the vaccine into receiving it, all under the guise of protecting recipients of Medicare and Medicaid. *See* 86 Fed. Reg. at 61,583 (noting "CMS initially chose . . . to encourage rather than mandate vaccination" but "vaccine uptake among health care staff [was not] as robust as hoped for"); *id.* at 61,569 (noting that despite healthcare worker hesitation about the vaccine, "mandates have already been successfully initiated in a variety of health care settings, systems, and states"); *id.* at 61,560 (noting it was "compelled to require staff vaccinations for COVID-19" given its "responsibility to protect the health and safety of individuals . . . receiving care and services from for Medicare- and

[23] In the Mandate, CMS discusses how influenza is a major problem plaguing the healthcare industry. Nonetheless, CMS states that half of healthcare workers resist the seasonal influenza vaccine nationwide, 86 Fed. Reg. at 61,568, but that it continues to "recommend" influenza vaccination rather than mandate it. *Id.* Even though CMS has evidence that influenza vaccination of health care staff is associated with declines in nosocomial influenza in hospitalized patients and nursing home residents. *Id.* at 61,557.

Medicaid-certified providers and suppliers"). But even if forcing the administration of a specific vaccine, into the otherwise unwilling, in an effort to protect the recipients of these programs could be a reasonable explanation to justify the extraordinary action—action that long has been the province of the states, see *Zucht*, 260 U.S. at 176 (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination"); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–26 (1905) (similar)—CMS has not shown that it is reasonable in this instance.[24] Rather, it specifically notes that the vaccines' effectiveness to prevent disease transmission by those vaccinated is not currently known. 86 Fed. Reg. at 61,615 (noting "the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known").

5. ***The mandate is arbitrary and capricious because CMS failed to consider or properly weigh necessary reliance interests.***

Because CMS changed course, it was required to "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Fox Television*,

[24] The inadequacy of the explanation for the reversal is especially true since Plaintiffs will likely succeed in demonstrating it is a pretextual rationale. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019); *id.* at 2583 (Thomas, J., concurring in part and dissenting in part) (noting Court "opened a Pandora's box of pretext-based challenges in administrative law"); *id.* at 2597 (Alito, J., concurring in part and dissenting in part). While a court may not set aside an agency's policymaking decision "solely because it might have been influenced by political considerations or prompted by an Administration's priorities," *Department of Commerce*, 139 S. Ct. at 2573, an agency's change in course "cannot be solely a matter of political winds and currents." *North Carolina Growers' Association, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). Plaintiffs have demonstrated that they could likely show pretext. *See, e.g.*, Doc. [9] at 4 (citing Joseph Biden, Remarks at the White House (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ (decrying "nearly 80 million Americans who have failed to get the shot" while announcing "a new plan to require more Americans to be vaccinated" and explaining that "[i]f you're seeking care at a health facility, you should be able to know that the people treating you are vaccinated. Simple. Straightforward. Period."); *see also* 86 Fed. Reg. at 61,601 ("the protective scope of this rule is far broader than the health care staff that it directly affects"); *see also id.* at 61,612 ("Staff vaccination will also provide significant community benefits when staff are not at work."). The Court "cannot ignore the disconnect between the decision made and the explanation given." *Dep't of Com.*, 139 S. Ct. at 2575.

556 U.S. at 515. Ignoring reliance interests is necessarily arbitrary and capricious. *Id.* Yet, it appears this is what CMS did. An agency is required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. *Regents*, 140 S. Ct. at 1915.

In concluding that the mandate's benefits outweigh the risks to the healthcare industry, CMS did not properly consider *all* necessary reliance interests of facilities, healthcare workers, and patients. 86 Fed. Reg. at 61,607–10. CMS looked only at evidence from interested parties in favor of the mandate, while completely ignoring evidence from interested parties in opposition. *Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974) (noting agency "must not ignore evidence placed before it by interested parties"). In fact, CMS foreclosed these parties' ability to provide information regarding the mandate's effects on the healthcare industry, while simultaneously dismissing those concerns based on "insufficient evidence." 86 Fed. Reg. at 61,569. But facts do not cease to exist simply because they are ignored, and "[s]tating that a factor was considered[25] is not a substitute for considering it." *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) (internal quotations and alterations omitted); *Sierra Club*, 459 F. Supp. 2d at 100 ("Merely describing an impact and stating a conclusion of non-impairment is insufficient[.]"); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) ("The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage."). Had CMS followed the proper procedural requirements,

[25] Several times throughout the mandate, CMS acknowledges the countervailing effect it will have on the healthcare industry. *See, e.g.*, 86 Fed. Reg. at 61,607 ("currently there are endemic staff shortages for almost all categories of employees at almost all kinds of health care providers and supplier and these may be made worse if any substantial number of unvaccinated employees leave health care employment altogether"); *id.* at 61,567 ("and the urgent need to address COVID-related staffing shortages that are disrupting patient access to care, provides strong justification as to the need to issue this IFC requiring staff vaccination for most provider and supplier types over which we have authority."). Yet, despite these acknowledged concerns about intensifying an already-existing healthcare crisis, CMS decided to move forward anyway, without properly considering the totality of interests affected by the mandate, such as rural hospitals.

States, healthcare providers, and healthcare workers would have submitted critical information to CMS—instead of to the Courts[26]—showing that the mandate portends a disaster for the healthcare industry, particularly in rural communities. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816, (2019) (requiring HHS to undertake notice-and-comment rulemaking, in part, because it "neglected to acknowledge the potential countervailing benefits"); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2nd Cir. 2013) (explaining APA policies are "to ensure the agency has all pertinent information before it when making a decision"). By dispensing with those requirements, CMS ignored evidence showing that the mandate threatens devastating consequences to healthcare providers, staff, and patients throughout the nation.

Even if CMS did properly consider these reliance issues—which this Court finds it most likely did not—the scant evidence of record shows CMS was unable to adequately balance these reliance interests because it placed a rock on one side of the scale and a feather on the other. *Regents*, 140 S. Ct. at 1914 (failing to weigh reliance interests against competing policy concerns is arbitrary and capricious). And as already explained, these evidence deficiencies are solely a product of its own doing. So, either CMS entirely failed to consider an important aspect of the problem or failed to weigh the interests properly; regardless, either way the pendulum swings, CMS's actions, or rather, inaction, violates basic tenants of administrative law. *Id.*; *State Farm*, 463 U.S. at 43 (noting that "entirely fail[ing] to consider an important aspect of the problem" is

[26] It is not the job of this Court to collect evidence and opposition from affected parties; rather, this is the role, actually a duty, of CMS when promulgating a rule. *See District of Colombia v. United States Dep't of Agriculture*, 496 F. Supp. 3d 213, 228 (D.D.C. 2020) (emphasizing that one purpose of notice and comment rulemaking is to "give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review"); *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996) ("Notice and comment rulemaking . . . facilitates the marshaling of opposition to a proposed rule, and may result in the creation of a very long record that may in turn provide a basis for a judicial challenge to the rule if the agency decides to promulgate it.").

arbitrary and capricious); *Michigan*, 576 U.S. at 750–52 (noting "agency action is lawful only if it rests on a consideration of the relevant factors" and "important aspects of the problem").

In conclusion, Plaintiffs likely can show the CMS mandate is arbitrary and capricious because the evidence does not show a rational connection to support implementing the vaccine mandate, the mandate's broad scope, the unreasonable rejection of alternatives to vaccination, CMS's inadequate explanation for its change in course, and its failure to consider or properly weigh reliance interests.

Accordingly, Plaintiffs' challenges to the mandate show a great likelihood of success on the merits, and this fact weighs critically in favor of a preliminary injunction. *Home Instead*, 721 F.3d at 497 ("While no single factor is determinative, the probability of success factor is the most significant." (internal quotations and citations omitted)).

b. ***Plaintiffs demonstrate irreparable harm.***

The Court must next determine whether Plaintiffs have shown that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs must show more than a mere "possibility," but they need not show a certainty; rather, they need to demonstrate "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiffs have done so here.

The Plaintiff States bring their claims in a number of capacities: sovereign, quasi-sovereign/*parens patriae*, and proprietary. *See, e.g.*, Doc. [1] ¶¶ 5, 7, 9. Through their various interests, they have shown irreparable injury is more than likely in the absence of an injunction.

First, Plaintiffs sovereign interests[27] are likely to suffer irreparable harm without a preliminary injunction because they will be unable to enforce their duly enacted laws surrounding vaccination mandates and providing proof of vaccination. *See, e.g.*, Mo. Rev. Stat § 67.265; 2021 Alaska Sess. Laws ch. 2, § 17; Ark. Code § 20-7-143; *see also, e.g.*, Ark. Code § 11-5-118. The mandate notes that it "preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers." 86 Fed. Reg. at 61,568. Generally, this preemption would be unremarkable. *See* U.S. Const. art. VI, § 2. But, as here, where CMS likely did not lawfully enact its mandate, Plaintiffs are harmed because they cannot enforce their duly enacted laws and no lawfully enacted regulation preempts them. The injury that results when a state cannot enforce "statutes enacted by representatives of its people" is irreparable. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *accord Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) ("Prohibiting the State from enforcing a statute properly passed . . . would irreparably harm the State.").

Second, Plaintiffs quasi-sovereign interests are likely to suffer irreparable harm without a preliminary injunction. Unlike the harm Plaintiffs likely would face to their sovereign interests—which though significant, is more abstract—the harm Plaintiffs likely would face to their quasi-sovereign interests would be observable and appreciable. Indeed, the likely harm would be *harm* in the colloquial sense—pain, suffering, distress. Plaintiffs have a quasi-sovereign interest "in the health and well-being—both physical and economic—of [their] residents, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982), and Plaintiffs have put forth evidence that this mandate would have a detrimental effect on the health and well-bring of their citizens.

[27] The States also have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach, as discussed in depth in section II.B.a.i.2.

Review of the affidavits filed in support of Plaintiffs' motion for preliminary injunction shows the harm to the physical health and well-being of their states' citizens if the mandate is not enjoined. The Plaintiffs' affidavits came from varying healthcare entities and associations in their states impacted by the mandate. The affiants describe existing and significant staffing shortages as well as open and unfilled positions for an extended period of time, some for more than a year. *See, e.g.*, Doc. [9-7] at 3; Doc. [9-11] at 3; Doc. [9-25] at 3; Doc. [9-3] at 4. The affidavits also demonstrate that the mandate will more than likely exacerbate the already-existing staffing problem. Many of the affidavits generally describe the number of individuals employed by the entity and the number or percentage of employees either known or reasonably known to have not been vaccinated.[28] *See, e.g.*, Doc. [9-4] at 3, 4; Doc. [9-3] at 4. Through talks, surveys, and direct conversations with staff, the affiants know the individuals that will leave employment if CMS goes ahead with its mandate. *See, e.g.*, Doc. [9-4] at 3; Doc. [9-5] at 3; Doc. [9-13] at 4; Doc. [9-19] at 3; Doc. [9-20] at 3. Already, in some cases, the mere announcement of CMS's mandate has compelled some to resign. *See, e.g.*, Doc. [9-26] at 2.

Staff reductions due to implementing the mandate, especially in light of the already understaffed healthcare facilities, will cause a cascade of consequences. *See, e.g.*, Doc. [9-16] at 3–6. The mandate's effect of reducing staff will decrease the quality of care provided at facilities, compromise the safety of patients, and place even more stress on the remaining staff. *See, e.g.*, Doc. [9-11] at 4. The mandate "creates a risk in patient safety" and will create "ongoing ripple effects on . . . patients, remaining employees and [the] community for some time in the future." Doc. [9-18] at 5. An affiant noted that "even if we can technically staff services with extra shift and call, we are already doing that, have been doing that for more than a year, and our vaccinated

[28] CMS itself notes that rural hospitals are less vaccinated than urban. 86 Fed. Reg. at 61,613 (recognizing that "rural hospitals are having greater problems with employee vaccination . . . than urban hospitals").

staff will not be capable of doing it for much longer. At this point, considering it is nearly impossible to recruit clinical staff today, more will resign due to the stress and burnout that will inevitably exist." Doc. [9-23] at 5.

The loss of certain staffing categories will diminish entire areas of care within a facility that inevitably implicate others. *See, e.g.*, Doc. [9-19] at 3 (warning of the loss of the only remaining anesthesiologist); Doc. [9-21] at 3 (warning of the loss of 80% of imaging department); Doc. [9-14] at 3; Doc. [9-18] at 4; Doc. [9-25] at 4. Facilities in rural locations, already hard-pressed to find qualified applicants regardless of vaccination status, will have to evaluate what healthcare services they could still safely provide, if any at all, in the region they serve. *See, e.g.*, Doc. [9-4] at 4; Doc. [9-7] at 3–4; Doc. [9-9] at 2–5; Doc. [9-12] at 4; Doc. [9-13] at 4; Doc. [9-19] at 3; Doc. [9-23] at 4. As an example, for a general hospital located in North Platte, Nebraska, implementation of the mandate would result in the loss of the *only* remaining anesthesiologist. Doc. [9-19] at 3. Understandably, without an anesthesiologist, there could be no surgeries—at all. Thus, such a loss irreparably causes a cascading effect on the entire facility and a wide-range of patients. Other examples show the mandate's far-reaching implications not just on the administration of healthcare itself, but the functioning of the facilities in general. For example, the building manager of a nursing home in Memphis, Missouri states he will leave if the choice is between his job or the vaccine. Doc. [9-9] at 3–4. If the mandate takes effect, then, the nursing home would have "no one competent enough to run [the] building and [perform] all the complicated systems and required inspections." *Id.* Also, this type of position is not the kind that can be filled "quickly, especially with today's workforce and being in a rural setting." *Id.* Other affidavits also detail an especially hard impact to emergency services in rural areas. *See, e.g.*, Doc. [9-21] at 2–3 ("If we lose our imaging department we will have to divert many of our emergency

patients to other facilities; the closest one is 45 miles away."); Doc. [9-11] at 4 (explaining that in the event this hospital closes, the nearest one would be thirty miles away); Doc. [9-12] at 2–3 (similar); Doc. [9-16] at 6 (similar).

Further, the loss of staffing in many instances will result in *no care at all*, as some facilities will be forced to close altogether. For example, the Administrator of the Scotland County Care Center (SCCC), a nursing home located in Memphis, Missouri, notes that out of about sixty-five employees, twenty have indicated that they are opposed to taking the vaccine, and if the mandate is imposed, that they will quit.[29] Doc. [9-9] at 2. A loss of twenty staff members will cause SCCC to "close its doors" and displace residents that have lived in that community their entire lives. *Id.* at 5; *see also* Doc. [9-26] at 4. Thus, if the mandate goes into effect, it will irreparably harm patients[30] by impeding access to care for the elderly and for persons who cannot afford it—directly contrary to Medicare and Medicaid's core objective of providing proper care. In sum, Plaintiffs' evidence shows that facilities—rural facilities in particular—likely would face crisis standards of care or will have no choice but to close to new patients or close altogether, both of which would cause significant, and irreparable, harm to Plaintiffs' citizens. *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003) (finding "danger to plaintiffs' health, and perhaps even their lives, gives them a strong argument of irreparable injury").[31]

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[29] This includes SCCC's billing and accounting staff members, which would create a "substantial disruption" in SCCC's business functions, as well as their building plant manager, "that would leave me with no one competent enough to run my building and all the complicated systems and required inspections." *Id.* at 4.

[30] Medicare and Medicaid programs "touch[] the lives of nearly all Americans" and are two of the "largest federal program[s]" in the country. *See Allina Health Servs.*, 139 S. Ct. at 1808.

[31] "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). As already explained, CMS most likely does not have the authority to promulgate the mandate, and clear congressional authorization is also lacking. "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.'" *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp. v. Harry Brown's, L.L.C.*, 563 F.3d 312, 319 (8th Cir. 2009)). It follows then,

Besides the harm to physical health that Plaintiffs have shown will likely occur absent a preliminary injunction, the mandate also would have a negative effect on the economies in Plaintiff states, especially, once again, in rural areas.[32] While economic injuries normally would be reparable at law, "federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021); *see also* 5 U.S.C. § 702 (providing for an action seeking relief "other than money damages"). Therefore, the economic loses in Plaintiff states would be unrecoverable and thus irreparable. *Iowa Utls. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss, however, does qualify as irreparable harm."); *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013).

Fourth, and finally, Plaintiffs would likely face irreparable harm to their proprietary interests absent a preliminary injunction. Plaintiffs themselves operate healthcare facilities that CMS's mandate reaches. They therefore would face the same harms any private owner of a facility faces, like the "business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, [or] the diversion of resources necessitated by the Mandate." *BST Holdings*, 17 F.4th at ---. As just noted, since these costs could not be recovered from the federal government, they are irreparable. *Iowa Utls. Bd.*, 109 F.3d at 426.

For all these reasons, the Court finds that Plaintiffs are likely to suffer significant irreparable harm absent a preliminary injunction.

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that forcing individuals to choose "between their job(s) and their jab(s)," *BST Holdings*, 17 F.4th at ---, substantially burdens the liberty interests of individuals, which cannot be fully compensated through an award of damages.

[32] For example, Callaway District Hospital and Medical Clinics is the largest employer in Callaway, Nebraska and is a "significant driver of the local business and agriculture economy." Doc. [9-12] at 4. The expected loss of staff would "almost certainly" lead to closure of the facility. *Id.* "Cherry County Hospital is a leader of employment" for its county. Doc. [9-16] at 6. "Kimball County Manor and Assisted Living employs 55 full time staff and as such is one of the largest employers in Kimball County, a rural county located in Nebraska's western panhandle." Doc. [9-22] at 3.

c. The balance of equities tip in favor of Plaintiffs, and the public has an interest in an injunction.

Finally, the Court must determine whether Plaintiffs have shown that the "balance of equities tips in [their] favor" and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24. When the party opposing the injunction is the federal government, the balance-of-harms factor "merge[s]" with the public-interest factor. *Nken v. Holder*, 556 U.S. 418, 436 (2009).

The public has an interest in stopping the spread of COVID. No one disputes that. But the Court concludes that the public would suffer little, if any, harm from maintaining the "status quo" through the litigation of this case. Defendants argue that "enjoining the rule would harm the public interest by further exposing Medicare and Medicaid patients and staff—and the Medicare and Medicaid programs—to unvaccinated health care workers." Doc. [23] at 48. But CMS's own conclusions undercut this argument. *See id.* at 61,615 ("[T]he effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known."); *id.* at 61,612. Regardless, the pandemic has continued more than twenty months now. Vaccine rates rise every day, and more therapeutics and treatments for the virus are available than ever before. The status quo today, without the CMS mandate, is still far better than the public faced even just a few months ago.

And while, according to CMS, the effectiveness of the vaccine to prevent disease transmission by those vaccinated is not currently known, what is known based on the evidence before the Court is that the mandate will have a crippling effect on a significant number of

healthcare facilities in Plaintiffs' states, especially in rural areas,[33] create a critical shortage of services (resulting in *no medical care at all* in some instances), and jeopardize the lives of numerous vulnerable citizens. The prevalent, tangible, and irremediable impact of the mandate tips the balance of equities in favor of a preliminary injunction.

To be sure, the Court looks at the principles underlying preliminary injunctions. *Dataphase*, 640 F.2d at 113 n.5 (quoting *Love v. Atchison, T. & S. F. Ry. Co.*, 185 F. 321, 331 (8th Cir. 1911) ("The controlling reason for the existence of the judicial power to issue a [preliminary] injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated."). Although the parties disagree on the magnitude of the mandate's disruption to the healthcare industry, both agree a disruption is certain and imminent. Thus, the importance of enjoining the mandate, and thus preserving the "status quo," is imperative. *Dataphase*, 640 F.2d at 113 (8th Cir. 1981) ("[T]he question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."). And "[t]here is clearly a robust public interest in safeguarding prompt access to health care." *Whitman-Walker Clinic, Inc. v. DHS*, 485 F. Supp. 3d 1, 61 (D.D.C. 2020).

The Court finds that in balancing the equities, the scale falls clearly in favor of healthcare facilities operating with some unvaccinated employees, staff, trainees, students, volunteers, and

[33] The disproportionate impact the mandate will have on rural communities is why CMA's "one-size-fits-all sledgehammer" approach does not work and in fact, undermines CMA's focus on providing proper care. *See BST Holdings*, 17 F.4th at ---. This is why healthcare matters are typically left to the States, because these policy decisions are matters dependent on local factors and conditions, and Federalism allows States to tailor such matters in the best interests of their communities. The Court agrees with Plaintiffs point that whatever might make sense in Chicago, St. Louis, or New York City, could be actually counterproductive and harmful in rural communities like Memphis (MO) or McCook (NE). Doc. [1] at 1–2.

contractors, rather than the swift, irremediable impact of requiring healthcare facilities to choose between two undesirable choices—providing substandard care or providing no healthcare at all.[34]

It is true that the Agency would face irreparable harm *if* it is unable to enforce a *properly authorized* and *enacted* regulation. But, as discussed above, the Court has concluded CMS likely did not enact the mandate at issue lawfully. Thus, any interest CMS may have in enforcing an unlawful rule is likely illegitimate. *See BST Holdings*, 17 F.4th at ---. By this same conclusion, the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress, as already discussed. And while "it is indisputable that the public has a strong interest in combating the spread of COVID-19," "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

In conclusion, CMS mandate raises substantial questions of law and fact that must be determined, as discussed throughout this opinion. Because it is evident CMS significantly understates the burden that its mandate would impose on the ability of healthcare facilities to provide proper care, and thus, save lives, the public has an interest in maintaining the "status quo" while the merits of the case are determined. *Dataphase*, 640 F.2d at 113; *Love*, 185 F. at 331.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction, Doc. [6], is **GRANTED**.

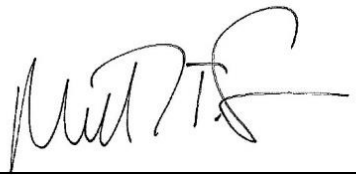
Accordingly,

[34] CMS also discusses that the upcoming influenza season will further exacerbate the strain on the healthcare system. However, one would assume that the onset of flu season coupled with COVID would be a reason to *avoid* critical staffing shortages at healthcare facilities—not to exacerbate them.

IT IS HEREBY ORDERED that Defendants are preliminarily enjoined from the implementation and enforcement of 86 Fed. Reg. 61,555 (Nov. 5, 2021), the Interim Final Rule with Comment Period entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," against any and all Medicare- and Medicaid-certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming pending a trial on the merits of this action or until further order of this Court. Defendants shall immediately cease all implementation or enforcement of the Interim Final Rule with Comment Period as to any Medicare- and Medicaid-certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

IT IS FURTHER ORDERED that no security bond shall be required under Federal Rule of Civil Procedure 65(c).

Dated this 29th day of November, 2021.



MATTHEW T. SCHELP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*, Defendants.	Civil No. 3:21-cv-00055-GFVT **OPINION & ORDER**

*** *** *** ***

This is not a case about whether vaccines are effective. They are. Nor is this a case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can. The question presented here is narrow. Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no. So, for the reasons that follow, the pending request for a preliminary injunction will be GRANTED.

I

On January 20, 2021, Joseph Robinette Biden, Jr. became the forty-sixth President of the United States. On his first day in office, President Biden signed Executive Order 13991, which established the Safer Federal Workforce Task Force. 86 Fed. Reg. 7,045–48 (Jan. 20, 2021). The Task Force's stated mission is to "provide ongoing guidance to heads of agencies on the

operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID–19 pandemic." *Id.* at 7,046.

On September 9, 2021, President Biden signed Executive Order 14042. 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Executive Order 14042 mandated the Safer Federal Workforce Task Force to provide Guidance regarding "adequate COVID–19 safeguards" by September 24, 2021, that would apply to all federal contractors and subcontractors. *Id.* at 50,985. According to the Department of Labor, "workers employed by federal contractors" make up "approximately one-fifth of the entire U.S. labor force." United States Department of Labor, *History of Executive Order 11246*, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history (last visited Nov. 24, 2021). For Kentucky, Ohio, and Tennessee, federal contracting is a multi-billion-dollar industry. [R. 32 at 4.] The executive order specified that the Guidance would be mandatory at all "contractor or subcontractor workplace locations" so long as the Director of the Office of Management and Budget approved the Guidance and determined that it would "promote economy and efficiency in Federal contracting." 86 Fed. Reg. at 50,985. Furthermore, the executive order applies to "any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument." *Id.* at 50,986.[1]

On September 24, the Safer Federal Workforce Task Force issued its Guidance pursuant to Executive Order 14042. *See* Safer Federal Workforce Task Force, *COVID–19 Workplace*

[1] President Biden made clear his intentions in signing Executive Order 14042 in a speech to the American Public. On the day that President Biden signed Executive Order 14042, he stated that earlier in the day he had signed an executive order requiring all federal contractors to be vaccinated. Joseph Biden, Remarks at the White House (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

Safety: Guidance for Federal Contractors and Subcontractors, https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Nov. 24, 2021). The Guidance requires all "covered contractors"[2] to be fully vaccinated by December 8, 2021,[3] unless they are "legally entitled to an accommodation." *Id.* at 1. The Guidance applies to all "newly awarded covered contracts" at any location where covered contract employees work and covers "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace." *Id.* at 3–5.

On September 28, the Director of the OMB, "determined that compliance by Federal contractors and subcontractors with the COVID–19 workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,692.

Executive Order 14042 tasked the Federal Acquisition Regulatory Council with "amend[ing] the Federal Acquisition Regulation." 86 Fed. Reg. 50,986. The Federal Acquisition Regulation is a set of policies and procedures that governs the drafting and procurement processes of contracts for all executive agencies. *See* United States General Services Administration, *Federal Acquisition Regulation (FAR)*, https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far (last visited Nov. 24, 2021). On

[2] A covered contractor is "a prime contractor or subcontractor at any tier who is party to a covered contract." Safer Federal Workforce Task Force, *COVID–19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at 3.

[3] The deadline for full vaccination has been delayed until January 18, 2022. This means that covered contractors would need to receive their Johnson & Johnson vaccine or the second dose of a Pfizer or Moderna vaccine by January 4 to be fully vaccinated by January 18. *See* The White House, *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/ (last visited Nov. 24, 2021).

September 30, the Federal Acquisition Regulatory Council issued Guidance in the form of a memo to assist agencies responsible for mandating contractor and subcontractor compliance with the vaccination requirement until the Federal Acquisition Regulation can be officially amended. *See* FAR Council Guidance, https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf (last visited Nov. 24, 2021). The vaccine requirement officially only applies to contracts awarded (1) on or after November 15; (2) "new solicitations issued on or after October 15"; and (3) extensions to or renewals of existing contracts exercised on or after October 15." *Id.* at 2. However, the Federal Acquisition Regulatory Council attached a deviation clause to the Guidance that contractors were encouraged to insert into their current contracts. *Id.* at 4–5.

Plaintiffs filed their Complaint on November 4, and on November 8, Plaintiffs filed a temporary restraining order and preliminary injunction asking this court to enjoin the federal contractor vaccine mandate. [R. 12 at 31.] Plaintiffs argue that Defendants' actions were contrary to procedure, arbitrary and capricious, and violated the U.S. Constitution. *Id.* at 9–10. On November 9, the Court held a telephonic conference with the parties, and with no objection from the parties, denied Plaintiffs' temporary restraining order and construed the motion as one for a preliminary injunction only.[4] The Court set briefing deadlines for the parties and scheduled a hearing for Thursday, November 18. [R. 16; R. 17.] On November 10, the OMB Director issued a revised Determination that (1) revoked the prior OMB Determination; (2) provided

[4] Courts frequently construe joint TRO and preliminary injunction motions as a motion for a preliminary injunction only and deny the TRO as moot. *See Ranchers-Cattlemen Action Legal Fund v. Perdue*, 2017 WL 2671072, at *1 (D. Mont. June 21, 2017) (denying TRO as moot and addressing as preliminary injunction only); *Justice Res. Ctr. v. Louisville-Jefferson Cnty. Metro. Gov't*, 2007 WL 1302708, at *5 (W.D. Ky. Apr. 30, 2007) (denying plaintiffs' request for a temporary restraining order and focusing only on plaintiffs' motion for a "temporary injunction," which the court construed as a motion for preliminary injunction because defendant was given notice and opportunity to respond to Plaintiff's request); *New England Health Care v. Rowland*, 170 F. Supp. 2d 199, 201 n.2 (D. Conn. 2001) (denying TRO as moot after setting hearing on a preliminary injunction).

additional reasoning and support for how the Contractor Guidance will promote economy and efficiency in government contracting; and (3) gave covered contractors additional time to comply with the vaccination requirement. *See* 86 Fed. Reg. 63,418. On November 15, in light of the revised Determination, Plaintiffs filed an Amended Complaint. [R. 22.] Defendants filed a response in opposition to Plaintiffs' preliminary injunction on November 16, Plaintiffs replied on November 17, and the Court held a hearing with the parties on November 18. [R. 27; R. 32; R. 41.]

II

A

An initial matter is the question of standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought") (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y.*, 137 S. Ct. at 1651.

Standing is a threshold inquiry in every federal case that may not be waived by the parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). "To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted). Plaintiffs' injury-in-fact must be both particularized and concrete. *Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1545 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* at 1548 (internal quotation marks omitted). Further, a "concrete" injury is a de facto injury that actually exists. *Id.* Finally, "a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based." *Haskell v. Washington Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citations omitted).

Here, Defendants argue that (1) Plaintiffs have failed to provide proof in either their Complaint or Amended Complaint that any state agency or subdivision will be affected by the vaccine mandate; and (2) Plaintiffs lack standing to challenge the FAR Memo under the redressability prong. [R. 27 at 17–19.] Under the first argument, Defendants argue that none of the contracts Plaintiffs provide in their briefing are actually covered by the vaccine mandate because they are present and not future contracts and are merely requests for bilateral modification. *Id.* at 18–19. Defendants argue that "[a]sking to change a contract term is not a cognizable harm." *Id.* at 19.

Although the Plaintiffs did not provide an example of a new contract that is subject to the mandate in their briefing, the Court finds that Plaintiffs satisfy standing as to this argument for multiple reasons. States are "entitled to special solicitude in the standing analysis." *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). And States are permitted "to litigate as *parens patriae* to protect quasi-sovereign interests—i.e., public or governmental interests that concern the state as a whole." *Id.* at 520 n.17 (quoting R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 289 (5th ed. 2003)).

In 2020, according to the federal government's System for Award Management, which tracks federal contracts, $10,221,706,227 worth of federal contracts were performed in Kentucky, and $9,934,033,221 worth of federal contracts were held by vendors located in Kentucky, including numerous state agencies.[5] [R. 22 at 13 (citing SAM.gov).] In 2020, Ohio was the place of performance for $8,935,417,106 worth of federal contracts, and $12,498,379,202 worth of federal contracts were held by vendors located in Ohio, including Ohio agencies. *Id.* at 14. And in 2020, Tennessee was the place of performance for $10,258,679,277 worth of federal contracts, and $10,010,028,677 worth of federal contracts were held by Tennessee vendors, including Tennessee agencies. *Id.*

"When a claim involves a challenge to a future contracting opportunity, the pertinent question is whether Plaintiffs ha[ve] made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract." *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). As the facts above indicate, federal contracts bring in billions of dollars to the states of Kentucky, Ohio, and Tennessee annually, and there is every indication that federal contractors and subcontractors throughout Kentucky, Ohio, and Tennessee will continue bidding for new contracting opportunities.[6] *But see Hollis v. Biden*, 2021 WL 5500500 (N.D. Miss. Nov. 23, 2021) (finding institutions who are "likely to be recipients of" future federal contracts lacked standing to challenge Executive Order 14042). Therefore, given that the OMB's latest Determination on the matter is only a couple of weeks old, it seems disingenuous of Defendants to argue that because Plaintiffs do not yet have an example of a new contract

[5] As both parties declare in their briefing, the Court may take judicial notice of factual information located on government websites. *See Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 947 n.3 (6th Cir. 2020) (Bush, J., dissenting).

[6] This also applies to the two Sheriff Plaintiffs, Frederick W. Stevens and Scott A. Hildenbrand, who are suing in their official capacities as sheriffs for the Seneca County and Geauga County Sheriff's Offices, respectively. [*See* R. 12-2; R. 12-3.]

ensuring compliance with the vaccine clause, they lack standing. This situation is constantly changing, as evidenced by the email Counsel for the Plaintiffs received during the hearing in this matter stating that the University of Louisville, which relies on numerous contracts with the federal government to operate, would be implementing a vaccine mandate for all University of Louisville employees pursuant to Executive Order 14042.

Furthermore, the fact that governmental agencies are already requesting that current contracts, which are not officially subject to Executive Order 14042 and subsequent Guidance, comply with the vaccine mandate indicates a threat of future harm to the Plaintiffs. [*See* R. 32 at 5.] The Defendants argue that because the vaccine mandate only applies to future contracts, contractors with current contracts have a choice as to whether they will comply with the vaccine mandate or not. [R. 27 at 18.] However, if the government is already attempting to require contracts not officially covered by the vaccine mandate to still include such a mandate, it stands to reason that contractors who do not comply will likely be blacklisted from future contracting opportunities if they refuse to comply. This is particularly true given President Biden's remarks on September 7: "If you want to work with the federal government, vaccinate your workforce." Remarks of President Joseph Biden, Remarks at the White House (Sept. 9, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. Accordingly, the Court finds that Plaintiffs have satisfied their burden as to the Defendants' first standing argument.

Defendants next argue that Plaintiffs do not have standing to challenge the FAR Memo under the redressability prong. [R. 27 at 19.] Specifically, Defendants argue that because the FAR Memo merely "suggests a sample clause that agencies and contracting officers might use to implement the Executive Order," enjoining the FAR Memo would not actually redress any

injury. *Id.* However, the FAR Memo flows directly from the President's executive order, which tasked the FAR Council with recommending to agencies language to include in existing contracts until the Federal Acquisition Regulation could be amended. 86 Fed. Reg. at 50, 986.

Essentially, the effect of the FAR Memo is to force contractors and subcontractors with existing federal government contracts to include a vaccine mandate in their current contracts by adding a deviation clause to those current contracts. Sure, a contractor may refuse to include the deviation clause in their current contracts because current contracts are not covered by the vaccine mandate. But moving forward, those contractors who refuse to include a deviation clause, many of whom rely on federal contracts, are provided with a Hobson's choice: add the vaccine mandate to your current federal contracts by way of the deviation clause or lose out on future federal contracts. [R. 32 at 5–6.] Enjoining the vaccine mandate, including the FAR Memo, would redress this injury.

Here, the Court finds that Plaintiffs have sufficiently demonstrated that they have suffered an injury in fact, that the injury is fairly traceable to the Defendants' actions, and that enjoining the vaccine mandate will redress the Plaintiffs' injuries. *See Spear*, 520 U.S. at 162. The Court has the power to hear this case.

B

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (cleaned up) ("[A] preliminary injunction involv[es] the exercise of a very far-reaching power ...."). To issue a preliminary injunction, the Court must consider: (1) whether the movant has shown a strong likelihood of

success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Overstreet*, 305 F.3d at 573 (citations omitted).

The Court of Appeals clarified that, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). However, even if the plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits" an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Thus, the Plaintiffs must show that the foregoing preliminary injunction factors are met, and that immediate, irreparable harm will result if the injunction is not issued.

Defendants' arguments against Plaintiffs' motion for a preliminary injunction fall primarily into two buckets: (1) whether the president exceeded his statutory and constitutional authority in promulgating the executive order at issue in this case; and (2) whether the agencies at issue in this case followed the proper administrative procedures. Plaintiffs argue both that the president exceeded his authority in promulgating the executive order and that the agencies failed to follow the proper administrative procedures in implementing and enforcing President Biden's executive order.

1

President Biden issued Executive Order 14042 pursuant to the U.S. Constitution, 3 U.S.C § 301, which provides the president with general delegation authority, and 40 U.S.C. 101 *et seq.*, also known as the Federal Property and Administrative Services Act (FPASA). *See* 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Congress delegated to the president the authority to manage federal procurement through FPASA. 40 U.S.C. 101 *et seq.* The first question the Court must answer is whether President Biden exceeded his delegated authority under FPASA in promulgating Executive Order 14042. The Court finds that he did.

The scope of FPASA is a matter first impression in the Sixth Circuit[7] and presents a "difficult problem of statutory interpretation." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). The FPASA "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Id.* Congress's goal in enacting FPASA was to create an "economical and efficient system for…procurement and supply." *Id.* at 788. "'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789.

Through the FPASA, Congress granted to the president a broad delegation of power that presidents have used to promulgate a host of executive orders. *See, e.g.*, *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 366 (2003) (holding that FPASA authorized the president to require contractors to post notices at all facilities informing

[7] A Westlaw search of the term "Federal Property and Administrative Services Act" revealed that only four cases in the Sixth Circuit have even mentioned the Federal Property and Administrative Services Act, and none of them addressed the scope of the act. *See Americans United for Separation of Church and State v. School Dist. of City of Grand Rapids*, 718 F.2d 1389, 1415 (6th Cir. 1983) (Krupansky, J. dissenting); *Higginson v. United States*, 384 F.2d 504, 506 (6th Cir. 1967); *Solomon v. United States*, 276 F.2d 669, 673 (6th Cir. 1960); *United States v. Witherspoon*, 211 F.2d 858, 860 n.1 (6th Cir. 1954).

employees of certain rights); *Kahn*, 618 F.2d 784 (holding that FPASA authorized the president to require government contractors to comply with price and wage controls); *Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 905 (10th Cir. 2004) (holding that FPASA authorized executive order setting out priorities "for meeting Federal space needs in urban areas"). For decades, "the most prominent use of the President's authority under the FPASA [was] a series of anti-discrimination requirements for Government contractors." *Kahn*, 618 F.2d at 790.[8]

However, despite Congress's broad delegation of power under the FPASA, the President's authority is not absolute. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). The District of Columbia Circuit cautioned that the FPASA does not provide authority to "write a blank check for the President to fill in at his will. The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id.* (quoting *Kahn*, 618 F.2d at 793). Furthermore, the FPASA "does not allow the President to exercise powers that reach beyond the Act's express provisions, *Kahn*, 618 F.2d. at 797 (Tamm, J., concurring), and there must be a "close nexus between the Order and the objectives of the Procurement Act." *Id.* (Bazelon, J., concurring).

Defendants argue that the nexus between the vaccine mandate and economy and efficiency in federal contracting "is self-evident." [R. 27 at 23.] After all, Defendants argue, requiring vaccination for all government contractors and subcontractors will limit the spread of Covid-19, which in turn will (1) decrease worker absence; (2) decrease labor costs; and (3) improve efficiency at work sites. [R. 27 at 23 (citing Executive Order 14042).] However, the

[8] In dissent, Judge MacKinnon argues that the majority's argument that FPASA has been used in the past to invoke anti-discrimination orders is misleading because, in the cases relied on by the majority, either "the courts' discussion of the scope of the procurement power was dicta," or the court did not need to "rely exclusively on the presidential procurement power to uphold an affirmative action plan," and "did not do so." *Kahn*, 618 F.2d at 810 (MacKinnon, J. dissenting).

FPASA's goal is to create an "economical and efficient system for…*procurement and supply*." *Kahn*, 618 F.2d at 788 (emphasis added). While the statute grants to the president great discretion, it strains credulity that Congress intended the FPASA, a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination.

If a vaccination mandate has a close enough nexus to economy and efficiency in federal procurement, then the statute could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency. *Cf. Ala. Ass'n of Realtors v. Dept. of Health and Human Servs.*, 141 S. Ct. 2485, 2488–89 (2021) (finding the federal government's interpretation of § 361 would grant the CDC a "breathtaking amount of authority" that could be used to "mandate free grocery delivery for the sick or vulnerable…[r]equire manufacturers to provide free computers to enable people to work from home" or "[o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work").

The vaccine mandate applies to employees of federal contractors and subcontractors who work entirely from home and are not at risk of spreading Covid-19 to others. [R. 12 at 6 (citing Task Force Guidance).] Under the same logic employed by the Defendants regarding the vaccine mandate, what would stop FPASA from being used to permit federal agencies to refuse to contract with contractors and subcontractors who employ individuals over a certain BMI for the sake of economy and efficiency during the pandemic? After all, the CDC has declared that "obesity worsens the outcomes from Covid-19." Centers for Disease Control and Prevention, *Obesity, Race/Ethnicity, and COVID-19*, https://www.cdc.gov/obesity/data/obesity-and-covid-19.html (last visited Nov. 22, 2021).

Furthermore, the CDC states that Covid-19 spreads more easily indoors than outdoors. Centers for Disease Control and Prevention, *Participate in Outdoor and Indoor Activities*,

https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/outdoor-activities.html (last visited Nov. 22, 2021). Why couldn't the federal government refuse to contract with contractors and subcontractors who work in crowded indoor office spaces or choose to engage in indoor activities where Covid-19 is more likely to spread?

Although Congress used its power to delegate procurement authority to the president to promote economy and efficiency federal contracting, this power has its limits. *Reich*, 74 F.3d at 1330. Furthermore, even for a good cause, including a cause that is intended to slow the spread of Covid-19, Defendants cannot go beyond the authority authorized by Congress. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89; *see also Missouri v. Biden*, Case No. 4:21-cv-01329-MTS, at *3–4 (E.D. Mo. Nov. 29, 2021) (holding that Congress must provide clear authorization if delegating the exercise of powers of "vast economic and political significance," if the authority would "significantly alter the balance between federal and state power," or if the "administrative interpretation of a statute invokes the outer limits of Congress' power"). Accordingly, the Court finds that the president exceeded his authority under the FPASA.

a

There are several concerning statutory and constitutional implications from President Biden exceeding his authority under the FPASA. Three of particular concern are the Competition in Contracting Act, the nondelegation doctrine and concerns regarding federalism, and the Tenth Amendment.[9]

[9] The Plaintiffs also briefly argue that the vaccination mandate violates the Spending Clause. Plaintiffs cite to *Cutter v. Wilkenson* to argue that the government must "state all conditions on the receipt of federal funds 'unambiguously' so as to 'enabl[e] the states to exercise their choice knowingly." [R. 12 at 21 (citing 423 F.3d 579, 585 (6th Cir. 2005) (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).] However, Plaintiffs fail to point to any support for the proposition that federal contract obligations are subject to the *Dole* clarity requirement. The Court is concerned, given that the Defendants in this case are "acting as patron rather than sovereign" that accepting the Plaintiffs' argument may turn simple budgetary imprecisions in federal procurement into matters of constitutional concern. [R. 27 at 33 (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998)).] At this early stage in the

Plaintiffs argue that President Biden exceeded his authority under the Competition in Contracting Act. [R. 12 at 16.] Pursuant to 41 U.S.C. § 3301(a)(1), federal agencies must provide "full and open competition through the use of competitive procedures" in procurement. Plaintiffs argue that the vaccine mandate violates § 3301. *Id.* Defendants argue that just because a requirement may exclude certain contractors from bidding on certain jobs, that does not mean that the requirement runs afoul of the Competition in Contracting Act. [R. 27 at 24 (citing *Nat'l Gov't Servs, Inc. v. United States*, 923 F.3d 977, 985 (Fed. Cir. 2019)).]

However, *National Government Services* supports the Plaintiff's position. In *National Government Services*, the Federal Circuit determined that a contract award limit placed on contractors by Centers for Medicare and Medicaid Services violated the Competition in Contracting Act because it failed to provide for full and open competition, which the Act requires. 923 F.3d at 990. The court held that "the Award Limitations Policy precludes full and open competition by effectively excluding an offeror from winning an award, even if that offeror represents the best value to the government." *Id.* Here, Defendants may run into the same problem: contractors who "represent[] the best value to the government" but choose not to follow the vaccine mandate would be precluded from effectively competing for government contracts. *Id.*

Defendants cannot preclude full and open competition pursuant to the Competition in Contracting Act, and Defendants have not demonstrated that they followed "the congressionally designed procedure for" excluding unvaccinated contractors and subcontractors from government contracts. *Id.* Accordingly, at this early stage in the litigation, the Court finds that this argument favors the Plaintiffs.

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litigation, and on the record before the Court, the Court does not find that Plaintiffs are likely to succeed on the merits as to this claim.

b

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I § 1. "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). Therefore, under the nondelegation doctrine, Congress may not "delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935). In the nondelegation doctrine context, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123. Here, Plaintiffs argue that FPASA "lacks any intelligible principle if interpreted so loosely as to bless the Administration's practices here." [R. 12 at 22.] Plaintiffs argue that mandating vaccination for millions of federal contractors and subcontractors is a decision that should be left to Congress (or, more appropriately, the States) and is a public health regulation as opposed to a measure aimed at providing an economical and efficient procurement system. *Id.* at 22–23. Defendants respond that the "Procurement Act's delegation of authority fits comfortably within the bounds of constitutionally permissible delegations," particularly given the leniency of the "intelligible principle" standard. [R. 27 at 35.]

It would be reasonable to assume that a vaccine mandate would be more appropriate in the context of an emergency standard promulgated by OSHA. After all, OSHA was created "to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance." Occupational Safety and Health Administration, *About OSHA*, https://www.osha.gov/aboutosha (last visited Nov. 23, 2021). On

November 5, 2021, OSHA promulgated a vaccine mandating requiring all employers with 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy." 86 Fed. Reg. 61,402,61,402. However, the Fifth Circuit recently found that the "Occupational Safety and Health Act, which created OSHA," could not be used under the nondelegation doctrine to "make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings, LLC v. OSHA*, --- F.4th ---, 2021 WL 5279381, at *3 (5th Cir. Nov. 12, 2021). If OSHA promulgating a vaccine mandate runs afoul of the nondelegation doctrine, the Court has serious concerns about the FPASA, which is a procurement statute, being used to promulgate a vaccine mandate for all federal contractors and subcontractors.[10]

Admittedly, the OSHA vaccine mandate at issue in *BST Holdings* and the vaccine mandate in this case differ in significant ways. First, of course, the purposes and effects of the two statutes are markedly different. The Occupational Safety and Health Act created OSHA, which is a governmental agency responsible for overseeing workplace safety in the United States. *See* Occupational Safety and Health Administration, *About OSHA*. The FPASA, on the other hand, was enacted to create an "economical and efficient system for…procurement and supply." *Kahn*, 618 F.2d at 788.

Second, the scope and impact of the two vaccine mandates are different. The OSHA vaccine mandate applied to all companies in the United States with one hundred or more employees. *BST Holdings, LLC*, 2021 WL 5279381, at *1. The OSHA mandate would have

[10] Following the Fifth Circuit's stay issued on November 6 and extended on November 12, the Sixth Circuit was chosen by random multi-circuit lottery to decide the outcome of OSHA's Emergency Temporary Standard requiring Covid-19 vaccination or weekly testing. Andrea Hsu, *6th Circuit Court 'wins' lottery to hear lawsuits against Biden's vaccine rule*, NPR (Nov. 16, 2021), https://www npr.org/2021/11/16/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery. That matter is currently pending before the Sixth Circuit. *See In re: MCP No. 165; OSHA Rule on Covid19 Vaccination and Testing, 86 Fed. Reg. 61402*, No. 21-7000.

forced all companies in the United States with one hundred or more employees to comply with the mandate or pay a fine. *Id.* Here, however, contractors and subcontractors are free to choose whether they want to bid for federal government contracts. Only if a contractor or subcontractor chooses to contract with the federal government will they be required to abide by the vaccine mandate. Therefore, the federal government is not forcing the vaccine mandate on contractors writ large, only contractors and subcontractors who choose, moving forward, to contract with the federal government.

Third, although *BST Holdings* concerned the imposition of a vaccine mandate on private businesses, the vaccine mandate in this case concerns the federal government acting as a business entity in its own interest. Generally, the federal government, as a business entity, is free to "determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

Notwithstanding these differences, however, one thing is clear in both cases: neither OSHA nor the executive branch is permitted to exercise statutory authority it does not have. *Cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."); *Kahn*, 618 F.2d at 811 (MacKinnon, J., dissenting) ("Mere proximity may count in horseshoes and dancing, but adherence to congressionally-prescribed standards is required for valid lawmaking by executive officers."). In this case, the FPASA was enacted to promote an economical and efficient procurement system, and the Defendants cannot point to a single instance when the statute has been used to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors.

It is true that only twice in American history, both in 1935, has the Supreme Court found Congressional delegation excessive. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. 495; *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The Court believes that today's holding is consistent with prior nondelegation doctrine precedent. However, because cases analyzing the contours of the nondelegation doctrine are scarce, it may be useful for appellate courts to further develop the contours of the nondelegation doctrine, particularly in light of the pandemic. *See Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

c

The Court is also concerned that the vaccine mandate intrudes on an area that is traditionally reserved to the States. This principle, which is enshrined in the Tenth Amendment of the Constitution, states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[11] U.S. Const. amend. X. Generally, "[t]he regulation of health and safety matters is primarily and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *see also South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring). Plaintiffs argue that the federal government "has no general police power, and nothing in the Constitution gives the federal government the power it seeks here." [R. 12 at 20.] In response, Defendants argue that the FPASA is a "validly enacted

[11] *See* Thomas Jefferson Letter to George Washington, Feb. 15, 1791, Opinion on Bill for Establishing a National Bank ("I consider the foundation of the Constitution as laid on this ground that 'all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people' ... To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.").

[statute] under one of Congress's enumerated powers, and the Executive Branch [is exercising] authority lawfully delegated under that statute."[12] [R. 27 at 31.]

The Fifth Circuit recently addressed federalism concerns in a similar governmentally imposed vaccine mandate context:

> [T]he Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power…The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power. In sum, the Mandate would far exceed current constitutional authority.

BST Holdings, LLC, 2021 WL 5279381, at *7 (citations omitted). The Court finds *BST Holdings* to be persuasive. On the record currently before the Court, there is a serious concern that Defendants have stepped into an area traditionally reserved to the States, and this provides an additional reason to temporarily enjoin the vaccine mandate.

2

The next issue is whether the relevant agencies in this case followed the proper administrative procedures. Plaintiffs argue that (1) the Defendants issued the FAR Council Guidance and OMB Determination in violation of the procedure required by law; and (2) the agencies' actions were "arbitrary and capricious." [R. 12 at 10, 17.]

[12] Defendants also argue that the doctrine of intergovernmental immunity applies here, arguing that "federal contractors are treated the same as the federal government itself." [R. 27 at 32 (citing *United States v. Cal.*, 921 F.3d 865, 882 n.7 (9th Cir. 2019)).] However, as Plaintiffs point out, intergovernmental immunity is not relevant to this lawsuit because "Plaintiffs are not suing federal contractors for violations of state law," but are instead suing the federal government as, at least in part, federal contractors. [R. 32 at 18.]

a

The Administrative Procedure Act (APA) requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be…without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Specifically, Plaintiffs argue that 41 U.S.C. § 1707(a) requires procurement policies, regulations, procedures, or forms to be published in the Federal Register for sixty days before it can take effect, which Plaintiffs state Defendants failed to do with regards to the FAR Council Guidance and OMB Determination.[13] In response, Defendants argue that the FAR Council Guidance is not final agency action or subject to review under § 1707. [R. 27 at 29.] Furthermore, Defendants argue that the OMB Determination is not reviewable under § 1707, and even if it were reviewable, the OMB Determination satisfies § 1707's procedural requirements. *Id.* at 25. Although the procedural path taken by the agencies was, at times, inartful and a bit clumsy, the Court finds based on the record before it that the Defendants likely followed the procedures required by statute.

First, FAR Council Guidance is not subject to judicial review pursuant to the APA because the Guidance does not constitute final agency action. *See Spear*, 520 U.S. at 178 (finding that final agency action is action that marks "the consummation of the agency's decisionmaking process," and "by which rights or obligations have been determined, or from which legal consequences will flow"). Here, as Defendants correctly argue, Executive Order 14042 instructed the FAR Council to "take *initial* steps to implement" the contract clause. 86 Fed. Reg. 50,985–88 (Sept. 9, 2021) (emphasis added). Therefore, the FAR Council Guidance is not final agency action and is therefore not subject to judicial review under the APA.

[13] Plaintiffs also invoke 5 U.S.C. § 553 but focus on § 1707 "because it is more stringent." [R. 12 at 11.]

Furthermore, § 1707 does not apply to the FAR Council Guidance because it constitutes nonbinding guidance that does not rise to the level of a "procurement policy, regulation, procedure, or form." § 1707. The purpose of the FAR Council Guidance was to "support agencies in meeting the applicability requirements and deadlines set forth in" the executive order, and to encourage agencies to "exercise their authority" in helping contractors and subcontractors insert deviation clauses into their contracts. FAR Council Guidance. Therefore, the Court finds that Plaintiffs' challenge of Defendants' FAR Council Guidance is not likely to succeed on the merits.

The OMB Determination is a bit more complicated. Plaintiffs filed their Motion for a Preliminary Injunction and argued that the OMB Determination failed to "adhere to the process mandated by law." [R. 12 at 12.] However, on November 16, eight days after Plaintiffs filed their motion, the OMB Director rescinded its original Determination and issued a new Determination. 86 Fed. Reg. 63418. In addition to revoking the prior Determination, the OMB Director's new Determination also provided more robust support for the proposition that the vaccine mandate will promote economy and efficiency in government contracting, provided covered contractors more time to comply with the vaccine mandate, and invoked § 1707 "to the extent that…1707 is applicable." *Id.*

Defendants first argue that § 1707 does not apply to the OMB determination because that section "does not apply to exercises of Presidential authority like the OMB Determination" in this case. [R. 27 at 25.] However, the D.C. Circuit squarely rejected this argument in *Reich*. There, the Court stated:

> That the "executive's" action here is essentially that of the President does not insulate the entire executive branch from judicial review. We think it is now well established that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the

> President's directive." *Franklin*, 505 U.S. at 815, 112 S.Ct. at 2790 (Scalia, J., concurring in part and concurring in the judgment). Even if the Secretary were acting at the behest of the President, this "does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands."

Reich, 74 F.3d at 1328. The Court further explained that "if [a] federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit." *Id.* at 1329. The Court finds *Reich* to be persuasive. *Reich* also involved a challenge to an executive order promulgated under FPASA. *Id.* at 1324. Therefore, the Court finds that review of the OMB Determination is appropriate in this case.

However, judicial review is not fatal to the OMB Determination. From the outset, the Court notes that Plaintiff's arguments pertaining to the September 24 OMB Determination were rendered moot by the promulgation of the new OMB Determination on November 16. *See Akiachak Native Community v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (collecting cases demonstrating that it is an "uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"). Furthermore, Plaintiffs argued that the OMB Director failed to either permit notice and comment or invoke § 1707(d)'s waiver of notice and comment. [R. 12 at 11–12.] While this was true of the OMB Director's initial Determination, the subsequent Determination included a thirty-day notice and comment period and invoked § 1707(d). 86 Fed. Reg. 63423.

Plaintiffs argue that the OMB Director's invocation of § 1707(d) in its subsequent Determination is "facially senseless" and irrational because the Determination simultaneously delayed the mandate compliance date and invoked the § 1707(d) "urgent and compelling circumstances," exception. [R. 32 at 10–11.] Plaintiffs' argument is well taken, and further

review may demonstrate that the OMB Determination failed to follow the proper procedures. However, there is no evidence of bad faith on the part of the OMB Director, and Counsel for the Defendants explained during the hearing in this matter that the compliance date was delayed to benefit federal contractors and ensure that they would have sufficient time to comply with the mandate. Ultimately, based on the limited record, the Court finds that the FAR Council Guidance and subsequent OMB Determination in this matter did not run afoul of the proper administrative procedures.

b

Plaintiffs also argue that the administration's actions in promulgating the vaccine mandate were arbitrary and capricious under the APA.[14] As the Supreme Court recently explained:

> The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.

Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

First, Plaintiffs argue that the OMB Determination failed to explain how the vaccine mandate would "promote economy and efficiency in procurement." [R. 12 at 17.] Second, Plaintiffs argue that Defendants "failed to consider the possibility that their actions would cause a labor shortage." *Id.* at 18. Third, Plaintiff argue that the OMB Determination ignored "costs to the Plaintiffs." *Id.* Fourth, Plaintiffs argue that the OMB Determination failed to consider "lesser alternatives to a vaccine mandate." *Id.* And finally, Plaintiffs argue that the Task Force

[14] Plaintiffs' arguments here pertain to both the FAR Council Guidance and OMB Determination. [R. 12 at 17–19.] However, because the Court found above that the FAR Council Guidance was not subject to review under the APA, the Court need only address Plaintiffs' arguments as they pertain to the OMB Determination.

Guidance and FAR Council Guidance concluding that the vaccine mandate would "improve procurement efficiency by reducing absenteeism and decreasing labor costs is blatantly pretextual." *Id.* at 19.

Plaintiffs' first argument primarily pertained to the OMB Director's first Determination, which, as explained above, is now moot. It is true that the first Determination only included a 210-word explanation for how the vaccine mandate would create contracting efficiencies. *See* OMB Determination, 86 Fed. Reg. at 53,691–92. But the subsequent Determination promulgated on November 16 included a more thorough and robust economy-and-efficiency analysis. *See* Fed. Reg. 86 63,421–23. Therefore, Plaintiffs' first argument fails.

Similar to Plaintiffs' first argument, the second are third arguments are more applicable to the OMB Director's first Determination than the second. In the OMB Director's second Determination, she specifically addressed potential effects on the labor force and costs of the vaccine mandate, finding that few employees will quit if faced with a vaccine mandate and that Covid-19 vaccination will reduce net costs. *Id.* at 63421–23. It is perfectly reasonable for the Plaintiffs to disagree with Defendants on this point. However, "[w]hen, as here, an agency is making predictive judgments about the likely economic effects of a rule, we are particularly loath to second-guess its analysis." *Newspaper Ass'n of Am. v. Postal Regul. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013).

The Court likewise rejects Plaintiffs' one-sentence argument that the OMB Director failed to consider lesser alternatives to a vaccine mandate. *See La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327, 338 n.5 (6th Cir. 2010) (finding argument made without elaboration is waived); *see also In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 901

(6th Cir. 2009) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Plaintiffs' final argument, that Defendants' finding that a vaccine mandate would improve procurement efficiency is pretextual, also fails. To support this argument, Plaintiffs argue that from the beginning, the President's statements demonstrate that this executive order and the vaccine mandate are an effort to get more people vaccinated. [R. 12 at 19.] However, the Court is "reluctant to consider the President's motivation in issuing the Executive Order." *Reich*, 74 F.3d at 1335. Furthermore, the subsequent OMB Determination provided ample support for the premise that a vaccine mandate will improve procurement efficiency. *See* 86 Fed. Reg. 63,421–23. Furthermore, "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). Accordingly, the Plaintiffs' arguments that the administration's actions were arbitrary and capricious fail.

3

The Court finds, based on the limited record at this stage in the litigation, that Defendants have followed the appropriate procedural requirements in promulgating the vaccine mandate. However, because the Court also finds that the president exceeded his authority under the FPASA, and for the serious Constitutional concerns addressed above, the Court holds that Plaintiffs are likely to succeed on the merits as to their preliminary injunction. Furthermore, the Court finds that Plaintiffs are likely to suffer irreparable harm without preliminary relief and that preliminary relief is not contrary to the public interest.

Plaintiff agencies and contractors are now having to make tough choices about whether they will choose to comply with the vaccine mandate or lose out on future federal government

contracts. For the individual Plaintiffs, "the loss of constitutional freedoms 'for even minimal periods of time…unquestionably constitutes irreparable injury.'" *BST Holdings, LLC*, 2021 WL 5279381, at *8 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Furthermore, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance." *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)). And the States "have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach." *Id.* Finally, "any abstract 'harm' a stay might cause…pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." *Id.* Therefore, Plaintiffs have satisfied the requisite preliminary injunction factors in this case.

C

Lastly, the Court must consider the scope of its injunction. The Sixth Circuit has held that a "district court should limit the scope of [an] injunction to the conduct 'which has been found to have been pursued or is related to the proven unlawful conduct.'" *Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015) (quoting *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994)). The Defendants' actions affect Kentucky, Ohio, and Tennessee, as well as the additional two plaintiffs in this case. However, individuals in every state in the country are affected. While it is true that the evidence presented by the parties primarily relates to Kentucky, Ohio, and Tennessee, this Court's ruling rests on facts that are universally present in the federal government's dealings with contractors and subcontractors in all of the states. Consequently, this Court must consider the breadth of its injunction. Should it temporarily enjoin enforcement of the vaccine mandate for contractors and subcontractors as it relates to (1)

the Eastern District of Kentucky (this Court's District); (2) Ohio, Tennessee, and Kentucky (the entities before the Court); or (3) all of the States (both parties and non-parties).

In *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) Justice Thomas discussed the increasing frequency of "universal" or "nationwide injunctions." Justice Thomas expressed his skepticism of such injunctions, noting: (1) historical principles of equity in Article III courts; (2) the recency of nationwide injunctions; (3) and the properly limited role of district courts. *Id.* at 2425–29 ("[In the past, as] a general rule, American courts of equity did not provide relief beyond the parties to the case"). Justice Thomas found that the sweeping relief brought by nationwide injunctions likewise brings "forum shopping" and makes "every case a national emergency for the courts and the Executive Branch." *Id.* at 2425. Instead, district courts should allow legal questions to percolate through the federal court system. *Id.* Justice Gorsuch affirmed this notion in *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Noting that "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit," Justice Gorsuch found that nationwide injunctions "raise serious questions about the scope of courts' equitable powers under Article III." *Id.* Not only are such injunctions impracticable, they "force judges into making rushed, high-stakes, low-information decisions." *Id.* Careful review by multiple district and circuit courts, on the other hand, allows the Supreme Court the benefit of thoughtful and, at times, competing outcomes. *Id.*

Although the debate over the proper scope of injunctions is ongoing, this Court believes that redressability in the present case is properly limited to the parties before the Court. Consequently, the scope of the permanent injunction shall apply to Kentucky, Ohio, Tennessee and the additional sheriff plaintiffs before the Court in equal force.

III

Once again, the Court is asked to wrestle with important constitutional values implicated in the midst of a pandemic that lingers. These questions will not be finally resolved in the shadows. Instead, the consideration will continue with the benefit of full briefing and appellate review. But right now, the enforcement of the contract provisions in this case must be paused.

Accordingly, and the Court being sufficiently advised and for the reasons set forth herein, it is hereby **ORDERED** as follows:

1. Plaintiffs' motion for a preliminary injunction **[R. 12]** is **GRANTED**;
2. The Government is **ENJOINED** from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.

This the 30th day of November, 2021.

Gregory F. Van Tatenhove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, et al., Defendants.	CIVIL ACTION NO.: 1:21-cv-163

O R D E R

Plaintiffs, comprised of the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia; the governors of several of those states; and various state agencies, including the Board of Regents of the University System of Georgia, filed this suit seeking declaratory and injunctive relief against enforcement of Executive Order 14042, which requires, *inter alia*, that contractors and subcontractors performing work on certain federal contracts ensure that their employees and others working in connection with the federal contracts are fully vaccinated against COVID-19. (Docs. 1, 54.) Upon filing the lawsuit, Plaintiffs requested that this Court issue a preliminary injunction. (Docs. 19, 55.) Additionally, Associated Builders and Contractors, Inc. (hereinafter, "ABC"), a trade organization, and one of its chapters, Associated Builders and Contractors of Georgia, Inc. (hereinafter, "ABC-Georgia"), (hereinafter, collectively, "Proposed Intervenors")) filed a Motion to Intervene in the action, (doc. 48), and also filed their own Motion for Preliminary Injunction, (doc. 50). The Court established an expedited briefing schedule and, following the submission of responses by the Defendants to all motions, (docs. 61,

63), and the submission of replies by Plaintiffs and by the Proposed Intervenors, (docs. 76–78), the Court conducted a hearing on the Motions on December 3, 2021.

As another Court that has preliminarily enjoined the same measure at issue in this case has stated, "[t]his case is not about whether vaccines are effective. They are." Kentucky v. Biden, No. 3:21-cv-55, 2021 WL 5587446, at *9 (E.D. Ky. Nov. 30, 2021). Moreover, the Court acknowledges the tragic toll that the COVID-19 pandemic has wrought throughout the nation and the globe. However, even in times of crisis this Court must preserve the rule of law and ensure that all branches of government act within the bounds of their constitutionally granted authorities. Indeed, the United States Supreme Court has recognized that, while the public indisputably "has a strong interest in combating the spread of [COVID-19]," that interest does not permit the government to "act unlawfully even in pursuit of desirable ends." Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 585–86 (1952)). In this case, Plaintiffs will likely succeed in their claim that the President exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act when issuing Executive Order 14042. Accordingly, after due consideration of the motions, supporting briefs, responsive briefing, and the evidence and argument presented at the hearing,[1] the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC's Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs' Amended Motion for Preliminary Injunction, (doc. 55).

[1] On December 2, 2021, the American Medical Association, which is not a party to this case, was granted leave of Court to file an *amicus curiae* brief in opposition to Plaintiffs' Amended Motion for Preliminary Injunction. (Doc. 86.)

BACKGROUND

On January 20, 2021, President Biden signed Executive Order 13991, establishing the "Safer Federal Workforce Task Force" (hereinafter, the "Task Force"). 86 Fed. Reg. 7,045–48 (Jan. 20, 2021). The Task Force's stated mission is to "provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic." Id. at 7,046.

On September 9, 2021, President Biden signed Executive Order 14042 (hereinafter, "EO 14042"). 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Therein, the President stated that his order would "promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument," which would "decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." Id. at § 1. EO 14042 mandated that the Task Force provide, by September 24, 2021, guidance regarding "adequate COVID-19 safeguards," which must be complied with by federal contractors and subcontractors. Id. at 50,985. This executive order specified that the Task Force's guidance would be mandatory at all "contractor or subcontractor workplace locations" so long as the Director of the Office of Management and Budget (hereinafter, the "OMB") approved the guidance and determined that it would "promote economy and efficiency in Federal contracting." Id. EO 14042 states that it applies, with some specified exceptions, to "any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument;

extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument." Id.

On September 24, the Task Force issued its Guidance for Federal Contractors and Subcontractors (hereinafter, the "Task Force Guidance") pursuant to EO 14042. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, available at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Dec. 4, 2021). The Task Force Guidance requires all "covered contractors"[2] to be fully vaccinated by January 18, 2022,[3] unless they are "legally entitled to an accommodation." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), at p. 5, available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). The Task Force Guidance applies to all "newly awarded covered contract[s]" at any

[2] "Covered contractor" means "a prime contractor or subcontractor at any tier who is party to a covered contract." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at p. 3.

[3] While the initial Task Force Guidance announced a deadline of December 8, 2021, on November 10, 2021, an updated version was issued which pushed the deadline for full vaccination to January 18, 2022. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). This means that covered contractors' employees would need to receive their Johnson & Johnson vaccine or the second dose of a Pfizer or Moderna vaccine by January 4 to be fully vaccinated by the deadline. See The White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies, https://www.whitehouse.gov/briefing-room/statementsreleases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/ (last visited Dec. 4, 2021).

location where covered contract employees work and it covers "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace." Id. at pp. 3–5.

On September 28, the Director of the OMB issued a notice of her determination "that compliance by [f]ederal contractors and subcontractors with the COVID-19 workplace safety protocols detailed in th[e] [Task Force G]uidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691–92.

In order to implement the policies and requirements it established, EO 14042 directed the Federal Acquisition Regulatory Council (hereinafter, the "FAR Council") to "amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order [a] clause" requiring compliance with the Task Force Guidance (including the vaccination requirements). 86 Fed. Reg. 50,986. The Federal Acquisition Regulation (hereinafter, the "FAR") is the set of policies and procedures that governs the drafting and procurement processes of contracts for all executive agencies; it also contains standard solicitation provisions and contract clauses. See United States General Services Administration, Federal Acquisition Regulation (FAR), https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far (last visited Dec. 4, 2021).

On September 30, 2021, the FAR Council issued a memo to various agencies, providing direction on when and how to use the new clause, (hereinafter, the "FAR Memo"). See FAR Council Guidance, https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf (last visited Dec. 4,

2021). The FAR Memo explains that EO 14042 directed the FAR Council to "develop a contract clause requiring contractors and subcontractors . . . to comply with [the Task Force Guidance] and to provide initial policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4, Deviations from the FAR." Id. at p. 2. According to the FAR Memo, "[t]he FAR Council has opened a case (FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) to make appropriate amendments in the FAR to reflect the requirements of [EO 14042]," id. at p. 3, and it has "developed [a] clause"—which it included as an attachment to the memo—"pursuant to section 3(a) of the order to support agencies in meeting the applicability requirements and deadlines set forth in [EO 14042]," id. at p. 2. The attachment is entitled "FAR Deviation Clause . . . [52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors . . .]," and it states, *inter alia*:

> *(c) Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at *https:/www.saferfederalworkforce.gov/contractors/*.
>
> *(d) Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

Id. at pp. 4–5. The FAR Memo lists the types of solicitations and contracts in which the agencies "are *required* to include" the new clause, id. at p. 2 (emphasis added), but it also states that, "[t]o maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force *strongly encourages* agencies to apply the requirements of its guidance broadly,

consistent with applicable law, by including the clause in" other types of contracts that are not otherwise covered by EO 14042, id. at p. 3 (emphasis added).

Plaintiffs filed their Complaint initiating this action on October 29, 2021, (doc. 1), and they filed their initial Motion for Preliminary Injunction on November 5, 2021, (doc. 19). On November 10, 2021, the OMB Director issued a revised Determination that (1) revoked the prior OMB Determination; (2) provided additional reasoning and support for how the Task Force Guidance will promote economy and efficiency in government contracting; (3) gave covered contractors additional time to comply with the vaccination requirement; and (4) provided a public comment period through December 16, 2021. See 86 Fed. Reg. 63,418. In light of the revised OMB Determination, Plaintiffs filed an Amended Complaint, (doc. 54), and an Amended Motion for Preliminary Injunction, (doc. 55). Meanwhile, the Proposed Intervenors filed their Motion to Intervene as Plaintiffs, (doc. 48), and their Motion for Preliminary Injunction, (doc. 50). All parties were given an opportunity to file responsive briefs and to present evidence and argument during the hearing on December 3, 2021.

During the hearing, Plaintiffs presented testimony from representatives of three universities within the University System of Georgia: Augusta University, Georgia Institute of Technology (hereinafter, "Georgia Tech"), and the University of Georgia (hereinafter, "UGA"). (See also doc. 55-12, p. 4 (these three institutions' federal contracts generated approximately $736,968,899.00 in revenue in fiscal year 2021).) These witnesses each testified generally about their respective research institution's participation in and reliance on federal contracting, and they provided data regarding the number of employees who work on federal contracts at their institution and the amount of funds received by their institution as a result of its various federal contracts.

(See, e.g., Transcript of Dec. 3, 2021 Hearing (hereinafter, "Tr."), pp. 22–27 (testimony of Michael Shannon, Vice President and Deputy Chief Business Officer at Georgia Tech, that Georgia Tech has roughly 16,000 employees who work on contracts with the Department of Defense, the Department of Commerce, the Department of Transportation, the Department of Health and Human Services, the National Aeronautics and Space Administration (hereinafter "NASA"), the Centers for Disease Control, and other agencies, and, in fiscal year 2021, it received approximately $664 million in federal contracts, which constitutes approximately 68% of its externally sponsored revenue); id. at pp. 67–70 (testimony of Jason Guilbeault, Director of Post-Award Services at Augusta University, that his institution receives over $17 million per year on federal contracts, which represents about 10% of its total sponsored programs funding, and that it has roughly 5,802 employees working on federal contracts, which represents about 95% of its workforce); id. at p. 93 (testimony of Sige Burden, Senior Managing Director for Workforce Engagement at UGA, that UGA has 14,728 employees working on or in connection with federal contracts.) They also each provided even more detailed testimony about the laborious undertakings they have had to perform to comply with the mandate, particularly with the impending January 18 deadline. (See, e.g., id. at pp. 24–27 (testimony of Shannon that Georgia Tech had to "shift a tremendous amount of resources" in order to build a "team comprised of [members of the] information technology [department], [the human resources department], . . . medical and health services folks, [Georgia Tech's] legal team, [and its] emergency services folks" to "very, very rapidly" work to "create something that didn't exist"—a portal to "marry [human resources] data and medical data together"); id. at pp. 70 (testimony of Guilbeault about the data analytics he performed to identify the wide variety of employees who are covered by the mandate, and the software program he has

helped implement to permit employees to log in and enter their vaccination information and a scan of their vaccine card or to log in and submit questions).) Finally, they testified to having a number of employees who have not yet provided proof they are vaccinated or are in the process of becoming vaccinated, and the concern it causes them that many employees will ultimately decline to be vaccinated, meaning the institution will ultimately be non-compliant and may lose valuable employees. (See, e.g., id. at pp. 30–33 (about 20% of Georgia Tech's employees who may be covered have not provided proof they are vaccinated); id. at pp. 71–72 (about 39% of Augusta State employees who may be covered have not provided proof); id. at pp. 92–93 (fewer than half of the University of Georgia's employees who may be covered have provided proof of vaccination).) The Court, which heard testimony from each of these witnesses about their background and job experience and was able to observe them during both direct and cross-examination, found these witnesses to be credible.

LEGAL AUTHORITY & DISCUSSION

I. Motion to Intervene

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a party is permitted to intervene as of right if (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) its interest is represented inadequately by the existing parties to the suit. Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship, 874 F.3d 692, 695–96 (11th Cir. 2017). Where a party is not entitled to intervene as of right, subsection (b) of Federal Rule of Civil Procedure 24 gives a court discretion to nonetheless permit the party to intervene, on timely motion, "when a statute of the United States

confers a conditional right to intervene," or "when [the] applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Accordingly, when there is no right to intervene under Rule 24(a), it is wholly within the Court's discretion to allow permissive intervention under Rule 24(b). Worlds v. Dep't of Health & Rehab. Servs., 929 F.2d 591, 595 (11th Cir. 1991). Subsection (b) of Rule 24 instructs only that the Court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

First, the Court finds that ABC, a trade organization representing tens of thousands of contractors and subcontractors that regularly bid on and work on federal contracts for services, (doc. 49-1, pp. 2–3), has an interest relating to the transaction which is the subject of the action. See N.Y. Pub. Interest Research Grp. v. Regents of Univ. of N.Y., 516 F.2d 350, 352 (2d Cir. 1975) (intervening organizations may properly assert the interests of their members). That interest is described in detail in Discussion Section II, infra, where the Court explains its conclusion that ABC has standing. Next, the Court finds that ABC's ability to protect its interests would be impaired without intervention. In ABC's own words, "in the event that the Proposed Intervenors cannot intervene[,] and this Court issues an adverse decision, the Proposed Intervenors will have no further recourse" and it members will have to comply with EO 14042, (doc. 49, p. 16), which—as explained throughout this Order—the Court finds costly, laborious and likely to result in a reduction in available members of the workforce. See Huff v. Comm'r of IRS, 743 F.3d 790, 800 (11th Cir. 2014) ("All that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings."). Additionally, the Motion to Intervene was timely. ABC filed its Motion to Intervene roughly twenty days after Plaintiffs filed

suit and prior to any substantive decisions having been made by the Court. At the time the Motion to Intervene was filed, Defendants had not yet responded (or been required to respond) to any substantive requests for relief in the case. Indeed, the day after ABC filed its Motion to Intervene, Plaintiffs filed their Amended Complaint (and Amended Motion for Preliminary Injunction), superseding their prior pleadings. Finally, the Court finds that ABC's interests are represented inadequately by the existing Plaintiffs. ABC represents private entities, many of whom are considered small businesses, while the Plaintiffs are all governmental officials, entities, and agencies. ABC seeks to assert a clam for violation of the Small Business Regulatory Enforcement Fairness Act, which the existing Plaintiffs have not asserted (and may not be able to assert even if they desired to do so). (See doc. 48-1, p. 40.) Additionally, the evidence presented to the Court indicates that ABC's members generally bid on and perform different types of contracts as compared to the wider-ranging types of contracts the Plaintiffs typically bid on and perform, and Plaintiffs and ABC also have different administrative systems and costs when it comes to managing their employees and workforce. Accordingly, ABC's members (as private entities) have economic interests and concerns that differ from those of the Plaintiffs.[4] See, e.g., Kleissler v. United States Forest Serv., 157 F.3d 964, 973–74 (3d Cir. 1988) ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies."); W. Energy Alliance v. Zinke, 877 F.3d 1157, 1168 (10th Cir. 2017)

[4] As a specific example, one differing interest and strategy that was readily apparent during oral argument concerned the scope of any preliminary injunction. The existing Plaintiffs indicated they would be satisfied if the Court issued a preliminary injunction only effective in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, while ABC, whose members work on contracts throughout the country, urged that any preliminary injunction would need to be nationwide in order to afford it adequate relief.

("Also, we have held that the government cannot adequately represent the interests of a private intervenor and the interests of the public.").

ABC-Georgia, however, has failed to show that it has standing to bring the claims it seeks to assert in its proposed complaint. No evidence was presented to show that any specific member of the chapter would have standing (i.e., no evidence was presented showing that any member regularly bids on or performs contracts that would be covered under EO 14042, much less that any member wishes to bid on any upcoming contracts that would be covered by EO 14042 but believes it cannot feasibly do so due to the vaccine requirement).

In light of the foregoing, the Court finds that ABC is entitled to intervene as of right in this case pursuant to Federal Rule of Civil Procedure 24(a). Even if it were not permitted to intervene as of right, the Court would exercise its discretion pursuant to subsection (b) of Rule 24 to permit it to intervene because, for the reasons described above, its claims and the main action "have a question of law or fact in common," Fed. R. Civ. P. 24(b), and its intervention will not result in any undue delay or prejudice to the adjudication of the original parties' rights. The Court, however, finds that ABC-Georgia lacks standing to assert its claims and thus is not entitled to intervene. Accordingly, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene. (Doc. 48.)

II. Standing

"[The] standing doctrine . . . requir[es] plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf.'" Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). To establish Article III standing a

plaintiff must show that it: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo v. Robins, 578 U.S. 330, 338 (2016).

Defendants have focused much of their standing challenge on arguing that Plaintiffs have not "provide[d] [any] evidence that they are (1) parties to a federal contract that already has the challenged clause; or (2) parties to an existing covered contract that is up for an option, extension, or renewal that must include the clause," and that they have not "identif[ied] any specific, covered solicitations that they plan to bid on or contracts that they plan to enter into in the immediate future." (Doc. 63, p. 3.) Notably, however, prior to the hearing, Plaintiffs filed the "Supplemental Declaration of Michael Shannon," which shows that Georgia Tech is a finalist in response to a solicitation, in excess of $250,000, issued by NASA. (Hearing Exhibit (hereinafter, "Exh.") P-22 (also available at doc. 76-1).) According to the Declaration (and as confirmed during Mr. Shannon's live testimony at the hearing and supported by exhibits to his Supplemental Declaration), in October 2021, "the solicitation was amended to include Federal Acquisition Regulation (FAR) clause 52.223-99" and "Georgia Tech was required to agree to FAR clause 52.223-99 to maintain its eligibility for the contract award pursuant to the NASA solicitation." (Id.; see also Tr., pp. 23–24, 43) Accordingly, Plaintiff Board of Regents of the University System of Georgia has standing because it has shown that one of its institutions (Georgia Tech) is a finalist for a contract with NASA and it has been advised that, if it is awarded the contract, the at-issue clause must be included in the contract.[5]

[5] At the hearing, counsel for Defendants conceded that this bestows at least limited standing to certain Plaintiff(s), but she argued that the standing is "limited to that particular contract." (Tr., pp. 17–18.)

Additionally, ABC, which the Court permits, through this Order, to intervene as a Plaintiff, has standing. An organization may sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Greater Birmingham Ministries v. Sec'y of Ala., 992 F.3d 1299 (11th Cir. 2021). ABC, a construction industry trade association, has provided sworn declarations showing that at least two of its members "intended to bid" on specified upcoming federal construction projects, but, following EO 14042, have concluded that it is not practical for them to do so because they likely will not have sufficient employees to perform the job if they enter into a contract that requires all of the covered employees to be vaccinated. (See Exh. ABC-3 (declaration of President of McKelvey Mechanical, Inc., explaining that his company, which is a member of ABC, "traditionally bids many federal projects per year and usually performs 4–6 per year," but a majority of his employees are not vaccinated and many unvaccinated employees have stated that they will quit if they are required to be vaccinated); see also Exh. ABC-2 (declaration of Executive Vice President of Cajun Industries Holdings, LLC, explaining that there are "a number of forthcoming solicitations by the Army for construction projects of the type that Cajun would normally bid upon and perform, and which [it] desire[s] to bid for" but because the projects would fall under EO 14042, it will likely be unable to bid because it has reason to believe that many of its unvaccinated workers (over half its total workforce) will quit if they are required to be vaccinated).) ABC also provided evidence—using information gathered from the General Services Administration's Website for federal contracts—that the federal government frequently and routinely issues solicitations and pre-solicitations for bids on

construction contracts (which ABC's members would normally bid on and be qualified to perform) that would be covered by EO 14042. (Exh. ABC-4.) Coupling that evidence with the sworn testimony provided by ABC, the Court finds that ABC has members that would otherwise have standing to sue in their own right. The Court also concludes that, as a trade association for thousands of contractors, the interests ABC seeks to protect in this lawsuit are germane to its purpose. The Court also finds that neither the claims asserted nor the relief requested (declaratory and injunctive relief) require the participation of individual members in the lawsuit. Greater Birmingham Ministries, 992 F.3d at 1316 n.29 ("[P]rospective relief weigh[s] in favor of finding that associational standing exists."). Accordingly, ABC has standing.

It is well-established that, where there are multiple parties petitioning for injunctive relief, "[o]nly one petitioner needs to have standing to authorize review." Massachusetts v. E. P.A., 549 U.S. 497, 498 (2007); see also Town of Chester, 137 S. Ct. at 1650. Here, two parties petitioning for declaratory and injunctive relief (ABC and the Board of Regents of the University System of Georgia) have standing; accordingly, Defendants' challenge to the lawsuit on this ground fails.

Even without these showings about specific bids and/or contracts, the Court would be inclined to find that Article III standing exists based on the ample evidence (including declarations and live testimony presented at the hearing) showing that the State Plaintiffs (including many of their agencies) and members of ABC (as described in the preceding paragraph) routinely enter into contracts that would be covered by EO 14042,[6] have current contracts that could easily fall under

[6] According to the Declaration of Bill Anderson, the President and CEO of ABC's Georgia chapter, "[a]ccording to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry's federal contracting base as ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million

the requirements of EO 14042 (if, for instance, they are renewed, modified, or have options that are exercised), and have shown that they would typically continue to seek out contract opportunities with the federal government that now will be covered by EO 14042. (See, e.g., doc. 55-6 (University of Idaho has federal contracts totaling approximately $22 million per year, based on average of last three years); doc. 55-10 (Utah Department of Health has federal contracts totaling $811,000); doc. 55-14 (Alabama Department of Agriculture and Industries has federal contracts and has leased land to the United States Department of Agriculture continuously for the past 26 years).) See Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (When a claim involves a challenge to a future contracting opportunity, the pertinent question for determining whether an alleged injury is sufficiently imminent is whether Plaintiffs "ha[ve] made an adequate showing that sometime in the relatively near future [they]will bid on another Government contract [of the type at issue in the case].").

Based on all the foregoing, the Court concludes that Plaintiffs have standing. The Court addresses the parties' debate over whether Plaintiffs have shown a sufficient injury-in-fact at length in Discussion Section III.C, infra, and, for the reasons provided therein, concludes that a sufficient injury has been shown.

III. Motions for Preliminary Injunction

A. Standard of Review

To be entitled to a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of ultimate success on the merits; (2) an injunction or protective order is necessary to prevent

awarded during fiscal years 2009–2020." (Doc. 49-1, p. 4 (citing USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership).)

irreparable injury; (3) the threatened injury outweighs the harm the injunction would inflict on the non-movant; and (4) the injunction or protective order would not be adverse to the public interest. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225–26 (11th Cir. 2005). In the Eleventh Circuit, an "injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." Horton v. City of Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001). If a plaintiff succeeds in making such a showing, then "the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation." Newman v. Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982).

B. Likelihood of Success on the Merits

The likelihood of success on the merits is generally considered the most important of the four factors. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). If Plaintiffs cannot satisfy their burden with respect to this factor, the Court need not consider the other three factors. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1329 (11th Cir. 2015). Although Plaintiffs raise multiple claims against Defendants, Plaintiffs need only show a substantial likelihood of success on the merits on one claim. See Schiavo, 357 F. Supp. 2d at 1383, *aff'd* 403 F.3d 1223 (11th Cir. 2005) (noting that "[t]o obtain temporary injunctive relief, [the plaintiffs] must show a substantial likelihood of success on at least one claim").

1. Whether the Procurement Act Authorized the President to Issue EO 14042

The President expressly relied on the Federal Property and Administrative Services Act, 40 U.S.C. § 101 et seq. (hereinafter, the "Procurement Act"), for his authority to issue EO 14042 "in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce." 86 Fed. Reg. 50,985–88. The

Procurement Act was "designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector. These goals can be found in the terms 'economy' and 'efficiency' which appear in the statute and dominate the sparse record of the congressional deliberations." Am. Fed'n of Labor and Congress of Indus. Orgs. v. Kahn, 618 F.2d 784, 787–88 (D.C. Cir. 1979).[7] In Khan, the Court of Appeals for the District of Columbia Circuit examined the history of and apparent congressional intent behind the Procurement Act, and stated its belief that, "by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions." Id. at 788. The court acknowledged that, "To define the President's powers under Section 205(a) [(40 U.S.C. § 121(a))], some content must be injected into the general phrases 'not inconsistent with' the [Procurement Act] and 'to effectuate the provisions' of the Act." Id. After considering the Procurement Act's emphasis on promoting "economy" and "efficiency" and ensuring contracts are awarded on terms that are "most advantageous to the Government, price and other factors considered," the Kahn court stated that the Procurement Act "grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency." Id. at 789.

[7] The Court has been unable to find—and the parties have not pointed to—any relevant case law from the Court of Appeals for the Eleventh Circuit grappling with the scope of the authority granted to the President in the Procurement Act.

While the Procurement Act explicitly and unquestionably bestows some authority upon the President, the Court is unconvinced, at this stage of the litigation, that it authorized him to direct the type of actions by agencies that are contained in EO 14042. Pursuant to clear United States Supreme Court precedent, Congress is expected to "speak clearly" when authorizing the exercise of powers of "vast economic and political significance." Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (quotations omitted); see also Utility Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014). The Court has already described in detail the extreme economic burden the Plaintiffs have suffered and will continue to suffer in endeavoring to comply with EO 14042 (not to mention the impediment it will likely pose to some Plaintiffs' (in particular, ABC's members') ability to continue to perform federal contract work). Additionally, the direct impact of EO 14042 goes beyond the administration and management of procurement and contracting; in its practical application (requiring a significant number of individuals across the country working in a broad range of positions and in numerous different industries to be vaccinated or face a serious risk of losing their job), it operates as a regulation of public health. It will also have a major impact on the economy at large, as it limits contractors' and members of the workforce's ability to perform work on federal contracts. Accordingly, it appears to have vast economic and political significance.

The issue, then, is whether Congress, through the Procurement Act, has "clearly" authorized the President to issue the directives contained in EO 14042, or whether, instead, EO 14042 "bring[s] about an enormous and transformative expansion in . . . regulatory authority without clear congressional authorization," Utility Air Regul. Grp., 573 U.S. at 324. Looking to the Kahn court for guidance, the Court considers whether EO 14042 fits within Congress's grant

to the President, through the Procurement Act, of "particularly direct and broad-ranging authority over those larger *administrative and management issues* . . . that . . . should be used in order *to achieve a flexible management system* capable of making sophisticated judgments in pursuit of economy and efficiency." Kahn, 618 F.2d at 789 (emphases added). The Court finds that Plaintiffs have a likelihood of proving that Congress, through the language it used, did not clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health,[8] which is not clearly authorized under the Procurement Act.[9]

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[8] During oral argument, counsel for Defendants urged that vaccine mandates are needed in order to "efficiently manage our way out of this pandemic." (Tr., p. 153.) However, the issue here is far more nuanced and requires a finding that *Congress* clearly gave the *President* authority to require all individuals who work on or in connection with a federal contract (valued over $250,000) to be fully vaccinated against COVID-19.

[9] The Court acknowledges that, one day prior to the entry of this Order, the Eleventh Circuit Court of Appeals issued an opinion, in a separate case, refusing to preliminarily enjoin enforcement of an interim rule issued by the Secretary of Health and Human Services requiring facilities that provide health care to Medicare and Medicaid beneficiaries to ensure that their staff are fully vaccinated against COVID-19. See Florida v. Dep't of Health and Human Servs, No. 21-14098-JJ, 2021 WL 5768796, at *1 (11th Cir. Dec. 6, 2021), available at . Defendants in this case notified the Court that the Florida opinion "supplements their merits arguments" (though they neglected to elaborate as to how), but the Court finds the case at hand to be materially different, in numerous ways, from the case before the Eleventh Circuit. First, in the Florida opinion, the court addressed very different statutory and regulatory schemes, the Medicare and Medicaid statutes and the regulations governing conditions for facilities to participate in those programs. Id. at *1–2. Nothing in the Florida case bears on whether the President is authorized, under his authority pursuant to the Procurement Act, to require private companies that enter into federal contracts to, in turn, require virtually all of their employees to be vaccinated. Additionally, in the Florida case and unlike in the case at hand, the challenged directive is similar to the authorizing statutes, because they "both directly relate to efforts to prevent the spread of disease at facilities treating Medicare or Medicaid patients to protect the health and safety of those patients." Id. at *13; see also id. at *1–2 ("For both the Medicare and Medicaid programs, Congress charged the Secretary with ensuring that participating facilities protect the health and safety of their patients," and the at-issue interim rule issued by the Secretary "amend[ed] the infection-control regulations for facilities that participate in Medicare or Medicaid . . . [to] require[] that facilities certified to participate in Medicare or Medicaid ensure their staff are fully vaccinated against COVID-19, unless an employee is exempt . . . ."). By contrast, here, while EO 14042 relates to efforts to prevent the spread of disease in any place an individual is working on or in connection with a federal contract, the at-issue claimed authorizing statute relates to the President's authority to take actions to "achieve a flexible

Even if, however, EO 14042 did not trigger the specific requirement that Congress "speak clearly" in authorizing the challenged executive action, the Court additionally finds that Plaintiffs have a likelihood of proving that EO 14042 does not have a sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act.

For essentially the same reasons recited in the preceding subsection, the Court finds that the directives contained within EO 14042 were not authorized by the Procurement Act. Defendants claim that, "[t]o anyone who has lived through the COVID-19 pandemic and its resulting economic turmoil, the nexus between reducing the spread of COVID-19 and economy and efficiency is self-evident." (Doc. 63, p. 16.) They emphasize EO 14042's explanation that "[the] safeguards [in the Task Force Guidance] will decrease the spread of COVID-19, which will decrease work absence, reduce labor costs, and improve the efficiency of contractors and subcontractors" and they argue that this "easily satisfies [the] lenient standard" of a sufficiently close nexus between the executive order and the purpose of the Procurement Act. (Id. (quoting 86 Fed. Reg. 50,985–88).) Defendants are correct that the President has typically been afforded deference when courts review executive orders issued pursuant to the Procurement Act. See, e.g., Chamber of Com. v. Reich, 74 F.3d 1322, 1333 (D.C. Cir. 1996) ("The President's authority to pursue 'efficient and economic' procurement . . . certainly reach[es] beyond any narrow concept

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management system capable of making sophisticated judgments in pursuit of economy and efficiency" in government procurement and contracting, see Kahn, 618 F.2d at 789. Put simply, the authorizing statute in the Florida case authorized the executive to implement a health and safety measure while the relied upon statute in this case does not. The differing results in this case, the Florida case, and other cases challenging governmental actions to address the COVID-19 pandemic underscore the point that the focus of these cases is not on the effectiveness of vaccines and other measures but rather the legality of the Government's actions.

of efficiency and economy in procurement.") (collecting examples). However, that deference was expressly *not* intended to operate as "a blank check for the President to fill in at his will." Kahn, 618 F.2d at 793. The President's directives still must be "*reasonably* related" to the purposes of the Procurement Act, Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 170 (4th Cir. 1981) (emphasis added), and Defendants have not cited to a case upholding the use of the Procurement Act "to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors," Kentucky v. Biden, 2021 WL 5587446, at *9. Nor have Defendants cited to a case upholding some action or requirement undertaken pursuant to the Procurement Act that the Court finds analogous to the mandates in EO 14042. While the Court is aware of cases where courts have held that a variety of types of executive orders were authorized under the Procurement Act, none have involved measures aimed at public health and none have involved the level of burdens implicated by EO 14042, which has already required and will continue to require extensive and costly administrative work by employers and will force at least some individuals to choose between getting medical treatment that they do not want or losing their job (and facing limited job replacement options due to the mandate). Cf. UAW-Labor Emp. & Training Corp. v. Chao, 325 F.3d 360, 366–67 (D.C. Cir. 2003) (sufficiently close nexus between Procurement Act and executive order requiring federal contractors to post notices at all of their facilities informing employees of rights under federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities); Kahn, 618 F.2d at 786–87 (sufficiently close nexus between Procurement Act and executive order that required certain federal contractors to comply with wage and price controls). Following the Defendants' logic and reasoning, the Procurement Act would be construed to give the President

the right to impose virtually any kind of requirement on businesses that wish to contract with the Government (and, thereby, on those businesses' employees) so long as he determines it could lead to a healthier and thus more efficient workforce or it could reduce absenteeism. Simply put, EO 14042's directives and resulting impact radiate too far beyond the purposes of the Procurement Act and the authority it grants to the President. Accordingly, the Court concludes, based on the limited record before it, that Plaintiffs are more likely than Defendants to succeed on the issue of whether there is a sufficiently close nexus between EO 14042 and the purposes of the Procurement Act.

2. Other Grounds Upon Which Plaintiffs Challenge EO 14042

In further support of their request for a preliminary injunction, Plaintiffs also claim that Defendants issued the Task Force Guidance and the FAR Deviation Clause, which they claim constitute final agency action, without complying with the Administrative Procedure Act's notice-and-comment requirements. (Doc. 55, pp. 17–22.) The Court declines to wade into this issue given its determination that Plaintiffs have a likelihood of success on the merits on other grounds.

Additionally, Plaintiffs allege that, if the Procurement Act does indeed authorize the directives issued in EO 14042, then the Procurement Act and EO 14042 are unconstitutional under the non-delegation doctrine and because they exceed Congress's authority and intrude on state sovereignty. This Court need not and does not issue any determination as to those challenges to resolve the motions before it. However, it is worth noting that other Courts have either expressed agreement with or at least concern about these arguments, see, e.g., BST Holdings, LLC v. Occupational Safety and Health Admin., 17 F.4th 604, 616–18 (5th Cir. 2021); Kentucky, 2021 WL 5587446, at *9.

C. Irreparable Injury Requirement

In order to satisfy the irreparable injury requirement, a party must show that the threat of injury is "neither remote nor speculative, but actual and imminent." Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 973 (2d Cir. 1989)); see also Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994) (In order to obtain injunctive relief, a plaintiff must show "a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury.").

Defendants argue that losing contracts would not be irreparable harm—because there are administrative processes through which Plaintiffs can seek to challenge the contractual provision and to recover losses on contracts—and they claim that Plaintiffs have not "demonstrated that the compliance costs they claim to have incurred are in fact tied to such contracts." (Doc. 63, p. 4.) As referenced previously in this Order, the Court heard from three witnesses who described the incredibly time-consuming processes they have undertaken (typically requiring major input and assistance from numerous other departments across their institution) to identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption) by the deadline in January. Not only must Plaintiffs ensure that their own employees satisfy the mandate, but they also must require that any subcontractors' employees working on or in connection with a covered contract are in compliance. The declarations of representatives of ABC members Cajun Contracting and McKelvey show similar administrative burdens and costs—though on a smaller scale. (See Exhs. ABC-2, ABC-3.) Moreover, "complying with a regulation

later held invalid almost always produces the irreparable harm of nonrecoverable compliance." BST Holdings, 17 F.4th at 618 (citing Texas v. EPA, 829 F.3d 405, 433 (5th Cir. 2016)). The Court finds that the time and effort spent on these measures in the past—and going forward—constitute compliance costs resulting from EO 14042, which appear to be irreparable. See id. ("[T]he companies seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, [or] the diversion of resources necessitated by the Mandate . . . ."); see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d at 1289 ("[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.").

D. Balancing of the Harms

Defendants contend that, even assuming Plaintiffs have shown a risk of irreparable injury, no injunction should issue because more harm would result from enjoining EO 14042 and further delaying the vaccination of the thousands of currently-unvaccinated individuals working on federal contracts (thereby permitting the continued spread of COVID-19). The Court disagrees. Enjoining EO 14042 would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations. Indeed, it appears that not granting an injunction could imperil the financial viability of many of ABC's members. Additionally, requiring compliance with EO 14042 would likely be life altering for many of

Plaintiffs' employees as Plaintiffs would be required to decide whether an employee who refuses to be vaccinated can, in practicality, be reassigned to another office or another task or whether the employee instead must be terminated. "[A]ny abstract 'harm' a stay might cause . . . pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." BST Holdings, 17 F.4th at 618. Accordingly, the Court finds that the balancing of the harms weighs heavily in favor of enjoining the enforcement of EO 14042.

E. Public Interest

"For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of [EO 14042] has contributed to untold economic upheaval in recent months" and "the principles at stake when it comes to [EO 14042] are not reducible to dollars and cents." Id. at 619.

F. Scope of Injunctive Relief

The Court now must determine the appropriate scope of the injunctive relief. Generally, the Court treads lightly when issuing injunctive relief and resists the entry of "universal" or "nationwide" injunctions, and recognizes the need to "allow legal questions to percolate through the federal court system," Kentucky, 2021 WL 5587446, at *14 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) and Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring)). While the original Plaintiffs to this case are (or are based in) a limited number of states, the Court has, in this Order, permitted ABC, a trade association with members "all over the country," (doc. 50-1, p. 3), to intervene as a Plaintiff. Not only is the geographic scope of ABC's membership broad, their involvement in federal contracts is as well. As noted above, they were awarded 57% of federal contracts exceeding $25 million

during fiscal years 2009–2020. Accordingly, if the Court were to enjoin the enforcement of the mandate only in the Southern District of Georgia or only in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, then ABC's members would not have injunctive relief as to covered contracts in other states.[10] Furthermore, given the breadth of ABC's membership, the number of contracts Plaintiffs will be involved with, and the fact that EO 14042 applies to subcontractors and others, limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion. Thus, on the unique facts before it, the Court finds it necessary, in order to truly afford injunctive relief to the parties before it, to issue an injunction with nationwide applicability.

CONCLUSION

In light of the foregoing, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC's Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs' Amended Motion for Preliminary Injunction, (doc. 55).[11] Accordingly, the Court **ORDERS** that Defendants are **ENJOINED**, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America. The Court further **DIRECTS** the Clerk of Court to **UPDATE** the docket to reflect the addition of Associated Builders and Contractors, Inc., as a Plaintiff in this case. Because the proposed

[10] The Court is mindful of the fact that at least some of ABC's members are already able to benefit from the injunctive relief recently afforded by the District Court for the Eastern District of Kentucky as to covered contracts in Kentucky, Ohio, and Tennessee. See Kentucky, 2021 WL 5587446, at *14.

[11] Plaintiffs' initial Motion for Preliminary Injunction, which was superseded by the Amended Motion for Preliminary Injunction that they later filed, is **DENIED AS MOOT**. (Doc. 19.)

Complaint filed on the docket includes ABC-Georgia (which has not been allowed to intervene) as a plaintiff, the Court **ORDERS** Associated Builders and Contractors, Inc., to file a revised version of its Complaint within **SEVEN (7) DAYS**.

SO ORDERED, this 7th day of December, 2021.

R. STAN BAKER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 12, 2021
Lyle W. Cayce
Clerk

No. 21-60845

BST Holdings, L.L.C.; RV Trosclair, L.L.C.; Trosclair Airline, L.L.C.; Trosclair Almonaster, L.L.C.; Trosclair and Sons, L.L.C.; Trosclair ; Trosclair, Incorporated; Trosclair Carrollton, L.L.C.; Trosclair Claiborne, L.L.C.; Trosclair Donaldsonville, L.L.C.; Trosclair Houma, L.L.C.; Trosclair Judge Perez, L.L.C.; Trosclair Lake Forest, L.L.C.; Trosclair Morrison, L.L.C.; Trosclair Paris, L.L.C.; Trosclair Terry, L.L.C.; Trosclair Williams, L.L.C.; Ryan Dailey; Jasand Gamble; Christopher L. Jones; David John Loschen; Samuel Albert Reyna; Kip Stovall; Answers in Genesis, Incorporated; American Family Association, Incorporated; Burnett Specialists; Choice Staffing, L.L.C.; Staff Force, Incorporated; Leadingedge Personnel, Limited; State of Texas; HT Staffing, Limited; doing business as HT Group; The State of Louisiana; Cox Operating, L.L.C.; Dis-Tran Steel, L.L.C.; Dis-Tran Packaged Substations, L.L.C.; Beta Engineering, L.L.C. Optimal Field Services, L.L.C.; The State of Mississippi; Gulf Coast Restaurant Group, Incorporated; The State of South Carolina; The State of Utah; Word of God Fellowship, Incorporated, doing busines as Daystar Television Network,

Petitioners,

versus

Occupational Safety and Health Administration, United States Department of Labor; United States

No. 21-60845

DEPARTMENT OF LABOR; MARTIN J. WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR; DOUGLAS PARKER, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents.

Petition for Review of
Occupational Safety and Health Administration
Emergency Temporary Standard

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

The Occupational Safety and Health Administration (OSHA) "reasonably determined" in June 2020 that an emergency temporary standard (ETS) was "not necessary" to "protect working people from occupational exposure to infectious disease, including COVID-19." *In re AFL-CIO*, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020). This was not the first time OSHA had done this; it has refused several times to issue ETSs despite legal action urging it do so. *See, e.g.*, *In re Int'l Chem. Workers Union*, 830 F.2d 369 (D.C. Cir. 1987) (per curiam). In fact, in its fifty-year history, OSHA has issued just ten ETSs.[1] Six were challenged in court; only one survived.[2] The reason for the rarity of this form of emergency action is

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[1] CONG. RSCH. SERV., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, at 34 tbl. A-1 (Nov. 10, 2021), *available at* https://crsreports.congress.gov/product/pdf/R/R46288.

[2] It bears noting at the outset that most of the few ETSs issued by OSHA were immediately stayed pending merits review. *See Asbestos Info. Ass'n/N. Am. v. OSHA*, 727 F.2d 415, 418 (5th Cir. 1984); *Indus. Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 968 (D.C. Cir. 1977); *Taylor Diving Salvage Co. v. U.S. Dep't of Lab.*, 537 F.2d 819, 820–21 (5th

simple: courts and the Agency have agreed for generations that "[e]xtraordinary power is delivered to [OSHA] under the emergency provisions of the Occupational Safety and Health Act," so "[t]hat power should be delicately exercised, and only in those emergency situations which require it." *Fla. Peach Growers Ass'n v. U.S. Dep't of Lab.*, 489 F.2d 120, 129–30 (5th Cir. 1974).

This case concerns OSHA's most recent ETS—the Agency's November 5, 2021 Emergency Temporary Standard (the "Mandate") requiring employees of covered employers to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask.[3] An array of petitioners seeks a stay barring OSHA from enforcing the Mandate during the pendency of judicial review. On November 6, 2021, we agreed to stay the Mandate pending briefing and expedited judicial review. Having conducted that expedited review, we reaffirm our initial stay.

I.

OSHA promulgated its much anticipated[4] vaccine mandate on November 5, 2021. Framed as an ETS, the Mandate requires all employers of 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy" and require any workers who remain

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Cir. 1976) (per curiam); *Fla. Peach Growers Ass'n v. U.S. Dep't of Lab.*, 489 F.2d 120, 126 (5th Cir. 1974).

[3] *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928).

[4] Debates over the Biden Administration's forthcoming vaccine mandate roiled the country throughout much of the Fall. For obvious reasons, the Mandate affects every person in America in one way or another.

unvaccinated to "undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination." 86 Fed. Reg. 61,402, 61,402.

On the afternoon of the Mandate's publication, a diverse group of petitioners (including covered employers, States, religious groups, and individual citizens) moved to stay and permanently enjoin the mandate in federal courts of appeals across the nation. Finding "cause to believe there are grave statutory and constitutional issues with the Mandate," we intervened and imposed a temporary stay on OSHA's enforcement of the Mandate. For ease of judicial review, and in light of the pressing need to act immediately, we consolidated our court's petitions under the case number captioned above.

Many of the petitioners are covered private employers within the geographical boundaries of this circuit.[5] Their standing[6] to sue is obvious—the Mandate imposes a financial burden upon them by deputizing their participation in OSHA's regulatory scheme, exposes them to severe financial risk if they refuse or fail to comply, and threatens to decimate their workforces (and business prospects) by forcing unwilling employees to take their shots, take their tests, or hit the road.

[5] Because these petitioners are the targets of the Mandate and bear the brunt of OSHA's regulatory power, we principally analyze the petitions from their perspective. This is not to say that the claims of other petitioners such as States or individual citizens would be any less successful on a thorough analysis.

[6] "Only one of the petitioners needs to have standing to permit us to consider the petition for review." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

The petitioners seek a stay—and ultimately a permanent injunction—of the Mandate's enforcement pending full judicial review of the Mandate. We address their request for a stay today.[7]

II.

The "traditional stay factors . . . govern a request for a stay pending judicial review." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Under the traditional stay standard, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Each of these factors favors a stay here.

A.

We first consider whether the petitioners' challenges to the Mandate are likely to succeed on the merits. For a multitude of reasons, they are.

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[7] Our November 6, 2021 stay order preserved the status quo during the pendency of briefing. The unusual procedural posture of this case makes for an unusual process. Ordinarily, a federal plaintiff aggrieved by an adversary's threatened course of action must go to a *district court* to seek injunctive relief at the outset. In this ordinary scenario, a preliminary injunction precedes a permanent injunction, and trial-court review precedes appellate review. But this is not a typical case. Here, the statute giving OSHA the power to issue emergency temporary standards like the Mandate also provides for direct and immediate judicial review in "the United States court of appeals for the circuit wherein" "[a]ny person who may be adversely affected by" an ETS "resides or has his principal place of business." *See* 29 U.S.C. § 655(f). Satisfied of our jurisdiction to proceed under that provision, but mindful of our unusual procedural posture, we apply the traditional factors for a stay pending judicial review and draw factual support from the attachments to the pleadings, uncontested facts, and judicial notice.

We begin by stating the obvious. The Occupational Safety and Health Act, which created OSHA, was enacted by Congress to assure Americans "safe and healthful working conditions and to preserve our human resources." *See* 29 U.S.C. § 651 (statement of findings and declaration of purpose and policy). It was not—and likely *could* not be, under the Commerce Clause and nondelegation doctrine[8]—intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways. *Cf. Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488–90 (2021) (per curiam).

On the dubious assumption that the Mandate *does* pass constitutional muster—which we need not decide today[9]—it is nonetheless fatally flawed on its own terms. Indeed, the Mandate's strained prescriptions combine to make it the rare government pronouncement that is both overinclusive (applying to employers and employees in virtually all industries and workplaces in America, with little attempt to account for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to shoulder in a cramped warehouse) *and* underinclusive (purporting to save employees with 99 or more coworkers from a "grave danger" in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same

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[8] The nondelegation doctrine constrains Congress's ability to delegate its legislative authority to executive agencies. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) ("'The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States' . . . and we have long insisted that 'the integrity and maintenance of the system of government ordered by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (first quoting U.S. CONST. art. I, § 1; then quoting *Field v. Clark*, 143 U.S. 649, 692 (1892))).

[9] *But see infra* subsection II.A.2.f.

threat). The Mandate's stated impetus—a purported "emergency" that the entire globe has now endured for nearly two years,[10] and which OSHA itself spent nearly two *months* responding to[11]—is unavailing as well. And its promulgation grossly exceeds OSHA's statutory authority.

1.

After the President voiced his displeasure with the country's vaccination rate in September,[12] the Administration pored over the U.S. Code in search of authority, or a "work-around,"[13] for imposing a national

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[10] As Justice Gorsuch recently observed, society's interest in slowing the spread of COVID-19 "cannot qualify as [compelling] forever," for "[i]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Does 1–3 v. Mills*, --- S. Ct. ---, 2021 WL 5027177, at *3 (Oct. 29, 2021) (Gorsuch, J., dissenting); *see also Fla. Peach Growers*, 489 F.2d at 131 (situation ongoing for "last several years . . . fail[ed] to qualify for [OSHA] emergency measures").

[11] The President announced his intention to impose a national vaccine mandate on September 9, 2021. *See, e.g.*, Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates that Could Cover 100 Million Americans*, CNN (Sept. 9, 2021), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html ("'We've been patient, but our patience is wearing thin, and your refusal has cost all of us,' Biden said, his tone hardening toward Americans who still refuse to receive a vaccine despite ample evidence of their safety and full approval of one . . . ."). OSHA issued the Mandate nearly two months later, on November 5, 2021, and the Mandate itself prominently features yet another two-month delay. One could query how an "emergency" could prompt such a "deliberate" response. In similar cases, we've held that OSHA's failure to act promptly "does not conclusively establish that a situation is not an emergency," but "may be evidence that a situation is not a *true* emergency." *Asbestos Info.*, 727 F.2d at 423 (emphasis added).

[12] *See supra* note 11.

[13] On September 9, 2021, White House Chief of Staff Ron Klain retweeted MSNBC anchor Stephanie Ruhle's tweet that stated, "OSHA doing this vaxx mandate as an emergency workplace safety rule *is the ultimate work-around for the Federal govt to require vaccinations*." *See, e.g.*, Pet'rs Burnett Specialists, Choice Staffing, LLC, and Staff Force Inc.'s Reply Brief at 4 (emphasis added).

vaccine mandate. The vehicle it landed on was an OSHA ETS. The statute empowering OSHA allows OSHA to bypass typical notice-and-comment proceedings for six months by providing "for an emergency temporary standard to take immediate effect upon publication in the Federal Register" if it "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1).

As the name suggests, *emergency* temporary standards "are an 'unusual response' to 'exceptional circumstances.'" *Int'l Chem. Workers*, 830 F.2d at 371 (quoting *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)). Thus, courts have uniformly observed that OSHA's authority to establish emergency temporary standards under § 655(c) "is an 'extraordinary power' that is to be 'delicately exercised' in only certain 'limited situations.'" *Id.* at 370 (quoting *Pub. Citizen*, 702 F.2d at 1155).[14]

But the Mandate at issue here is anything *but* a "delicate[] exercise[]" of this "extraordinary power." *Cf. Pub. Citizen*, 702 F.2d at 1155. Quite the opposite, rather than a delicately handled scalpel, the Mandate is a one-size-fits-all sledgehammer that makes hardly any attempt to account for differences in workplaces (and workers) that have more than a little bearing on workers' varying degrees of susceptibility to the supposedly "grave danger" the Mandate purports to address.

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[14] The Agency has thus conceded in the past that "[t]he OSH Act does not authorize OSHA to issue sweeping health standards to address entire classes of known and unknown infectious diseases on an emergency basis without notice and comment." *See* Department of Labor's Resp. to the Emergency Pet. for a Writ of Mandamus at 33–34, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 29, 2020) [hereinafter OSHA D.C. Circuit Brief].

2.

Thus, as § 655(c)(1) plainly provides, to be lawfully enacted, an ETS must: (1) address "substances or agents determined to be toxic or physically harmful"—or "new hazards"—in the workplace; (2) show that workers are exposed to such "substances," "agents," or "new hazards" in the workplace; (3) show that said exposure places workers in "grave danger"; and (4) be "necessary" to alleviate employees' exposure to gravely dangerous hazards in the workplace. As we have noted in the past, the precision of this standard makes it a difficult one to meet. *See Fla. Peach Growers*, 489 F.2d at 130 (observing that OSHA's ETS authority "requires determination of danger from exposure to harmful substances, not just a danger of exposure; and, not exposure to just a danger, but to a grave danger; and, not the necessity of just a temporary standard, but that an emergency [temporary] standard is necessary").[15]

(a)

In its brief, Texas makes a compelling argument that § 655(c)(1)'s neighboring phrases "substances or agents" and "toxic or physically harmful" place an airborne virus beyond the purview of an OSHA ETS in the first place. To avoid "giving unintended breadth to the Acts of Congress," courts "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015) (cleaned up). Here, OSHA's attempt to shoehorn an airborne virus that is both widely present in society (and thus not particular to any workplace) and non-life-

[15] In prior litigation, OSHA acknowledged that many "workplaces" covered by a COVID-19 ETS "are not merely workplaces," but are also "stores, restaurants, and other places occupied by workers and the general public alike, in which the measures called for require a broader lens—and at times a broader mandate—than available to OSHA." *See* OSHA D.C. Circuit Brief at 20.

threatening to a vast majority of employees into a neighboring phrase connoting *toxicity* and *poisonousness* is yet another transparent stretch. Other cases involving OSHA (though not ETSs per se) shed further light on the intended meaning of these terms. *See, e.g.*, *UAW v. OSHA*, 938 F.2d 1310, 1314 (D.C. Cir. 1991). *See generally Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980). Any argument OSHA may make that COVID-19 is a "new hazard[]" would directly contradict OSHA's prior representation to the D.C. Circuit that "[t]here can be no dispute that COVID-19 is a *recognized* hazard." *See* OSHA D.C. Circuit Brief at 25 (emphasis added).

(b)

A natural first step in enacting a lawful ETS is to show that employees covered by the ETS are in fact *exposed* to the dangerous substances, agents, or hazards at issue—here, COVID-19. *See, e.g.*, *Int'l Chem. Workers*, 830 F.2d at 371 (noting OSHA's stated view "that a finding of 'grave danger' to support an ETS be based upon exposure in actual levels found in the workplace"). As it pertains to the vast majority of private employees covered by the Mandate, however, OSHA fails to meet this threshold burden. In defending the Mandate before this court, the Government credits OSHA with "describ[ing] myriad studies showing workplace [COVID-19] 'clusters' and 'outbreaks' and other significant 'evidence of workplace transmission' and 'exposure.'" *See* Resp'ts' Opp'n to Emergency Stay Mot. at 8. But this misses the mark, as OSHA is required to make findings of exposure—or at least the presence of COVID-19—in *all* covered workplaces.

Of course, OSHA cannot possibly show that every workplace covered by the Mandate currently has COVID-positive employees, or that every industry covered by the Mandate has had or will have "outbreaks." As

discussed below, this kind of overbreadth plagues the Mandate generally. *See infra* subsection II.A.2.d.

(c)

Equally problematic, however, is that it remains unclear that COVID-19—however tragic and devastating the pandemic has been—poses the kind of grave danger § 655(c)(1) contemplates. *See, e.g.*, *Int'l Chem. Workers*, 830 F.2d at 371 (noting that OSHA itself once concluded "that to be a 'grave danger,' it is not sufficient that a chemical, such as cadmium, can cause *cancer* or *kidney damage* at a high level of exposure" (emphasis added)). For starters, the Mandate itself concedes that the effects of COVID-19 may range from "mild" to "critical." As important, however, the status of the spread of the virus has varied since the President announced the general parameters of the Mandate in September. (And of course, this all assumes that COVID-19 poses any significant danger to workers to begin with; for the more than *seventy-eight* percent[16] of Americans aged 12 and older either fully or partially inoculated against it, the virus poses—the Administration assures us—little risk at all.) *See, e.g.*, 86 Fed. Reg. 61,402, 61,402–03 ("COVID-19 vaccines authorized or approved by the [FDA] effectively protect vaccinated individuals against severe illness and death from COVID-19.").

The Administration's prior statements in this regard further belie the notion that COVID-19 poses the kind of emergency that allows OSHA to take the extreme measure of an ETS. In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In fact, courts have an affirmative duty *not* to do so. It is thus

[16] *See* CDC, COVID DATA TRACKER, https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

critical to note that the Mandate makes no serious attempt to explain why OSHA and the President himself[17] were against vaccine mandates before they were for one here. *See, e.g.*, Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23,042, 23,045 (May 30, 1989) ("Health in general is an intensely personal matter. . . . OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program."); Letter from Loren Sweatt, Principal Deputy Assistant Sec'y, OSHA, to Richard L. Trumka, President, AFL-CIO at 3 (May 29, 2020) [hereinafter Sweatt Letter] (acknowledging as a general matter that it "would not be necessary for OSHA to issue an ETS to protect workers from infectious diseases" because "OSHA lacks evidence to conclude that all infectious diseases to which employees may be exposed at a workplace constitute a 'grave danger' for which an ETS is an appropriate remedy"). Because it is generally "arbitrary or capricious" to "depart from a prior policy *sub silentio*," agencies must typically provide a "detailed explanation" for contradicting a prior policy, particularly when the "prior policy has engendered serious reliance interests." *FCC v. Fox*, 556 U.S. at 515. OSHA's reversal here strains credulity, as does its pretextual basis.[18] Such shortcomings are all hallmarks of unlawful agency actions.

To be sure, "OSHA's assessment of . . . scientifically complex [facts] and its balancing of the competing policies that underlie the decision whether to issue an ETS . . . are entitled to great deference," but this is not a case

[17] In December of 2020, the President was quoted as saying, "No I don't think [vaccines] should be mandatory." *See, e.g.*, Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020*, NEWSWEEK (Sept. 10, 2021), https://www.newsweek.com/fact-check-joe-biden-no-vaccines-mandatory-december-2020-1627774.

[18] *See supra* note 13 (Klain endorsement of the term "work-around").

where any amount of deference would make a bit of difference. *Int'l Chem. Workers*, 830 F.2d at 371.

(d)

We next consider the necessity of the Mandate. The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

Moreover, earlier in the pandemic, the Agency recognized the practical impossibility of tailoring an effective ETS in response to COVID-19. *See* OSHA D.C. Circuit Brief at 16, 17, 21, 26 ("Based on substantial evidence, OSHA determined that an ETS is not necessary both because there are existing OSHA and non-OSHA standards that address COVID-19 and because an ETS would actually be counterproductive. . . . To address all employers and to do so with the requisite dispatch, an ETS would at best be an enshrinement of these general and universally known measures that are already enforceable through existing OSHA tools that require employers to assess and address extant hazards. OSHA's time and resources are better spent issuing industry-specific guidance that adds real substance and permits flexibility as we learn more about this virus. Given that we learn more about COVID-19 every day, setting rules in stone through an ETS (and later a

permanent rule) may undermine worker protection by permanently mandating precautions that later prove to be inefficacious. . . . [A]n ETS could only enshrine broad legal standards that are already in place or direct employers to develop COVID-19 response plans specific to their businesses, something employers are already doing. Such a step would be superfluous at best and could be counterproductive to ongoing state, local, and private efforts. . . . Additionally, employers may choose any effective method to abate a recognized hazard under the general duty clause. Contrary to AFL-CIO's argument, this flexibility is likely to improve worker safety, because employers must choose a means of abatement that eliminates the hazard or materially reduces it to the extent feasible."). OSHA itself admitted that "an ETS once issued could very well become ineffective or counterproductive, as it may be informed by incomplete or ultimately inaccurate information." *Id.* at 30, 32–33 (acknowledging further that "[a]dequate safeguards for workers could differ substantially based on geographic location, as the pandemic has had dramatically different impacts on different parts of the country. State and local requirements and guidance on COVID-19 are thus critical to employers in determining how to best protect workers, and OSHA must retain flexibility to adapt its advice regarding incorporation of such local guidance, where appropriate. . . . [A]n ETS meant to broadly cover all workers with potential exposure to COVID-19—effectively *all* workers across the country—would have to be written at such a general level that it would risk providing very little assistance at all").

In light of this immense complexity, one might naturally ask the Agency—is this situation truly amenable to a one-size-fits-all Mandate? The likely answer may be why OSHA has in the past "determined that the best approach for responding to the pandemic is to enforce the existing OSH Act requirements that address infectious disease hazards, while also issuing detailed, industry-specific guidance," which is generally "more effective

than promulgating a rigid set of requirements for all employers in all industries based on limited information." *See* Sweatt Letter at 2. In sum, as OSHA itself has previously acknowledged, an ETS appears to be a "poorly-suited approach for protecting workers against [COVID-19] because no standard that covers all of the Nation's workers would protect all those workers equally." *See id.* at 9.

At the same time, the Mandate is also *underinclusive*. The most vulnerable worker in America draws no protection from the Mandate if his company employs 99 workers or fewer. The reason why? Because, as even OSHA admits, companies of 100 or more employers will be better able to administer (and sustain) the Mandate. *See* 86 Fed. Reg. 61,402, 61,403 ("OSHA seeks information about the ability of employers with fewer than 100 employees to implement COVID-19 vaccination and/or testing programs."). That may be true. But this kind of thinking belies the premise that any of this is truly an *emergency*. Indeed, underinclusiveness of this sort is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact "compelling." *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–46 (1993) (city's ban on religious animal sacrifice but corresponding allowance of other activities similarly endangering public health belied its purportedly "compelling" interest in safe animal disposal practices). The underinclusive nature of the Mandate implies that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary.[19]

[19] The Mandate is also underinclusive in the solutions it proposes. Indeed, even in its fullest force, the Mandate cannot prevent vaccinated employees from spreading the virus in the workplace, or prevent unvaccinated employees from spreading the virus in between weekly tests.

(e)

If the deficiencies we've already covered aren't enough, other miscellaneous considerations seal the Mandate's fate. For one, "[t]he Agency cannot use its ETS powers as a stop-gap measure," *Asbestos Info.*, 727 F.2d at 422, but concedes that that is precisely what the Mandate is intended to do here. *See* 86 Fed. Reg. 61,402, 61,434–35 (admitting that "[c]rafting a multi-layered standard that is comprehensive and feasible for all covered work settings, including mixed settings of vaccinated and unvaccinated workers, is an extraordinarily challenging and complicated undertaking, yet the grave danger that COVID-19 poses to unvaccinated workers obliges the agency to act as quickly as possible"). For another, courts have consistently recognized that the "protection afforded to workers [by an ETS] should outweigh the economic consequences to the regulated industry," *Asbestos Info.*, 727 F.2d at 423, but for all the reasons we've previously noted, the Mandate flunks a cost-benefit analysis here.

(f)

It lastly bears noting that the Mandate raises serious constitutional concerns that either make it more likely that the petitioners will succeed on the merits, or at least counsel against adopting OSHA's broad reading of § 655(c) as a matter of statutory interpretation.

First, the Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring); *see also id.* at 652–53 (Scalia, J., dissenting). And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power. *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long "settled that

it is within the police power of a state to provide for compulsory vaccination"); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–26 (1905) (similar). The Mandate, however, commandeers U.S. employers to compel millions of employees to receive a COVID-19 vaccine or bear the burden of weekly testing. 86 Fed. Reg. 61,402, 61,407, 61,437, 61,552. The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power. *See Sebelius*, 567 U.S. at 554 (Roberts, C.J., concurring) ("People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act."); *see also Bond v. United States*, 572 U.S. 844, 854 (2014) ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.' . . . The Federal Government, by contrast, has no such authority. . . ." (citations omitted)). Indeed, the courts "*always* have rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power." *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). In sum, the Mandate would far exceed current constitutional authority.

Second, concerns over separation of powers principles cast doubt over the Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation. As Judge Duncan points out, the major questions doctrine confirms that the Mandate exceeds the bounds of OSHA's statutory authority. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up). The Mandate derives its authority from an old statute employed in a

novel manner,[20] imposes nearly $3 billion in compliance costs, involves broad medical considerations that lie outside of OSHA's core competencies, and purports to definitively resolve one of today's most hotly debated political issues. *Cf. MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (declining to hold that the FCC could eliminate telecommunications rate-filing requirements); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (declining to hold that the FDA could regulate cigarettes); *Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (declining to allow DOJ to ban physician-assisted suicide). There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one. Nor can the Article II executive breathe new power into OSHA's authority—no matter how thin patience wears.

At the very least, even if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

* * *

Accordingly, the petitioners' challenges to the Mandate show a great likelihood of success on the merits, and this fact weighs critically in favor of a stay.

B.

It is clear that a denial of the petitioners' proposed stay would do them irreparable harm. For one, the Mandate threatens to substantially burden the

[20] Here, it is simply unlikely that Congress assigned authority over such a monumental policy decision to OSHA—hard hats and safety goggles, this is not.

liberty interests[21] of reluctant individual recipients put to a choice between their job(s) and their jab(s). For the individual petitioners, the loss of constitutional freedoms "for even minimal periods of time . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Likewise, the companies seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by OSHA's plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees. The Mandate places an immediate and irreversible imprint on all covered employers in America, and "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *See Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)).

The States, too, have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.

C.

In contrast, a stay will do *OSHA* no harm whatsoever. Any interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate. Moreover, any abstract "harm" a stay might cause the Agency

[21] Not to mention the free religious exercise of certain employees. *See* U.S. CONST. amend. I; *cf. Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies.

D.

For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months. Of course, the principles at stake when it comes to the Mandate are not reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials.

* * *

The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases—a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory—this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. *Cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.

For these reasons, the petitioners' motion for a stay pending review is GRANTED. Enforcement of the Occupational Safety and Health Administration's "COVID-19 Vaccination and Testing; Emergency

Temporary Standard"[22] remains STAYED pending adequate judicial review of the petitioners' underlying motions for a permanent injunction.[23]

In addition, IT IS FURTHER ORDERED that OSHA take no steps to implement or enforce the Mandate until further court order.

[22] 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928).

[23] The Clerk of Court shall ensure that this order applies with equal force to all related motions consolidated into this case in accordance with the court's November 6, 2021 order.

STUART KYLE DUNCAN, *Circuit Judge*, concurring:

In addition to the many reasons ably identified by Judge Engelhardt's opinion, I underscore one reason why these challenges to OSHA's unprecedented mandate are virtually certain to succeed.

Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). OSHA's rule reaches "two-thirds of all private-sector workers in the nation."86 Fed. Reg. 61,402, 61,403 (Nov. 5, 2021). It compels covered employers to (1) make employees get vaccinated or get weekly tests at their expense and wear masks; (2) "remove" non-complying employees; (3) pay per-violation fines; and (4) keep records of employee vaccination or testing status. 86 Fed. Reg. at 61,402–03, 61,551–54; 29 U.S.C. § 666. OSHA invokes no statute expressly authorizing the rule. Instead, OSHA issued it under an emergency provision addressing workplace "substances," "agents," or "hazards" that it has used only ten times in the last 50 years and never to mandate vaccines. 86 Fed. Reg. at 61,403; *see* 29 U.S.C. § 655(c)(1).

Whether Congress could enact such a sweeping mandate under its interstate commerce power would pose a hard question. *See NFIB v. Sebelius*, 567 U.S. 519, 549–61 (2012). Whether OSHA can do so does not.

I concur in granting a stay.

U.S. Department of Labor
Employee Benefits Security Administration
Washington, D.C. 20210

EBSA Disaster Relief Notice 2020-01

Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak

On March 13, 2020, President Donald J. Trump signed the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (COVID-19 National Emergency).[1] The Department of Labor (Department) recognizes that the COVID-19 outbreak may temporarily impede efforts to comply with various requirements and deadlines under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Except as otherwise provided, this guidance applies to employee benefit plans, employers, labor organizations, and other plan sponsors, plan fiduciaries, participants and beneficiaries, and service providers subject to ERISA from March 1, 2020, the beginning of the national emergency declared by the President, until 60 days after the announcement of the end of the COVID-19 National Emergency or such other date announced by the Department in a future notice. To the extent there are different outbreak period end dates for different parts of the country, the Department will issue additional guidance regarding the application of the relief to those different areas.

This notice has been coordinated with and reviewed by the Department of the Treasury (Treasury Department), the Internal Revenue Service (IRS), and the Department of Health and Human Services (HHS). The Treasury Department, the IRS, and HHS have advised the Department that they concur with the relief specified in this notice in the application of the laws under their jurisdiction.[2]

HHS has advised the Department that HHS will exercise enforcement discretion to adopt a temporary policy of measured enforcement to extend similar timeframes otherwise applicable to non-Federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan, and their participants, beneficiaries and enrollees under applicable provisions of the Public Health Service Act (PHS Act). HHS has advised the Department that HHS encourages states and health insurance issuers offering coverage in

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[1] Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, issued March 13, 2020, available at https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[2] Section 104 of Title I of Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires that the Secretaries of Labor, the Treasury, and Health and Human Services (the Departments) ensure through an interagency Memorandum of Understanding (MOU) that regulations, rulings, and interpretations issued by each of the Departments relating to the same matter over which two or more departments have jurisdiction, are administered so as to have the same effect at all times. Under section 104, the Departments, through the MOU, are to provide for coordination of policies relating to enforcement of the same requirements in order to have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement. See section 104 of HIPAA and Memorandum of Understanding applicable to Title XXVII of the PHS Act, Part 7 of ERISA, and Chapter 100 of the Internal Revenue Code, published at 64 FR 70164, December 15, 1999.

connection with a group health plan to enforce and operate, respectively, in a manner consistent with the relief provided in this notice and will not consider a state to have failed to substantially enforce the applicable provisions of title XXVII of the PHS Act if it takes such an approach.

ERISA Section 518 Extension of Certain Timeframes for Employee Benefit Plans

Section 518 of ERISA, as amended by section 3607 of the Coronavirus Aid, Relief and Economic Security Act (CARES Act), provides, in relevant part, that, in the case of an employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster or a public health emergency declared by the Secretary of HHS, the Secretary of Labor may prescribe, by notice or otherwise, a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 further provides that no plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with the postponement of a deadline.

Section 518 Relief in Joint Notice Issued by the Department of Labor and Department of the Treasury/Internal Revenue Service

The Department in conjunction with the Treasury Department and the IRS is publishing a separate joint notice in the Federal Register to announce an extension for a number of deadlines so plan participants, beneficiaries, and employers have additional time to make critical health coverage and other decisions affecting benefits during the COVID-19 outbreak. For group health plans, subject to ERISA or the Internal Revenue Code, the relief provides additional time to comply with certain deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims, and external review of certain claims. With regard to disability, retirement, and other plans, the joint notice provides additional time for participants and beneficiaries to make claims for benefits and appeal denied claims. Without the extension, individuals might miss key deadlines during the COVID-19 outbreak that could result in the loss or lapse of group health coverage or the denial of a valid claim for benefits.

The joint notice also announces the adoption of a temporary policy of relaxed enforcement by HHS to extend similar timeframes otherwise applicable to non-Federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan, and their participants, beneficiaries, and enrollees under applicable provisions under the PHS Act.

Section 518 Relief Covered by this Notice

In addition to the relief provided in the joint notice, the Department is separately announcing in this notice an extension of deadlines for furnishing other required notices or disclosures to plan participants, beneficiaries, and other persons so that plan fiduciaries and plan sponsors have additional time to meet their obligations under Title of I ERISA during the COVID-19 outbreak. This extension applies to the furnishing of notices, disclosures, and other documents required by provisions of Title I of ERISA over which the Department has interpretive and regulatory authority, except for those notices and disclosures addressed in the Section 518 joint notice issued by the Department and the Treasury Department/IRS. Subject to the duration limitation in

ERISA section 518, an employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

The Department believes that such relief is immediately needed to preserve and protect private-sector employee benefit plans. Accordingly, the Department has determined, pursuant to section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b) and (d), that there is good cause for granting the relief provided by this notice effective immediately upon publication and that notice and public participation may result in undue delay and, therefore, be contrary to the public interest.[3]

Plan Loans and Distributions

Verification Procedures

If an employee pension benefit plan fails to follow procedural requirements for plan loans or distributions imposed by the terms of the plan, the Department will not treat it as a failure if:

- that failure is solely attributable to the COVID-19 outbreak;
- the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
- the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

This relief for verification procedures imposed by the terms of the plan is limited to verification requirements required under provisions of Title I of ERISA that are within the interpretive and regulatory authority of the Department, and, for example, does not include spousal consent or other statutory or regulatory requirements under the jurisdiction of the Treasury Department/IRS. See https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments or call 1-877-829-5500 for questions about Treasury Department/IRS coronavirus relief or other guidance.

Participant Loans under the CARES Act

Section 2202(b)(1) of the CARES Act provides that during the period beginning on March 27, 2020, and ending on September 22, 2020 (the "loan relief period"), in applying section 72(p) of

[3] Good cause exists for the same reasons underlying the issuance of the March 13, 2020 Proclamation on Declaring a National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Outbreak and the determination, under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, *et seq*., that a national emergency exists nationwide as a result of the COVID-19 pandemic, and the same reasons underlying the issuance of the January 31, 2020 declaration that a public health emergency exists under section 319 of the PHS Act.

the Internal Revenue Code to a plan loan of a qualified individual, the $50,000 aggregate limit in section 72(p)(2)(A)(i) is increased to $100,000 and the limit in section 72(p)(2)(A)(ii) on the aggregate amount of loans is increased from one-half of the employee's vested accrued benefit to 100 percent of the employee's vested accrued benefit. A qualified individual is an individual described in section 2202(a)(4)(A)(ii) of the CARES Act.

Section 2202(b)(2) of the CARES Act provides that any repayment of a plan loan made to a qualified individual that is due during the period beginning on March 27, 2020 and ending December 31, 2020, may be delayed for up to one year without violating section 72(p) of the Internal Revenue Code if subsequent repayments are adjusted to reflect the delay in the manner described in section 2202(b)(2)(B) of the CARES Act.

The Department has advised the Treasury Department and IRS that it will not treat any person as having violated the provisions of Title I of ERISA, including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR 2550.408b-1, solely because: (1) the person made a plan loan to a qualified individual during the loan relief period in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance; or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance.

Certain Plan Amendments Related to the COVID-19 Outbreak

If an employee pension benefit plan is amended to provide the relief for plan loans and distributions described in section 2202 of the CARES Act, the Department will treat the plan as being operated in accordance with the terms of such amendment prior to its adoption if: (1) the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022, or such later date prescribed by the Secretary of the Treasury (or the Secretary's delegate), and (2) the amendment meets the conditions of section 2202(c)(2)(B) of the CARES Act.

Participant Contributions and Loan Repayments

Under 29 CFR § 2510.3-102, amounts that a participant or beneficiary pays to an employer, or amounts withheld from the participant's wages by an employer, for contribution or repayment of a participant loan to an employee pension benefit plan constitute plan assets. Generally, these amounts must be forwarded to the plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the amounts were paid to or withheld by the employer.

The Department recognizes that some employers and service providers may not be able to forward participant payments and withholdings to employee pension benefit plans within prescribed timeframes during the period beginning on March 1, 2020, and ending on the 60th day following the announced end of the National Emergency. In such instances, the Department will not – solely on the basis of a failure attributable to the COVID-19 outbreak – take enforcement action with respect to a temporary delay in forwarding such payments or contributions to the

plan. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

Blackout Notices

In general, the administrator of an individual account plan is required to provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period under 29 CFR 2520.101-3. For instance, a period of suspension, limitation, or restriction of more than three consecutive business days on a participant's ability to direct investments, obtain loans or obtain other distributions from the plan results in a blackout period and triggers the advance notice. The regulations provide an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing. The above relief under Section 518 applies to blackout notices that are required to be provided under the regulation, including those required to be provided after the blackout period begins. Further, the Department will not require the written determination by a fiduciary pursuant to the regulation for blackout notices covered by this notice, as pandemics are by definition beyond a plan administrator's control.

Form 5500 and Form M-1 Filing Relief

Form 5500 Annual Return/Report filing relief is provided in accordance with guidance published by the Treasury Department and the IRS on the IRS COVID-19 emergency website: https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments. See Treasury Regulations under Internal Revenue Code § 7508A and Section 8 of Rev. Proc. 2018-58, 2018-50 I.R.B. 990 and IRS Notice 2020-23 *Update to Notice 2020-18, Additional Relief for Taxpayers Affected by Ongoing Coronavirus Disease 2019 Pandemic* at https://www.irs.gov/pub/irs-drop/n-20-23.pdf.

Form M-1 filings required for multiple employer welfare arrangements (MEWAs) and certain entities claiming exception (ECEs) are provided relief for the same period of time as the Form 5500 Annual Return/Report filing relief.

General ERISA Fiduciary Compliance Guidance

The Department recognizes that affected plan participants and beneficiaries may encounter problems due to the COVID-19 outbreak. The guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

In addition, the Department acknowledges that there may be instances when plans and service providers may be unable to achieve full and timely compliance with claims processing and other

ERISA requirements. Our approach to enforcement will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible.

Additional/Extension of Relief

The Department will continue to monitor the effects of the COVID-19 outbreak and may provide additional relief as warranted.

Contact Information

The Department will continue to monitor and respond to the situation as appropriate. For more information, visit the Department's Employee Benefits Security Administration's (EBSA) Disaster Relief pages for Employers and Advisers or Workers and Families at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief and https://www.dol.gov/agencies/ebsa/workers-and-families/disaster-relief, or contact EBSA at http://www.askebsa.dol.gov or 1-866-444-3272. Questions about IRS guidance should be directed to the IRS at https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments or 1-877-829-5500.

Premium Assistance for COBRA Benefits

Notice 2021-31

This notice provides guidance on the application of § 9501 of the American Rescue Plan Act of 2021 (the ARP), Pub. L. 117-2, 135 Stat. 4 (March 11, 2021), relating to temporary premium assistance for Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continuation coverage.[1]

BACKGROUND

Section 9501 of the ARP – COBRA Premium Assistance

Section 9501 of the ARP provides for a temporary 100 percent reduction in the premium otherwise payable by certain individuals and their families who elect COBRA continuation coverage through the Internal Revenue Code (Code), the Employee Retirement Income Security Act of 1974 (ERISA), or the Public Health Service Act (PHS Act) due to a loss of coverage as the result of a reduction in hours or an involuntary termination of employment.[2] The temporary premium assistance is also available to individuals enrolled in continuation health coverage under State programs that provide for coverage comparable to COBRA continuation coverage, often referred to as "mini-COBRA." In this notice, continuation of health coverage under all of these provisions is referred to as "COBRA continuation coverage," unless otherwise specified. Also, in this notice, the temporary premium assistance available under the ARP is referred to as "COBRA premium assistance" or "premium assistance," unless otherwise specified.

Under § 9501(a)(3) of the ARP, an "Assistance Eligible Individual" is an individual (1) who is a qualified beneficiary with respect to a period of COBRA continuation coverage during the period from April 1, 2021, through September 30, 2021, and eligible for that COBRA continuation coverage by reason of a qualifying event specified in § 603(2) of ERISA, § 4980B(f)(3)(B) of the Code, or § 2203(2) of PHS Act, except for voluntary termination of employment, and (2) who elects COBRA continuation coverage. The ARP requires that health insurance issuers and group health plans treat Assistance Eligible Individuals as having paid the full amount of their COBRA premium for the specified coverage. The person to whom premiums for COBRA continuation coverage are payable (the employer, insurer, or multiemployer plan, as applicable) is entitled to a refundable tax credit against its share of Medicare taxes under newly added

[1] Employer-sponsored health plans generally are required to offer an employee, spouse, or dependent child covered by the plan the opportunity to continue coverage under the plan for a specified period of time after the occurrence of certain events that otherwise would have terminated the coverage (qualifying events). These continuation of coverage requirements, and corresponding coverage (if elected), are often referred to as "COBRA continuation coverage" or "COBRA" requirements. The COBRA requirements were enacted originally as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272 (April 7, 1986), and are set forth in § 4980B of the Internal Revenue Code.

[2] COBRA continuation coverage under the Code, ERISA, and the PHS Act is also referred to in this notice as "Federal COBRA."

§ 6432 of the Code.[3]

COBRA premium assistance is available as of the first period of coverage beginning on or after April 1, 2021, and will not be available for periods of coverage beginning after September 30, 2021. For each Assistance Eligible Individual, COBRA premium assistance does not extend beyond the period of COBRA continuation coverage in the event that the period ends prior to September 30, 2021. However, premium assistance is not available if an individual is eligible for coverage under any other group health plan[4] or for Medicare. If an individual receiving premium assistance becomes eligible for coverage under any other group health plan or for Medicare, the premium assistance period ends. An individual receiving premium assistance who becomes eligible for coverage under any other group health plan or Medicare is required to notify the group health plan providing COBRA continuation coverage of eligibility for that other coverage. If the individual fails to notify the group health plan, the individual may be subject to a penalty of $250 for each failure. If the individual fraudulently fails to notify the group health plan, the individual is subject to a penalty equal to the greater of $250 or 110 percent of the premium assistance improperly received after the end of eligibility for COBRA premium assistance.

Under § 9501(a)(1)(B) of the ARP, an employer may allow an Assistance Eligible Individual to elect coverage different from the coverage under the plan in which the individual was enrolled before the reduction in hours or involuntary termination of employment, and COBRA premium assistance will apply with respect to that newly elected coverage.[5] The premium for the different coverage option that is offered may not exceed the premium for the coverage the individual had before the reduction in hours or involuntary termination of employment. In addition, the other coverage offered under this option must be coverage offered to similarly situated active employees and may not be coverage that provides only excepted benefits (as defined in § 9832(c) of the Code, § 733(c) of ERISA, and § 2971(c) of PHS Act), a health FSA (as defined by § 106(c)(2) of the Code), or a QSEHRA (as defined in § 9831(d)(2) of the Code). If offered the option to enroll in different coverage, the Assistance Eligible Individual has

[3] Section 6432 was first added to the Code by the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (Feb. 17, 2009). It was later stricken by the Tax Technical Corrections Act of 2018, Pub. L. 115-141 (March 23, 2018). The ARP restores § 6432 to the Code with certain modifications.

[4] Eligibility for coverage under any other group health plan does not terminate eligibility for COBRA premium assistance if the other group health plan provides only excepted benefits (as defined in § 9832(c) of the Code, § 733(c) of ERISA, and § 2971(c) of the PHS Act), is a health flexible spending arrangement (FSA) (as defined by § 106(c)(2) of the Code), or is a qualified small employer health reimbursement arrangement (as defined in § 9831(d)(2) of the Code) (QSEHRA). Whenever reference is made in this notice to the end of eligibility for COBRA premium assistance due to eligibility for coverage under any other group health plan, coverage under these plans or arrangements is not taken into account. Additionally, eligibility for other group health plan coverage (that is not an excepted benefit, a health FSA, or a QSEHRA) makes an individual ineligible for COBRA premium assistance even if the offer of other coverage does not provide minimum value or is not affordable for purposes of the premium tax credit under § 36B.

[5] Note that this provision does not modify the general requirement under Federal COBRA that a group health plan must allow a qualified beneficiary to elect to continue the coverage in which the individual was enrolled as of the qualifying event.

90 days after the date of the notice of the option to elect other coverage to elect the other coverage.

Section 9501(a)(4) of the ARP provides an extended election period for certain individuals who did not have an election of COBRA continuation coverage in effect on April 1, 2021, referred to in this notice as the "ARP extended election period." The ARP extended election period is available for an individual who would be an Assistance Eligible Individual if the individual had a COBRA continuation coverage election in effect on April 1, 2021, or an individual who previously elected COBRA continuation coverage and discontinued that coverage before April 1, 2021. The ARP extended election period continues for 60 days after these individuals are provided notice of the extended election period. The resulting COBRA continuation coverage does not extend beyond the maximum period of COBRA continuation coverage that would have been required under the applicable COBRA continuation coverage provision if the individual had elected COBRA continuation coverage initially as required under that applicable COBRA provision, or had not discontinued the elected COBRA continuation coverage.

The plan must treat an Assistance Eligible Individual as having paid the full premium. If the plan does not treat the Assistance Eligible Individual as having paid the full premium, the plan will have failed to meet the applicable continuation coverage requirements. Thus, in the case of a plan subject to COBRA continuation coverage requirements under § 4980B, the failure to treat the Assistance Eligible Individual as having made the full payment is a failure to satisfy the requirements of § 4980B and may result in the imposition of the excise tax under § 4980B(b).

Section 6432 of the Code – COBRA Premium Assistance Credit

The ARP adds § 6432 to the Code, which provides that the "person to whom premiums are payable for continuation coverage" is allowed a "premium assistance credit" for each calendar quarter against the tax imposed by § 3111(b), or against so much of the taxes imposed under § 3221(a) as are attributable to the rate in effect under § 3111(b), of an amount equal to the premiums not paid by Assistance Eligible Individuals for COBRA continuation coverage by reason of § 9501(a)(1) of the ARP with respect to that calendar quarter. If, for the calendar quarter for which the credit is allowed, the amount of the credit allowed is in excess of the tax imposed by § 3111(b), or so much of the taxes imposed under § 3221(a) as are attributable to the rate in effect under § 3111(b), after reduction for any credits allowed under §§ 3131, 3132, and 3134, the excess is treated as an overpayment that is refunded under §§ 6402(a) and 6413(b).

The "person to whom premiums are payable" is (1) the multiemployer plan, in the case of a group health plan that is a multiemployer plan (as defined in § 3(37) of ERISA); (2) the employer, in the case of a group health plan, other than a multiemployer plan, that is (a) subject to Federal COBRA, or (b) under which some or all of the coverage is not provided by insurance (that is, a plan that is self-funded, in whole or in part); or (3) the insurer providing the coverage, in the case of any other group health

plan not described in (1) or (2) (generally, fully insured coverage subject to State continuation coverage requirements, not Federal COBRA). In this notice, the “person to whom premiums are payable” is sometimes referred to as the “premium payee.”

Section 6432(c)(2)(C) provides that any penalty under § 6656 for any failure to make a deposit of the tax imposed by § 3111(b), or so much of the taxes imposed under § 3221(a) as are attributable to the rate in effect under § 3111(b), is waived if the Secretary of the Treasury determines that the failure was due to anticipation of the premium assistance credit. Also, Notice 2021-24, 2021-18 IRB 1122, provides that the penalty under § 6656 does not apply for any failure to timely deposit employment taxes (withheld income taxes, taxes under the Federal Insurance Contributions Act (FICA), and taxes under the Railroad Retirement Tax Act (RRTA)) if (1) the employer is a person to whom premiums are payable, (2) the amount of employment taxes that the employer does not timely deposit (after reduction for other credits) is less than or equal to the amount of the employer’s anticipated credits under § 6432(a) for the calendar quarter as of the time of the required deposit, and (3) the employer did not seek payment of an advance credit by filing Form 7200 with respect to the anticipated credits it relied upon to reduce its deposits. Section 6432(f) extends the statute of limitations for the assessment of any amount attributable to the credit to 5 years after the later of (1) the date on which the original return which includes the calendar quarter with respect to which the credit is determined is filed, or (2) the date on which that return is treated as filed under § 6501(b)(2). Finally, § 6432(g) provides that the Secretary shall issue such regulations, or other guidance, forms, instructions, and publications, as may be necessary or appropriate to carry out § 6432, including “allowing the credit to third-party payers (including professional employer organizations, certified professional employer organizations, or agents under § 3504).”

Under § 6432(e), the gross income of any person allowed the premium assistance credit is increased, for the taxable year which includes the last day of any calendar quarter with respect to which the credit is allowed, by the amount of the credit. In addition, no credit is allowed with respect to any amount which is taken into account as qualified wages under § 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (March 27, 2020), as amended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (December 27, 2020), § 3134 of the Code, or as qualified health plan expenses under §§ 7001(d) or 7003(d) of the Families First Coronavirus Response Act (FFCRA), Pub. L. 116-127, 134 Stat. 178 (March 18, 2020), as amended by § 286 of the Relief Act, or §§ 3131 or 3132 of the Code.

Finally, the amount of any COBRA premium assistance is excluded from an individual’s gross income under new § 139I of the Code.

Emergency Relief Notices

In response to the COVID-19 National Emergency,[6] the Departments of Labor and the Treasury (the Departments) issued the Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice) (85 FR 26351, published May 4, 2020), which provides extensions of certain timeframes for group health plans and their participants and beneficiaries. The Joint Notice provides that plans must disregard certain periods beginning March 1, 2020 until 60 days after the announced end of the National Emergency or such other date announced by the Departments (Outbreak Period) in determining the time by which certain actions must be taken or are permitted to be completed.

Section 7508A(b) of the Code and § 518 of ERISA limit the Departments' authority to disregard time periods to one year. As the one-year anniversary of the Joint Notice approached, the Department of Labor, with the concurrence of the Treasury Department, issued EBSA Disaster Relief Notice 2021-01 (February 26, 2021). EBSA Disaster Relief Notice 2021-01 clarifies that disregarded periods under the Joint Notice run until the earlier of (1) one year from the date the applicable person was first eligible for relief, or (2) 60 days after the announced end of the National Emergency. The Joint Notice and EBSA Disaster Relief Notice 2021-01 are referred to collectively in this notice as the "Emergency Relief Notices."

The periods and dates subject to the Emergency Relief Notices include, among others: (1) the 60-day election period for COBRA continuation coverage under § 4980B(f)(5); (2) the date for making COBRA premium payments pursuant to § 4980B(f)(2)(B)(iii) and (C); and (3) the date for plans to provide a COBRA election notice under § 4980B(f)(6)(D).

QUESTIONS AND ANSWERS

The following questions and answers address many issues that have arisen with respect to COBRA premium assistance available for COBRA continuation coverage under the ARP. Generally, the questions and answers apply for purposes of all COBRA continuation coverage requirements under the ARP, that is, both Federal COBRA and comparable State mini-COBRA requirements. If a question or answer or a particular part of an answer is applicable only to Federal COBRA, that discussion refers specifically to Federal COBRA. COBRA premium assistance requirements apply to the employer or plan sponsor, group health plan, or issuer, depending on the facts and circumstances. For simplicity, in this notice, references in the questions and answers to an "employer" are considered references to the employer, plan, plan sponsor, group health plan, or issuer, as applicable to a particular situation, whereas references to

[6] On March 13, 2020, the President issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak declaring a national emergency, beginning March 1, 2020, under §§ 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq.*). By separate letter, also on March 13, 2020, the President declared under § 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.*, that an emergency existed nationwide, as the result of the COVID-19 outbreak (the COVID-19 National Emergency or National Emergency). *See* 85 FR 26351, 26352 (May 4, 2020).

"common law employer" are references to the entity that is the employer under the common law of the Assistance Eligible Individual receiving the COBRA premium assistance.

ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE

Q-1. Who qualifies as an Assistance Eligible Individual?

A-1. An Assistance Eligible Individual is any individual who is (1) a qualified beneficiary as the result of (A) the reduction of hours of a covered employee's employment or (B) the involuntary termination of a covered employee's employment (other than by reason of an employee's gross misconduct), (2) is eligible for COBRA continuation coverage for some or all of the period beginning on April 1, 2021, through September 30, 2021, and (3) elects the COBRA continuation coverage. This includes qualified beneficiaries who are the spouse or dependent child of the employee who had the reduction in hours or involuntary termination of employment resulting in a loss of coverage, as well as the employee, if that reduction in hours or involuntary termination of employment caused the qualified beneficiary to lose coverage and the other requirements are satisfied.

Q-2. Who qualifies as a qualified beneficiary for purposes of becoming an Assistance Eligible Individual?

A-2. In order to be a qualified beneficiary who is eligible to become an Assistance Eligible Individual, an individual must (1) be covered under the group health plan on the day before the reduction in hours or involuntary termination of the covered employee's employment, and (2) lose eligibility for the coverage due to the reduction in hours or involuntary termination of the covered employee's employment.[7] An individual who loses group health coverage in connection with the termination of a covered employee's employment by reason of the employee's gross misconduct is not a qualified beneficiary and, thus, cannot be an Assistance Eligible Individual.

Q-3. Can an individual become an Assistance Eligible Individual more than once?

A-3. Yes. An individual who becomes a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment, and who otherwise meets the requirements to be an Assistance Eligible Individual, is treated as an Assistance Eligible Individual regardless of whether the individual was also treated as an Assistance Eligible Individual at an earlier date.

Example: On April 1, 2021, the individual's employment is terminated, and the individual becomes a qualified beneficiary. The individual elects COBRA continuation

[7] There are exceptions to this rule in the case of a child born to or adopted by a covered employee during a period of COBRA continuation coverage or in certain circumstances where coverage was wrongfully denied to the individual (see § 54.4980B-3, Q&A-1).

coverage and becomes an Assistance Eligible Individual with COBRA continuation coverage beginning on April 1, the date the individual lost coverage. On July 1, 2021, the individual becomes eligible for coverage under a group health plan sponsored by the employer of the individual's spouse and ceases to be an Assistance Eligible Individual. The individual ceases COBRA continuation coverage as of July 1, 2021, and enrolls in coverage in the group health plan sponsored by the employer of the individual's spouse. On August 1, 2021, the individual's spouse has an involuntary termination of employment and as a result the individual and spouse lose coverage. The individual and spouse become qualified beneficiaries due to the loss of coverage and elect COBRA continuation coverage with the plan sponsored by the spouse's employer. The individual and spouse become Assistance Eligible Individuals with respect to COBRA continuation coverage as of August 1, 2021.

Q-4. May the employer require individuals to self-certify or attest that they are eligible for COBRA continuation coverage with COBRA premium assistance due to a reduction in hours or involuntary termination of employment and, if so, may the self-certification or attestation be used to assist the employer in substantiating its entitlement to the premium assistance credit?

A-4. Yes. Employers may require individuals to provide a self-certification or attestation regarding their eligibility status with respect to a reduction in hours or involuntary termination of employment, which may assist the employer in substantiating its entitlement to the credit. Employers are not required to obtain a self-certification or attestation; however, employers who claim the credit must retain in their records either a self-certification or attestation from the individual regarding the individual's eligibility status, or other documentation to substantiate that the individual was eligible for the COBRA premium assistance (see Q&A-7; see also Q&A-84).

Q-5. May the employer require individuals to self-certify or attest as to their eligibility status regarding other disqualifying group health plan coverage or Medicare, and if so, may the self-certification or attestation be used to assist the employer in substantiating its entitlement to the premium assistance credit?

A-5. Yes. Employers may require individuals to provide a self-certification or attestation as to their eligibility status for other disqualifying group health plan coverage or Medicare, which may assist the employer in substantiating its entitlement to the premium assistance credit. Employers are not required to obtain a self-certification or attestation; however, employers who claim the credit must retain in their records either a self-certification or attestation from the individual regarding the individual's eligibility status, or other documentation to substantiate that the individual was eligible for the COBRA premium assistance (see Q&A-7; see also Q&A-84).

Q-6. May an employer rely on an individual's attestation regarding a reduction in hours or involuntary termination of employment, or regarding eligibility for other disqualifying coverage, for the purpose of substantiating eligibility for the premium assistance credit?

A-6. Yes. An employer may rely on an individual's attestation regarding a reduction in hours or involuntary termination of employment, and eligibility for other disqualifying coverage, for the purpose of substantiating eligibility for the credit, unless the employer has actual knowledge that the individual's attestation is incorrect.

Q-7. Must an employer keep a record of an individual's attestation?

A-7. Yes. If the employer is relying on an individual's attestation regarding a reduction in hours or involuntary termination of employment, or regarding eligibility for other disqualifying coverage, the employer must keep a record of the attestation in order to substantiate eligibility for the premium assistance credit. An employer may rely on other evidence to substantiate eligibility, such as records concerning a reduction in hours or involuntary termination of employment.

Q-8. Does a qualifying event other than a reduction in hours or an involuntary termination of employment qualify an individual for COBRA premium assistance?

A-8. No. Qualifying events other than a reduction in hours or an involuntary termination of employment, such as divorce or a covered dependent child ceasing to be a dependent child under the generally applicable terms of the plan (such as loss of dependent status due to aging out of eligibility), are not events qualifying an individual for COBRA premium assistance.

Q-9. If a potential Assistance Eligible Individual was eligible for other group health plan coverage before April 1, 2021, but on and after April 1, 2021, has not been permitted to enroll in that other group health plan coverage, is COBRA premium assistance available for the individual's COBRA continuation coverage?

A-9. Yes. COBRA premium assistance is available to a potential Assistance Eligible Individual until the individual is permitted to enroll in coverage under any other group health plan (including during a waiting period for any other plan).

Example 1: An individual's employment was involuntarily terminated and as a result the individual lost health coverage on October 1, 2020. On November 1, 2020, the individual was eligible to enroll in the group health plan provided by the employer of the individual's spouse as part of that group health plan's annual open enrollment period, but the individual did not enroll. The open enrollment period for the spouse's group health plan ended December 1, 2020, and the individual has not been permitted to enroll in coverage under the spouse's group health plan at any time on or after April 1, 2021. Under these facts, the individual is not considered eligible for coverage under the plan of the spouse's employer until the first available enrollment period, if any, that begins on or after April 1, 2021. Therefore, the individual may elect COBRA continuation coverage under the plan of the individual's former employer during the ARP extended election period and may receive COBRA premium assistance as an Assistance Eligible Individual under the plan of the individual's former employer,

beginning on or after April 1, 2021.

Example 2: Same facts as Example 1, except that the spouse's group health plan has an open enrollment period from June 1, 2021, to June 14, 2021, with coverage elected during the open enrollment period beginning July 1, 2021. The spouse does not elect coverage for the individual under the plan of the spouse's employer, and the individual continues COBRA continuation coverage under the plan of the individual's former employer. Under these facts, COBRA premium assistance is not available for the individual's COBRA continuation coverage under the plan of the individual's former employer for periods of coverage beginning on or after July 1, 2021 (the date on which the individual was first eligible to enroll in the group health plan of the spouse's employer).

Example 3: An individual's employment was involuntarily terminated and as a result the individual lost health coverage on October 1, 2020. The individual received a COBRA notice on October 1, 2020. The individual qualified for a special enrollment period for loss of coverage under the group health plan of the spouse's employer. Under the Emergency Relief Notices, the individual remains eligible to elect COBRA continuation coverage or enroll in the spouse's plan. Additionally, on November 1, 2020, the individual was eligible to enroll in the spouse's plan under that plan's annual open enrollment period. The open enrollment period for the spouse's plan ended December 1, 2020. However, the individual remains eligible to enroll in coverage under the spouse's plan under the loss of coverage special enrollment period due to the Emergency Relief Notices. Under these facts, the individual is considered eligible for coverage under the plan of the spouse's employer due to the special enrollment period for loss of coverage as extended by the Emergency Relief Notices. Therefore, while the individual could elect COBRA continuation coverage from the former employer's plan, the individual may not receive COBRA premium assistance as an Assistance Eligible Individual under the plan of the individual's former employer.

Q-10. If a potential Assistance Eligible Individual does not elect COBRA continuation coverage and enrolls in coverage under another group health plan, but has ceased to be covered by the other group health plan as of April 1, 2021, is COBRA premium assistance available if the individual elects COBRA continuation coverage under the ARP extended election period?

A-10. Yes. Enrollment in other group health plan coverage before electing COBRA continuation coverage does not end the period of eligibility for COBRA continuation coverage. If the individual is no longer covered by (or eligible to enroll in) the other group health plan coverage as of April 1, 2021, that prior coverage by a group health plan does not disqualify the individual from COBRA premium assistance. However, beginning on April 1, 2021, coverage by (or eligibility to enroll in) another group health plan would disqualify the individual from COBRA premium assistance, even though it does not end the period of eligibility for COBRA continuation coverage.

Q-11. If an Assistance Eligible Individual is eligible for other disqualifying group

health plan coverage or Medicare beginning on or after April 1, 2021, but does not enroll in either, is COBRA premium assistance available for the individual's COBRA continuation coverage for periods of coverage beginning on or after the date the individual is first eligible for the other coverage?

A-11. No. (However, if the other coverage for which the individual is eligible is COBRA continuation coverage, that coverage will not cause the individual to be ineligible for the COBRA premium assistance.)

Example 1: An Assistance Eligible Individual enrolled in COBRA continuation coverage begins employment with a new employer and is eligible to enroll in the employer's group health plan, with coverage effective the first day of the next month. The Assistance Eligible Individual declines the coverage and continues COBRA continuation coverage. Although eligibility for other group health coverage does not end the individual's eligibility for Federal COBRA continuation coverage, eligibility for COBRA premium assistance ends as of the first day of the next month.

Example 2: Same facts as Example 1, except that the new employer's group health plan imposes a 2-month waiting period, with coverage starting as of the first day of the month immediately following the end of the waiting period. The individual's eligibility for COBRA premium assistance ends as of the first day of the month immediately following the end of the waiting period, even though the individual declined coverage under the new employer's group health plan. The result is the same if the individual enrolls in the new employer's group health plan; the individual is not eligible for COBRA premium assistance as of the first day of the month immediately following the end of the waiting period.

Example 3: Two Assistance Eligible Individuals who are spouses are enrolled in COBRA continuation coverage. One spouse begins employment with a new employer and is eligible to enroll in the employer's group health plan with self-only or family coverage, with coverage effective the first day of the next month. That spouse enrolls in self-only coverage, and the other spouse continues COBRA continuation coverage. Although the individual is allowed to continue Federal COBRA continuation coverage, the individual is no longer eligible for COBRA premium assistance as of the first day of the next month because the individual is eligible for coverage under the group health plan of the spouse's employer.

Q-12. Is an individual currently enrolled in Medicare who is a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment able to elect COBRA continuation coverage and receive COBRA premium assistance?

A-12. No. An individual currently enrolled in Medicare who becomes a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment may be eligible to elect COBRA continuation coverage but is not eligible for COBRA premium assistance.

Q-13. Is an individual who is a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment but who is currently enrolled in individual health insurance coverage through a Health Insurance Exchange eligible to elect COBRA continuation coverage and receive COBRA premium assistance?

A-13. Yes. An individual who is a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment but who is currently enrolled in individual health insurance coverage through a Health Insurance Exchange may be eligible to elect COBRA continuation coverage and for COBRA premium assistance. However, an individual is not eligible for a premium tax credit to help pay for the cost of Exchange coverage during any month that the individual is enrolled in COBRA continuation coverage. An individual who elects COBRA continuation coverage (with or without COBRA premium assistance) and who is enrolled in coverage through a Health Insurance Exchange with advance payments of the premium tax credit (APTC) may be required to repay the APTC for the overlap months. See Q&A-44 for information regarding the waiver of COBRA continuation coverage, which may assist individuals in this situation.

Q-14. Does a reduction in hours or involuntary termination of employment that follows an earlier qualifying event, such as a divorce, make the qualified beneficiary from the first qualifying event a potential Assistance Eligible Individual?

A-14. No. If COBRA continuation coverage is based on a qualifying event other than a reduction in hours or involuntary termination of employment, the later reduction in hours or involuntary termination of employment of the employee does not cause a loss of coverage, and the qualified beneficiary therefore does not become a potential Assistance Eligible Individual.

Example: An employee is divorced and the divorce results in a loss of health coverage for the spouse of the employee (but not the employee) on November 1, 2020. The spouse is eligible for and timely elects COBRA continuation coverage. On December 1, 2020, the employee's employment is involuntarily terminated and, as a result, the employee loses health coverage. The employee elects COBRA continuation coverage that begins December 1, 2020. The spouse is not an Assistance Eligible Individual because the qualifying event with respect to the spouse's COBRA continuation coverage is the divorce, rather than the employee's involuntary termination of employment. Moreover, the employee's involuntary termination of employment is not a qualifying event for the spouse. The employee is an Assistance Eligible Individual, however, because the qualifying event with respect to the employee is the involuntary termination of employment.

Q-15. If, as the result of an involuntary termination of employment, an individual loses coverage under a health plan that is not subject to COBRA continuation coverage requirements (as defined under the ARP) and the individual is then offered and elects continuation coverage provided voluntarily by the employer, is COBRA premium

assistance available with respect to that continuation coverage?

A-15. No. In order for COBRA premium assistance and the related premium assistance credit to be available, the plan must be subject to COBRA continuation coverage requirements as defined under the ARP. Examples of health plans that may not be subject to either Federal COBRA or State mini-COBRA include a self-insured church plan or a small employer plan. (Treas. Reg. § 54.4980B-2, Q&A-5 provides that a small-employer plan excluded from Federal COBRA is a group health plan maintained by an employer that normally employed fewer than 20 employees during the preceding calendar year.)

Q-16. Is COBRA premium assistance available with respect to temporary continuation coverage elected under the Federal Employees Health Benefits (FEHB) program pursuant to 5 U.S. Code § 8905a by an individual who lost coverage due to a reduction in hours or an involuntary termination of employment?

A-16. No. Continuation coverage elected under the FEHB program pursuant to 5 U.S. Code § 8905a is not COBRA continuation coverage for purposes of § 9501 of the ARP and so COBRA premium assistance is not available with respect to that coverage.

Q-17. Is COBRA premium assistance available to individuals who have elected and remained on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent those additional periods of coverage fall between April 1, 2021, and September 30, 2021, if the original qualifying event was a reduction in hours or an involuntary termination of employment?

A-17. Yes. If the original qualifying event was a reduction in hours or an involuntary termination of employment, COBRA premium assistance is available to individuals who have elected and remained on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent the additional periods of coverage fall between April 1, 2021, and September 30, 2021.

Q-18. If retiree health coverage (that is not COBRA continuation coverage) is offered to a potential Assistance Eligible Individual, how does that offer affect eligibility for COBRA premium assistance?

A-18. The effect on eligibility for COBRA premium assistance depends on whether the retiree health coverage is offered under the same group health plan as the COBRA continuation coverage or under a separate group health plan. If offered under the same group health plan, the offer of the retiree health coverage has no effect on a potential Assistance Eligible Individual’s eligibility for COBRA premium assistance under the ARP. However, a potential Assistance Eligible Individual is not eligible for COBRA premium assistance if the individual is offered retiree health coverage that is not COBRA continuation coverage and is coverage under a separate group health plan

than the plan under which the COBRA continuation coverage is offered.

The COBRA regulations provide rules for determining whether health benefits provided by an employer or employee organization constitute one or more group health plans for purposes of Federal COBRA. See Treas. Reg. § 54.4980B-2, Q&A-6. Under those rules, all health benefits provided by an organization constitute a single group health plan unless it is clear from the instruments governing the arrangement or arrangements that the benefits are being provided under separate plans, and the arrangement or arrangements are operated pursuant to such instruments as separate plans. (See Q&A-36 for more information regarding retiree health coverage.)

Q-19. Does COBRA premium assistance apply to portions of the premium attributable to COBRA continuation coverage for individuals who are not qualified beneficiaries?

A-19. No. COBRA premium assistance is limited to premiums attributable to COBRA continuation coverage for Assistance Eligible Individuals. For purposes of Federal COBRA, a qualified beneficiary with respect to a covered employee under a group health plan is the spouse of the employee or a dependent child of the employee if the spouse or dependent child was a beneficiary under the plan on the day before the qualifying event. A child who is born to or adopted by the covered employee during the period of COBRA continuation coverage may also be a qualified beneficiary. Otherwise, a spouse or dependent child who was not a beneficiary under the plan before the qualifying event is not a qualified beneficiary. In addition, if an individual does not meet the definition of a qualified beneficiary under Federal COBRA, the individual's coverage is not eligible for COBRA premium assistance, even though the individual may continue to be covered or be eligible to continue coverage under a plan by its terms, or as required by State law. (If there are additional individuals enrolled in COBRA continuation coverage who are ineligible for COBRA premium assistance, see Q&A-68 for information regarding calculation of the premium assistance credit.)

Q-20. If an individual makes or owes COBRA premium payments for retroactive COBRA continuation coverage elected under the Emergency Relief Notices for which the payment due date has been extended, does that make the individual ineligible for premium assistance?

A-20. No. If an individual elected retroactive COBRA continuation coverage under the Emergency Relief Notices, neither making nor owing COBRA premium payments for retroactive COBRA continuation coverage for which the payment due date has been extended makes an individual ineligible for COBRA premium assistance. However, an individual may lose retroactive COBRA continuation coverage (as noted in Q&A-58) for the months for which the premium is not timely paid under the Emergency Relief Notices. Any late or unpaid premiums for retroactive COBRA continuation coverage will not affect an individual's eligibility for COBRA premium assistance.

REDUCTION IN HOURS

Q&A-21 through Q&A-23 apply solely for purposes of determining whether there is a reduction in hours under § 9501 of the ARP and § 6432 of the Code, and other provisions of the Code added or amended by § 9501 of the ARP, but not for any other purposes of the Code or any other law.

Q-21. May a qualified beneficiary whose qualifying event is a voluntary reduction in hours be a potential Assistance Eligible Individual who qualifies for COBRA premium assistance?

A-21. Yes. An employee's reduction in hours would cause the qualified beneficiary to be a potential Assistance Eligible Individual regardless of whether the reduction in hours is voluntary or involuntary.

Q-22. Is a qualified beneficiary whose qualifying event is a furlough a potential Assistance Eligible Individual who qualifies for COBRA premium assistance?

A-22. Yes. In this notice, the term "furlough" means a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours (for example, due to an expected business recovery of the employer) such that the employer and employee intend to maintain the employment relationship. A furlough may be a reduction in hours regardless of whether the employer initiated the furlough, or the individual participated in a furlough process analogous to a window program (see Q&A-29).

Q-23. Does a reduction in hours include a work stoppage as the result of a lawful strike initiated by employees or their representatives or a lockout initiated by the employer?

A-23. Yes. A reduction in hours includes a work stoppage, either as the result of a lawful strike initiated by employees or their representatives or a lockout initiated by the employer, as long as at the time the work stoppage or the lawful strike commences the employer and employee intend to maintain the employment relationship.

INVOLUNTARY TERMINATION OF EMPLOYMENT

Q&A-24 through Q&A-34 apply solely for purposes of determining whether there is an involuntary termination of employment under § 9501 of the ARP and § 6432 of the Code, and other provisions of the Code added or amended by § 9501 of the ARP, but not for any other purposes under the Code or any other law.

Q-24. What circumstances constitute an involuntary termination of employment for purposes of the definition of an Assistance Eligible Individual?

A-24. An involuntary termination of employment means a severance from employment due to the independent exercise of the unilateral authority of the employer

to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services. For application of the involuntary termination of employment standard with respect to the failure to renew an employment agreement or similar contract, see Q&A-34. In addition, an employee-initiated termination of employment constitutes an involuntary termination of employment for purposes of COBRA premium assistance if the termination of employment constitutes a termination for good reason due to employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge.

The determination of whether a termination is involuntary is based on the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that the employee was willing and able to continue performing services, so that, absent the voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.

Q-25. Does involuntary termination of employment include an employer's action to end an individual's employment while the individual is absent from work due to illness or disability, if that action would otherwise constitute an involuntary termination of employment?

A-25. Yes. Involuntary termination of employment occurs when the employer takes action to terminate the individual's employment, if before the action there is a reasonable expectation that the employee will return to work after the illness or disability has subsided. However, mere absence from work due to illness or disability before the employer has taken action to end the individual's employment is not an involuntary termination of employment (see Q&A-32). Whether the absence from work is a reduction in hours potentially resulting in COBRA continuation coverage depends on whether the absence from work results in a loss of coverage.

Q-26. Does an involuntary termination of employment include retirement?

A-26. Generally, no. In general, a retirement is a voluntary termination of employment. However, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's employment, that the employee was willing and able to continue employment, and that the employee had knowledge that the employee would be terminated absent the retirement, the retirement is an involuntary termination of employment.

Q-27. Does involuntary termination of employment include involuntary termination of employment for cause?

A-27. Yes. However, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the loss of the health coverage of the employee and other family members by reason of the

employee's termination of employment does not lead to eligibility for COBRA continuation coverage. Therefore, the loss of coverage due to a termination of employment for gross misconduct will not result in an individual becoming a potential Assistance Eligible Individual.

Q-28. Does an involuntary termination of employment include a resignation as the result of a material change in the geographic location of employment for the employee?

A-28. Yes.

Q-29. Does an involuntary termination of employment include participation by an employee in a window program under which employees with impending terminations of employment are offered a severance arrangement to terminate employment within a specified period of time (the "window")?

A-29. Yes. An involuntary termination of employment includes participation in a window program that meets the requirements of Treas. Reg. § 31.3121(v)(2)-1(b)(4)(v). See those regulations for further information including certain time limits applicable to the window and limits on the ability to have successive windows.

Q-30. Does an involuntary termination of employment occur because the termination of employment is for "good reason" if an employee terminates employment because of concerns about workplace safety due to a health condition of the employee or a family member of the employee?

A-30. In general, an employee's termination of employment due to general concerns about workplace safety is not treated as an involuntary termination of employment. However, a termination of employment would be involuntary if the employee can demonstrate that the employer's actions (or inactions) resulted in a material negative change in the employment relationship analogous to a constructive discharge. A departure due to the personal circumstances of the employee unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate daycare, or other similar issues, generally will not rise to the level of being analogous to a constructive discharge absent the employer's failure to either take a required action or provide a reasonable accommodation.

Q-31. Is an individual whose qualifying event is an employee-initiated termination of employment because a child is unable to attend school or because another childcare facility is closed due to the COVID-19 National Emergency a potential Assistance Eligible Individual?

A-31. No. However, if the individual maintains the ability to return to work, and the facts and circumstances indicate that the qualifying event is a temporary leave of absence such that the employer and employee intend to maintain the employment relationship, the qualifying event is a voluntary reduction in hours and the individual

would be a potential Assistance Eligible Individual.

Q-32. Does an involuntary termination of employment include a termination of employment initiated by the employee in response to an involuntary material reduction in hours that did not result in a loss of coverage?

A-32. Yes. For purposes of COBRA premium assistance, an employee-initiated termination of employment in response to an involuntary material reduction in hours is treated as a termination for good reason. Thus, an employee-initiated termination of employment due to an involuntary material reduction in hours would be an involuntary termination of employment for purposes of COBRA premium assistance.

Q-33. Is the death of an employee an involuntary termination of employment that makes qualified beneficiaries such as the spouse and dependent children of the employee potential Assistance Eligible Individuals?

A-33. No. The death of an employee is not a reduction in hours or an involuntary termination of employment, so a loss of coverage due to the employee's death would not result in the spouse and dependent children of the employee being potential Assistance Eligible Individuals.

Q-34. Does an involuntary termination of employment include an employer's decision not to renew an employee's contract, including for an employee whose employer is a staffing agency?

A-34. Generally, yes. An employer's decision not to renew an employee's contract will be considered an involuntary termination of employment if the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract. However, if the parties understood at the time they entered into the expiring contract, and at all times when services were being performed, that the contract was for specified services over a set term and would not be renewed, the completion of the contract without it being renewed is not an involuntary termination of employment.

COVERAGE ELIGIBLE FOR COBRA PREMIUM ASSISTANCE

Q-35. Is COBRA premium assistance available for COBRA continuation coverage under a vision-only or dental-only plan?

A-35. Yes. COBRA premium assistance is available for COBRA continuation coverage of any group health plan, except a health FSA under § 106(c) offered under a § 125 cafeteria plan. Group health plans include vision-only and dental-only plans, regardless of whether the employer pays for a portion of the premiums for active employees. COBRA premium assistance is not available for continuation coverage offered by employers for non-health benefits that are not subject to Federal COBRA

continuation coverage requirements, such as group-term life insurance. (See Q&A-55 regarding eligibility for COBRA continuation coverage for distinct benefit options).

Q-36. May retiree health coverage be treated as COBRA continuation coverage for which COBRA premium assistance is available?

A-36. Yes, but only if the retiree coverage is offered under the same group health plan as the coverage made available to similarly situated active employees, though the amount charged for the retiree coverage may be higher than that charged to active employees. In that case, the retiree coverage may still be eligible for the COBRA premium assistance as long as the amount charged to a retiree does not exceed the maximum amount allowed under Federal COBRA.

Q-37. Is COBRA premium assistance available for COBRA continuation coverage under a health reimbursement arrangement (HRA)?

A-37. Yes. Note that, for purposes of the ARP, COBRA continuation coverage does not include a health FSA provided through a § 125 cafeteria plan paid for with salary reduction amounts. Even though, under some circumstances, an HRA may qualify as a health FSA under § 106(c)(2), such an HRA would not be excluded from the ARP's definition of COBRA continuation coverage because the HRA would be paid for with employer contributions, not salary reduction amounts contributed through a § 125 cafeteria plan.

Q-38. Does eligibility for coverage under an HRA end the period of COBRA premium assistance under the ARP in the same way as eligibility for coverage under any other group health plan?

A-38. Yes, unless the HRA qualifies as a health FSA under § 106(c)(2). Under § 106(c)(2)(B), a health FSA is health coverage under which the maximum amount of reimbursement that is reasonably available to a participant for the coverage is less than 500 percent of the value of the coverage. For this purpose, the maximum amount of reimbursement that is reasonably available generally would be the balance of the HRA, and the value of the HRA coverage generally would be the applicable premium for COBRA continuation of the HRA coverage, not taking into account COBRA premium assistance.

Q-39. Is COBRA premium assistance available for COBRA continuation coverage under an HRA integrated with individual health insurance coverage (an individual coverage HRA)?

A-39. Yes. In the case of an individual coverage HRA, the COBRA continuation coverage applies only to the individual coverage HRA and not to the underlying individual health insurance coverage. The qualified beneficiary with COBRA continuation coverage must still incur and substantiate covered medical care expenses (which may include health insurance premiums) to be reimbursed by the individual

coverage HRA. Although an individual coverage HRA may include an HRA integrated with Medicare, a qualified beneficiary eligible for Medicare cannot be an Assistance Eligible Individual; thus, COBRA premium assistance is not available if the COBRA continuation coverage is under an individual coverage HRA integrated with Medicare. (See Q&A-70 regarding the calculation of the premium assistance credit in the case of an individual coverage HRA.)

Q-40. Is COBRA premium assistance available for coverage under a QSEHRA as defined in § 9831(d)?

A-40. No. A QSEHRA is not a group health plan eligible for COBRA continuation coverage.

Q-41. Pursuant to § 9501(a)(1)(B) of the ARP, a plan sponsor allows an Assistance Eligible Individual to enroll in coverage under a plan that is different than the coverage the individual was enrolled in at the time of the qualifying event. Does the requirement that the premium for the different coverage elected not exceed the premium for coverage that the individual was enrolled in at the time of the qualifying event simply limit the amount of the COBRA premium assistance, thereby allowing the individual to elect a plan with a higher premium but restricting the amount of COBRA premium assistance to the amount of the premium for the coverage that the individual was enrolled in at the time of the qualifying event (with the individual or employer paying the excess over the COBRA premium assistance)?

A-41. No. Unless otherwise allowed under the COBRA regulations or other applicable law, coverage with a premium greater than the premium for the coverage that the individual was enrolled in at the time of the qualifying event is not eligible for the COBRA premium assistance. However, the requirements in § 9501(a)(1)(B) of ARP do not apply to a situation in which the plan in which the individual was enrolled at the time of the qualifying event is not available (see Q&A-42).

Example: An individual is an Assistance Eligible Individual who was enrolled in a plan with an $800 per month COBRA premium at the time of the qualifying event. The employer sponsoring the plan permits Assistance Eligible Individuals to enroll in other coverage pursuant to § 9501(a)(1)(B) of the ARP. Three other coverages are offered to active employees similarly situated to the individual, none of which are excepted benefits, a QSEHRA or a health FSA. The COBRA premiums for the other coverages are $700, $750 or $1,000 per month. The individual may enroll in the $700 or $750 per month options with COBRA premium assistance. If the employer allows, the individual may enroll in the $1,000 per month coverage option but that coverage will not be eligible for the COBRA premium assistance. (But see Q&A-69 regarding the availability of COBRA premium assistance for an Assistance Eligible Individual electing a different benefit package in compliance with § 54.4980B-8, Q&A-2(c), such as during open enrollment.)

Q-42. If a potential Assistance Eligible Individual elects COBRA continuation

coverage during the ARP extended election period but the employer no longer offers the health plan that previously covered the individual, must the employer place that individual in the plan most similar to the prior plan, provided the employer offers other health plans?

A-42. Yes. If an employer no longer offers the health plan that previously covered the potential Assistance Eligible Individual, the individual must be offered the opportunity to elect the plan that a similarly situated active employee would have been offered that is most similar to the previous plan that covered the individual, even if the premium for the plan is greater than the premium for the previous plan. In this case, the other coverage elected by the individual is eligible for the COBRA premium assistance, regardless of the premium for that coverage.

BEGINNING OF COBRA PREMIUM ASSISTANCE PERIOD

Q-43. When is an Assistance Eligible Individual first entitled to receive COBRA premium assistance?

A-43. An Assistance Eligible Individual is entitled to receive COBRA premium assistance as of the first applicable period of coverage beginning on or after April 1, 2021. For this purpose, a period of coverage is a monthly or shorter period with respect to which premiums are normally charged by the plan or issuer with respect to such coverage provided to employees and qualified beneficiaries. The start date of the first period of coverage beginning on or after April 1, 2021, depends on the period with respect to which premiums would have been normally charged by the plan if the individual had paid the premium.

Example: Plan provides that employees and qualified beneficiaries pay premiums for health coverage, including COBRA continuation coverage, on a biweekly basis for a corresponding two-week period of coverage. For March 2021, the last two-week period of coverage is from March 28 through April 10, 2021, followed by a period of coverage from April 11 through April 24, 2021. COBRA premium assistance could apply with respect to the premium for the period of coverage beginning April 11, 2021.

Q-44. Must an Assistance Eligible Individual electing COBRA continuation coverage under the ARP extended election period begin coverage as of the first period of coverage beginning on or after April 1, 2021?

A-44. No. While a group health plan must make COBRA continuation coverage with COBRA premium assistance available as of the first period of coverage beginning on or after April 1, 2021, in the case of an Assistance Eligible Individual electing COBRA continuation coverage under the ARP extended election period, the Assistance Eligible Individual may waive COBRA continuation coverage for any period before electing to receive COBRA premium assistance, including retroactive periods of coverage beginning prior to April 1, 2021.

Example: An individual's employment was involuntarily terminated and as a result the individual lost health coverage on October 1, 2020. The individual received the COBRA election notice on October 1, 2020. The individual enrolls in an individual health insurance policy on the Health Insurance Exchange, effective on November 1, 2020. The individual receives the notice of the ARP extended election period on May 1, 2021. At that time, the individual is not eligible to enroll in any other group health plan or Medicare. The individual may elect COBRA continuation coverage either retroactively to October 1, 2020, retroactively to April 1, 2021, or prospectively. The individual elects COBRA continuation coverage prospectively from June 1, 2021, and contacts the Health Insurance Exchange to end the Exchange health insurance policy as of May 31, 2021. The individual is an Assistance Eligible Individual as of June 1, 2021. Because there is no overlapping coverage, the individual is not required to repay any APTC when the individual files his or her 2021 tax return.

Q-45. If an employer is no longer subject to Federal COBRA due to a reduction in the number of employees, is the employer still required to provide the ARP extended election period to individuals who had a qualifying event that was a reduction in hours or involuntary termination of employment while the employer was subject to COBRA, and are those qualified beneficiaries potential Assistance Eligible Individuals?

A-45. Yes. Whether a qualified beneficiary is eligible to elect Federal COBRA continuation coverage is determined by the employer's status at the time of the qualifying event, and whether a qualified beneficiary is a potential Assistance Eligible Individual who may elect COBRA continuation coverage during the ARP extended election period is determined by whether the qualified beneficiary was eligible to elect COBRA continuation coverage at the time of the qualifying event.

Example: Based on the number of employees from the preceding calendar year, an employer is not a small employer for the 2020 calendar year, but is a small employer for calendar year 2021. As a result, Federal COBRA requirements apply to the employer for calendar year 2020 but not calendar year 2021. An individual has a qualifying event that is an involuntary termination of employment in November of 2020. Because the qualified beneficiary's qualifying event occurred during the 2020 calendar year when the employer was not a small employer and the plan was subject to Federal COBRA requirements, the employer is required to provide the ARP extended election period and the qualified beneficiary is eligible to elect Federal COBRA continuation coverage with COBRA premium assistance.

Q-46. Is COBRA premium assistance available for periods of coverage from April 1, 2021, through September 30, 2021, if the election for COBRA continuation coverage is made after September 30, 2021?

A-46. Yes, but only if the individual makes the election within the applicable 60-day election period. A qualified beneficiary who is a potential Assistance Eligible Individual has 60 days to elect COBRA continuation coverage after being provided either the general notice under § 9501(a)(5)(A) of the ARP (for a qualifying event after

April 1, 2021), or the notice regarding the ARP extended election period under § 9501(a)(5)(C) (with respect to a qualifying event before April 1, 2021). If the individual makes the COBRA election after September 30, 2021, but within the applicable 60-day period, then the individual is entitled to COBRA premium assistance through the earlier of the last period of coverage beginning on or before September 30, 2021, or the date that COBRA continuation coverage expires. COBRA premium assistance would start with the later of the first period of coverage beginning on or after April 1, the date of the qualifying event, or the date the qualified beneficiary elects to begin COBRA continuation coverage.

END OF COBRA PREMIUM ASSISTANCE PERIOD

Q-47. For how long is COBRA premium assistance available to an Assistance Eligible Individual?

A-47. COBRA premium assistance applies until the earliest of (1) the first date the Assistance Eligible Individual becomes eligible for other group health plan coverage (with certain exceptions) or Medicare coverage, (2) the date the individual ceases to be eligible for COBRA continuation coverage, or (3) the end of the last period of coverage beginning on or before September 30, 2021.

Example: A plan provides that employees and qualified beneficiaries pay premiums for health coverage, including COBRA continuation coverage, on a biweekly basis for a corresponding two-week period of coverage. For September 2021, the last two-week period of coverage is from September 19 through October 2, 2021. COBRA premium assistance would apply with respect to the entire period of coverage beginning September 19, even though the period of coverage includes coverage for October 1 and October 2, 2021.

Q-48. Once subsidized COBRA continuation coverage ends with the period of coverage including September 30, 2021, does coverage for a qualified beneficiary who was an Assistance Eligible Individual automatically continue with unsubsidized COBRA and, if so, when is the payment for the first subsequent period of coverage due?

A-48. COBRA continuation coverage automatically continues, and the payment for the first period of coverage after September 30, 2021 will be timely if paid according to the terms of the plan or coverage, subject to applicable COBRA continuation coverage requirements taking into account the Emergency Relief Notices.

Q-49. What are the consequences if an Assistance Eligible Individual fails to provide notice that the individual is no longer eligible for COBRA premium assistance due to eligibility for coverage under another group health plan or Medicare?

A-49. An Assistance Eligible Individual who fails to provide notice may be subject to a Federal tax penalty of $250 for each failure to notify the employer, plan, or issuer. If the failure to provide notice is fraudulent, the penalty will be the greater of

$250 or 110 percent of the COBRA premium assistance improperly received. The penalty will not apply if the individual's failure to provide notice was due to reasonable cause and not to willful neglect. The employer, plan, or issuer who received the premium assistance credit in the amount of the excess COBRA premium assistance has no right to the penalty payment.

Q-50. Does the death of an employee who has had a reduction in hours or involuntary termination of employment end the eligibility for COBRA premium assistance of any qualified beneficiary spouse and dependent children?

A-50. No.

EXTENDED ELECTION PERIOD

Q&A-51 through Q&A-55 apply only for purposes of Federal COBRA, unless the Q&A indicates otherwise.

Q-51. If an employee had a reduction in hours or an involuntary termination of employment before April 1, 2021 and elected self-only COBRA continuation coverage, may a spouse or a dependent child who is a qualified beneficiary in connection with the reduction in hours or involuntary termination of employment elect COBRA continuation coverage and receive COBRA premium assistance under the ARP extended election period?

A-51. Yes. A qualified beneficiary who does not have an election of COBRA continuation coverage in effect on April 1, 2021, but who would have been an Assistance Eligible Individual if the election were in effect, may elect COBRA continuation coverage under the ARP extended election period. A spouse or dependent child who is a beneficiary under a group health plan that covers an employee on the day before the reduction in hours or involuntary termination of employment of the employee also would have been an Assistance Eligible Individual if the spouse or dependent child had elected COBRA continuation coverage. Thus, a spouse or dependent child in this situation has a second election opportunity, notwithstanding the prior election of self-only COBRA continuation coverage by the employee.

Q-52. Is the ARP extended election period available to an individual if the continuation coverage is provided only under State law (and not Federal COBRA)?

A-52. No. The ARP extended election period under § 9501(a)(4)(A) applies only to a group health plan that is subject to Federal COBRA. It does not apply to plans subject to continuation coverage requirements under a State program that provides comparable continuation coverage. However, if a State law or program provides for a similar extended election right and an individual otherwise satisfies the requirements to be an Assistance Eligible Individual, COBRA premium assistance is available for any resulting period of COBRA continuation coverage for periods of coverage from April 1, 2021, through September 30, 2021.

Q-53. May a potential Assistance Eligible Individual whose qualifying event occurred before April 1, 2021, who still has an open COBRA continuation coverage election period independent of the ARP (including an extended period for electing coverage under the Emergency Relief Notices), elect COBRA continuation coverage under the ARP extended election period and receive COBRA continuation coverage with COBRA premium assistance that starts with a period of coverage beginning only on or after April 1, 2021?

A-53. Yes. The extended election period for electing COBRA continuation coverage is available for a potential Assistance Eligible Individual if the qualifying event occurred before April 1, 2021, and if the individual has not yet elected COBRA continuation coverage, including for an individual who has an open COBRA election period as of April 1, 2021. If the individual elects retroactive COBRA continuation coverage under the original COBRA election period available prior to the ARP extended election period under Federal COBRA, COBRA continuation coverage is retroactive to that individual's loss of coverage. COBRA premium assistance, however, does not apply to periods of coverage prior to the first period of coverage beginning on or after April 1, 2021.

Example: An individual is involuntarily terminated from employment on December 15, 2020 and receives the COBRA election notice on January 4, 2021. As of April 1, 2021, the individual has not elected COBRA continuation coverage. The individual must receive a notice of the ARP extended election period for COBRA continuation coverage. The individual may elect COBRA continuation coverage under the original COBRA election period (as extended by the Emergency Relief Notices) but will be eligible for COBRA premium assistance only for periods of coverage beginning on or after April 1, 2021. Alternatively, the individual may decline to elect COBRA continuation coverage under the original COBRA election period (as extended by the Emergency Relief Notices) and instead elect COBRA continuation coverage under the ARP extended election period only for periods of coverage beginning on or after April 1, 2021.

Q-54. How does an election of COBRA continuation coverage under the ARP extended election period apply in the case of an HRA if the Assistance Eligible Individual elects COBRA continuation coverage solely under the ARP extended election period, and declines to elect coverage that is retroactive to the qualifying event?

A-54. With respect to an election of COBRA continuation coverage for an HRA solely under the ARP extended election period, the HRA may no longer reimburse expenses incurred after the qualifying event that led to the loss of coverage and before the first day of the first period of coverage beginning on or after April 1, 2021. Generally, qualified beneficiaries electing COBRA continuation coverage with respect to HRA coverage have access to the same level of reimbursements during COBRA continuation coverage as was available immediately before the qualifying event. Thus, a qualified beneficiary electing COBRA continuation coverage with respect to an HRA under the ARP extended election period will have access to the same level of reimbursements as

the qualified beneficiary had immediately before the qualifying event based on the amount originally available for the HRA plan year and reimbursements for expenses incurred before the qualifying event, reduced by the amount of any reimbursements made after the qualifying event; for example, reimbursements for expenses incurred before the qualifying event that were submitted and reimbursed after the qualifying event.

Q-55. If a qualified beneficiary due to a reduction of hours or an involuntary termination of employment was previously offered COBRA continuation coverage with respect to both comprehensive health coverage and dental-only or vision-only coverage and the qualified beneficiary elected COBRA continuation coverage only with respect to the dental-only or vision-only coverage, is the qualified beneficiary still a potential Assistance Eligible Individual who must be offered the ARP extended election with respect to the comprehensive health coverage?

A-55. Yes. A qualified beneficiary whose qualifying event was a reduction in hours or an involuntary termination of employment is a potential Assistance Eligible Individual and must be offered the ARP extended election period with respect to any health coverage the qualified beneficiary was enrolled in prior to the qualifying event and for which the individual does not have a COBRA election in effect on April 1, 2021, even if the qualified beneficiary previously elected COBRA continuation coverage with respect to other coverage in which the qualified beneficiary was previously enrolled. If the qualified beneficiary elects additional COBRA continuation coverage pursuant to the ARP extended election period, the qualified beneficiary is an Assistance Eligible Individual with respect to all elected COBRA continuation coverage.

EXTENSIONS UNDER THE EMERGENCY RELIEF NOTICES

Q-56. What is the election period for a potential Assistance Eligible Individual to make the election for COBRA premium assistance if the individual is also eligible to elect COBRA continuation coverage under the Emergency Relief Notices?

A-56. If a qualified beneficiary received a COBRA notice under § 4980B before April 1, 2021, and also receives the notice of the ARP extended election period, then, within 60 days of receiving the notice of the ARP extended election period, the qualified beneficiary may elect COBRA continuation coverage with COBRA premium assistance for periods of coverage beginning on or after April 1, 2021. If a qualified beneficiary elects COBRA continuation coverage with COBRA premium assistance, the individual must also elect or decline COBRA continuation coverage retroactive to the loss of coverage, if eligible, within 60 days of receiving the notice of the ARP extended election period. If the qualified beneficiary elects retroactive COBRA continuation coverage, the qualified beneficiary may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021.

Q-57. Do the extensions of timeframes available under the Emergency Relief Notices apply to the required furnishing of the notice of an ARP extended election

period under § 9501(a)(5)(C), or to the ARP extended election period to elect COBRA continuation coverage with COBRA premium assistance beginning on or after April 1, 2021, under § 9501(a)(4)?

A-57. No. The extensions of timeframes available under the Emergency Relief Notices do not apply to either the required furnishing of a notice of an ARP extended election period under § 9501(a)(5)(C) or to the ARP extended election period. The notice of the ARP extended election period under § 9501(a)(5)(C) must be furnished by May 31, 2021 (60 days after April 1, 2021). An individual receiving the notice must elect COBRA continuation coverage no later than 60 days after the notice is provided in order to receive COBRA premium assistance.

Q-58. If a potential Assistance Eligible Individual elects retroactive COBRA continuation coverage, how do the Emergency Relief Notices apply to payment of the premiums for the retroactive coverage and what are the consequences if the premiums are not timely paid?

A-58. The extensions of timeframes under the Emergency Relief Notices remain available for premium payments for the retroactive periods of coverage for potential Assistance Eligible Individuals and those who have enrolled in COBRA continuation coverage with COBRA premium assistance. If an Assistance Eligible Individual also elects retroactive coverage for a period beginning before April 1, 2021, the employer may require the individual to pay the premiums for that period of COBRA continuation coverage consistent with the timeframes as extended under the Emergency Relief Notices. If, by an applicable deadline, the individual fails to pay any amount towards the total premiums due for periods of retroactive COBRA continuation coverage, the employer may treat the individual as having not elected COBRA coverage until the first period of coverage beginning on or after April 1, 2021. If, by the applicable deadline, the individual pays only a portion of the total premiums due for retroactive coverage, the plan may credit those premiums to the earliest months of the retroactive COBRA continuation coverage and resume providing COBRA continuation coverage as of the first period of coverage beginning on or after April 1, 2021.

Example: On November 1, 2020, an individual becomes a qualified beneficiary as the result of an involuntary termination of employment and receives the COBRA election notice under § 4980B(f)(6)(D). On April 30, 2021, the individual receives the notice of the ARP extended election period. On May 31, 2021, the individual elects both retroactive COBRA continuation coverage beginning on November 1, 2020, and COBRA continuation coverage with premium assistance for the first period of coverage beginning on or after April 1, 2021. The individual pays premiums for only three months of retroactive COBRA within the applicable payment deadlines. The individual makes no other premium payments before the applicable deadlines. The plan may treat the individual as having retroactive COBRA continuation coverage only for November 2020, December 2020, and January 2021, and as having no retroactive COBRA coverage for February 2021 and March 2021 (because only three months of premiums were paid). Because the individual also elected COBRA continuation coverage with premium

assistance for the first period of coverage beginning on or after April 1, 2021, the individual has COBRA continuation coverage with premium assistance for the first period of coverage beginning on or after April 1, 2021 through the end of the period of coverage that includes September 30, 2021, assuming the individual remains eligible for premium assistance throughout that period.

Q-59. May a potential Assistance Eligible Individual who elects COBRA continuation coverage with COBRA premium assistance and who declines to elect retroactive COBRA continuation coverage at that time later elect retroactive COBRA continuation coverage?

A-59. No. If a potential Assistance Eligible Individual elects COBRA continuation coverage with COBRA premium assistance but declines to elect COBRA continuation coverage that would begin at the time of a qualifying event that occurred before April 1, 2021, that individual may not, after the 60-day extended election period for electing COBRA continuation coverage under the ARP has ended, later elect COBRA continuation coverage that begins at the time of the qualifying event.

Example: An individual has a qualifying event that is an involuntary termination of employment on March 1, 2021, and receives the COBRA election notice the same day. The individual receives the notice of the ARP extended election period on May 31, 2021, and elects COBRA continuation coverage with COBRA premium assistance starting April 1, 2021. Assuming the Outbreak Period has not ended, the individual does not remain eligible after July 30, 2021 (60 days from the receipt of the individual's notice of the ARP extended election period), to elect COBRA continuation coverage starting March 1, 2021, despite the extensions available under the Emergency Relief Notices.

PAYMENTS TO INSURERS UNDER FEDERAL COBRA

Q-60. In the case of an insured plan subject to Federal COBRA that is not a multiemployer plan, if the insurer and the employer have agreed that the insurer will collect the COBRA premiums directly from the qualified beneficiaries, is the insurer required to treat an Assistance Eligible Individual as having paid the full premium?

A-60. Yes. If the insurer fails to treat the Assistance Eligible Individual as having made a payment of the full premium, the insurer may be liable for the excise tax under § 4980B(e)(1)(B), which applies to each person responsible (other than in a capacity as an employee) for administering or providing benefits under the plan and whose act or failure to act caused (in whole or in part) the failure, if the person assumed responsibility for the performance of the act to which the failure relates. Notwithstanding the agreement between the employer and the insurer, the employer is required to pay the premium to the insurer for the months of COBRA premium assistance with respect to the individual.

COMPARABLE STATE CONTINUATION COVERAGE

Q-61. Does a State continuation coverage program fail to provide comparable coverage qualifying for COBRA premium assistance under the ARP solely because the maximum period of continuation coverage under the program differs from the maximum period available under Federal COBRA?

A-61. No. A different period of continuation coverage under a State continuation coverage program does not by itself mean a State program fails to provide comparable coverage to Federal COBRA continuation coverage under the ARP. For example, the fact that a State continuation coverage program provides only six months of continuation coverage (instead of 18 months) would not by itself result in the State program failing to provide comparable coverage. Similarly, State programs providing for different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to provide comparable coverage solely for those reasons.

Q-62. In the case of an insured plan subject solely to State law requiring the insurer to provide continuation coverage, is the employer eligible to take the premium assistance credit directly if the employer pays the full premium to the insurer?

A-62. No. Under § 6432(b)(3), in the case of an insured plan subject solely to State law with respect to the requirement to provide continuation coverage, the premium payee is the insurer providing the coverage under the group health plan. The Treasury Department and the IRS are aware that this requirement may create administrative issues for certain Small Business Health Options Program (SHOP) exchanges that aggregate premiums paid by participating employers or where State rules require full payment of premiums by the employer; the Treasury Department and the IRS are continuing to consider this issue.

CALCULATION OF COBRA PREMIUM ASSISTANCE CREDIT

Q-63. As a general rule, what is the amount of the premium assistance credit for a quarter?

A-63. If the employer does not subsidize COBRA premium costs for similarly situated qualified beneficiaries who are not Assistance Eligible Individuals, the credit for a quarter is the amount equal to the premiums not paid by Assistance Eligible Individuals for COBRA continuation coverage due to the application of § 9501(a)(1) of the ARP for the quarter. In this case, the amount of the premiums not paid by the Assistance Eligible Individuals is the premium amount charged for COBRA continuation coverage to other similarly situated covered employees and qualified beneficiaries (for example, coverage for a single individual, individual plus one, or family who are not Assistance Eligible Individuals). The premium amount also includes any administrative costs otherwise allowed (that is, generally 102 percent of the applicable premium under § 4980B(f)(4)) (see Q&A-64).

Q-64. What is the amount of the premium assistance credit if the employer

subsidizes the COBRA premium costs for similarly situated covered employees and qualified beneficiaries who are not Assistance Eligible Individuals?

A-64. The amount of the credit is the premium that would have been charged to an Assistance Eligible Individual in the absence of the premium assistance, and does not include any amount of subsidy that the employer would have otherwise provided. Thus, absent the premium assistance, if the premium that the employer would have charged to an Assistance Eligible Individual is less than the maximum COBRA premium—for example, if the employer would have subsidized the coverage by paying all or part of the premium—the credit is equal to the amount that the employer actually would have charged to the Assistance Eligible Individual.

For the following examples, assume 102 percent of the applicable premium for COBRA continuation coverage is $1,000 per month, and the premium payee is the common law employer maintaining the plan.

Example 1: Absent the COBRA premium assistance, the common law employer requires individuals electing COBRA continuation coverage to pay $500 per month. The credit is $500 per month.

Example 2: The common law employer requires active employees to pay $200 per month for health coverage. Absent the COBRA premium assistance, for involuntarily terminated employees, severance benefits include continued health coverage at the cost of $200 per month for three months after termination. After the three-month severance period, the terminated employee must pay $1,000 per month for the remainder of COBRA continuation coverage. The common law employer considers the loss of coverage to occur on the last day coverage is in effect before the severance benefits begin; that is, the common law employer considers the three-month severance period (during which the employer pays $800 toward the cost of the terminated employee's COBRA continuation coverage) to be part of the terminated employee's COBRA continuation period of coverage.

A potential Assistance Eligible Individual has an involuntary termination of employment as of April 1, 2021, and makes the COBRA continuation election effective as of that date. For April, May, and June 2021, the credit is $200 per month. For July, August, and September 2021, the credit is $1,000 per month.

Example 3: Same facts as Example 2, except that the common law employer considers the loss of health coverage and the beginning of the terminated employee's COBRA continuation period of coverage to occur at the end of the three-month severance period. For the first three months after termination of employment, the terminated employee is not eligible for COBRA continuation coverage and is not an Assistance Eligible Individual. Instead, the employee pays $200 for coverage that is not a premium for COBRA continuation coverage. The employee receives severance benefits for health coverage beginning on April 1, 2021, and then elects COBRA continuation coverage beginning on July 1, 2021 (after the end of the three-month

severance period) and becomes an Assistance Eligible Individual. The credit is $0 per month for April, May, and June 2021, and $1,000 per month for July, August, and September 2021.

Example 4: Same facts as Example 2, except that for involuntarily terminated employees, the severance benefits include continued health coverage at no cost for the three months after termination of employment.

Because the monthly premium (absent the COBRA premium assistance) during April, May, and June 2021 is zero, COBRA premium assistance is not available and there is no credit for those months. After the severance period, the terminated employee is entitled to COBRA continuation coverage with COBRA premium assistance for July, August, and September 2021. The credit is $1,000 per month for July, August, and September 2021.

Q-65. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium for similarly situated covered employees and qualified beneficiaries pursuant to § 54.4980B-8, Q&A-2(b)(1) (or similar authority under comparable State law or other Federal law), does the COBRA premium assistance apply to the increased premium amount?

A-65. Yes.

Example: Under the plan, 102 percent of the applicable premium for COBRA continuation coverage is $1,000 per month. For periods of coverage before April 1, 2021, the plan charged $500 per month for COBRA continuation coverage. Pursuant to § 54.4980B-8, Q&A-2(b)(1) and the applicable notice requirements, beginning April 1, 2021, the plan charges $1,000 per month for COBRA continuation coverage for all covered employees and qualified beneficiaries. The COBRA premium assistance and the premium assistance credit are $1,000 per Assistance Eligible Individual per month for the coverage beginning April 1, 2021.

Q-66. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium pursuant to § 54.4980B-8, Q&A-2(b)(1), and the employer provides a separate taxable payment to the Assistance Eligible Individual, does the premium assistance credit apply to the increased premium amount?

A-66. Yes.

Example: Under a group health plan, 102 percent of the applicable premium for COBRA continuation coverage is $1,000 per month. Before April 1, 2021, the plan charged $400 per month for COBRA continuation coverage. Pursuant to § 54.4980B-8, Q&A-2(b)(1), and the applicable notice requirements, the plan charges all covered employees and qualified beneficiaries $1,000 per month for COBRA continuation coverage for periods of coverage beginning April 1, 2021. In addition, beginning April 1,

2021, the employer provides a taxable severance benefit of $600 per month to employees who are Assistance Eligible Individuals. An Assistance Eligible Individual is entitled to COBRA continuation coverage without payment of any premium. The credit is $1,000.

Q-67. If COBRA continuation coverage is provided under a State program that provides comparable continuation coverage, does the premium assistance credit apply to portions of the premium attributable to COBRA continuation coverage for those individuals who would not be qualified beneficiaries under Federal COBRA?

A-67. No. While § 9501(a)(9)(B) of the ARP defines the COBRA continuation coverage eligible for COBRA premium assistance to include comparable State continuation coverage, a qualified beneficiary is defined under § 9501(a)(9)(E) by cross-reference to § 607(3) of ERISA. Thus, COBRA premium assistance is limited to the premium attributable to the coverage of the employee who was involuntarily terminated (other than by reason of such employee's gross misconduct) or had a reduction in hours as a qualifying event and that employee's spouse or dependent children who are qualified beneficiaries under Federal COBRA, even if the State law requires a group health plan to provide continuation coverage to a broader group of individuals (for example, another member of the individual's household who is not the spouse or a dependent child).

Q-68. If COBRA continuation coverage of one or more Assistance Eligible Individuals also covers one or more individuals who are not Assistance Eligible Individuals, how is the premium for the COBRA continuation coverage allocated among the Assistance Eligible Individuals and the other individuals in determining the premium assistance credit?

A-68. The premium amounts for COBRA continuation coverage for one or more individuals who are Assistance Eligible Individuals and one or more individuals who are not Assistance Eligible Individuals are allocated first to the premiums for the Assistance Eligible Individuals, based on the cost of COBRA continuation coverage (without COBRA premium assistance) for only Assistance Eligible Individuals, and then to the premiums for the individuals who are not Assistance Eligible Individuals. Thus, if the total cost of the coverage for all covered individuals does not exceed the premium costs for the Assistance Eligible Individuals alone, then the premium for the individual who is not an Assistance Eligible Individual is zero, and the COBRA premium assistance is the full applicable premium amount of the COBRA continuation coverage. If the coverage of an individual who is not an Assistance Eligible Individual increases the total COBRA premium for all individuals, that incremental additional cost is not COBRA premium assistance for purposes of the credit.

Example 1: An employee and the employee's two dependent children are Assistance Eligible Individuals and have COBRA continuation coverage. COBRA continuation coverage also covers an individual who lives in the same household who is not an Assistance Eligible Individual. The amount the plan requires to be paid for

COBRA continuation coverage for self-plus-two-or-more-dependents (which includes the individual who is not an Assistance Eligible Individual) is $1,000 per month.

The amount the employee would pay (absent the COBRA premium assistance) for coverage for the employee and the two children (the Assistance Eligible Individuals) for COBRA continuation coverage is $1,000 per month. The additional premium amount for coverage of the individual who is not an Assistance Eligible Individual is $0 per month. The employee is entitled to apply the COBRA premium assistance for the full $1,000 premium amount per month. The credit is $1,000 per month.

Example 2: Same facts as Example 1, except the employee has only one dependent child, and the plan charges $800 per month for self-plus-one-dependent COBRA continuation coverage. The portion of the premium attributable to coverage for the individual and the individual's dependent child (both Assistance Eligible Individuals) is $800 per month.

The employee is entitled to apply the COBRA premium assistance to the $800 per month attributable to the Assistance Eligible Individuals. The incremental amount the employee pays for COBRA continuation coverage for the individual who is not an Assistance Eligible Individual is $200 per month, so the employee's total premium payment is $200 per month. The credit is $800 per month.

Example 3: An employee is an Assistance Eligible Individual who has self-only coverage that would cost $450 per month (absent the COBRA premium assistance). During the ARP extended election period, the plan has an open enrollment period during which it allows active employees and qualified beneficiaries to add spouses and dependents to their health coverage. The employee adds the employee's spouse and dependent child, who were not covered before the employee's qualifying event, to the employee's COBRA continuation coverage. Without regard to the COBRA premium assistance, COBRA continuation coverage for self-plus-two-or-more-dependents is $1,000 per month.

The spouse and the dependent child are not Assistance Eligible Individuals because they were not covered by the plan on the day before the employee's qualifying event. The amount the employee pays for the spouse and the dependent child is $550 per month ($1,000 less $450). The employee is entitled to COBRA premium assistance with respect to $450 per month. The credit is $450 per month.

Q-69. Does the premium assistance apply to the increased premium if the plan, in compliance with § 54.4980B-8, Q&A-2(c), allows the Assistance Eligible Individual to change coverage from the benefit package that covered the individual before a reduction in hours or involuntary termination of employment to a different benefit package with a higher applicable premium that allows for an increase in the premium amount charged to the Assistance Eligible Individual?

A-69. Yes. (But see Q&A-42 regarding the ability of an Assistance Eligible

Individual to enroll in coverage under a plan that is different than the coverage in which the individual was enrolled at the time of the qualifying event pursuant to § 9501(a)(1)(B) of the ARP.)

Q-70. How is the premium assistance credit calculated for an individual coverage health HRA?

A-70. The credit for an individual coverage HRA is limited to 102 percent of the amount actually reimbursed with respect to an Assistance Eligible Individual.

Example: An individual coverage HRA provides a monthly benefit of the lesser of the premium for the individual health insurance coverage purchased by the employee or $1,000 and charges the maximum allowable administrative fee for COBRA continuation coverage, for a total maximum COBRA premium of $1,020. Individual A and Individual B are Assistance Eligible Individuals and are enrolled in COBRA continuation coverage. For April 2021, Individual A is reimbursed for a premium payment for individual health insurance coverage of $900; Individual B is reimbursed for $1,000 of a $2,000 premium payment for individual health insurance coverage. The credit for April is $918 with respect to Individual A and $1,020 with respect to Individual B.

CLAIMING THE COBRA PREMIUM ASSISTANCE CREDIT

Q-71. Who is eligible for the premium assistance credit under § 6432(a) of the Code?

A-71. Under § 6432(a) of the Code, the premium payee for continuation coverage under § 9501(a)(1) of the ARP is eligible for the credit.

Q-72. Who is the premium payee under § 9501(a)(1) of the ARP?

A-72. The premium payee is:

(1) The multiemployer plan, in the case of a group health plan that is a multiemployer plan (as defined in § 3(37) of ERISA);

(2) The common law employer maintaining the plan, in the case of a group health plan, other than a multiemployer plan, that is (a) subject to Federal COBRA, or (b) under which some or all of the coverage is not provided by insurance (that is, a plan that is self-funded, in whole or in part);

(3) The insurer providing the coverage, in the case of any other group health plan not described in (1) or (2) (generally, fully insured coverage subject to State continuation coverage requirements).

Q-73. May a governmental entity be a premium payee, and therefore eligible for the premium assistance credit?

A-73. Yes. A premium payee may include the government of any State or political subdivision thereof, any Indian tribal government (as defined in § 139E(c)(1)), any agency or instrumentality of any of the foregoing, and any agency or instrumentality of the Government of the United States that is described in § 501(c)(1) and exempt from taxation under § 501(a).

Q-74. When does the premium payee become entitled to the premium assistance credit?

A-74. As of the date on which the premium payee receives the potential Assistance Eligible Individual's election of COBRA continuation coverage, the premium payee is entitled to the credit for premiums not paid by an Assistance Eligible Individual by reason of § 9501(a)(1) for any periods of coverage that began before that date.[8] The premium payee is entitled to the credit for the premiums not paid by an Assistance Eligible Individual for each subsequent period of coverage as of the beginning of each period of coverage that the individual does not pay the premiums by reason of § 9501(a)(1) in accordance with the individual's election, without regard to when the premium payee could have required the payment of any premium. (See Q&A-86 for information regarding entitlement to the credit if an Assistance Eligible Individual erroneously pays the premium.)

Example: A premium payee's COBRA period of coverage is a calendar month with COBRA premium payments due on the tenth day of each calendar month. The premium payee pays its employees semi-monthly, with payroll periods ending on the fifteenth of the month and the last day of the month. On June 17, 2021, the premium payee receives a COBRA election from a potential Assistance Eligible Individual who elects COBRA continuation coverage as of April 1, 2021. The premium payee is entitled to a credit as of June 17, 2021, for the premiums not paid by the Assistance Eligible Individual for the periods of coverage April 1, 2021, through April 30, 2021, May 1, 2021, through May 31, 2021, and June 1, 2021, through June 30, 2021. Assuming the Assistance Eligible Individual does not notify the premium payee that the Assistance Eligible Individual is no longer eligible for COBRA premium assistance (and the premium payee does not otherwise become aware that the Assistance Eligible Individual is ineligible), the premium payee becomes entitled to the credit as of July 1, 2021, for the premiums not paid by the Assistance Eligible Individual for the period of coverage of July 1, 2021, through July 31, 2021. (Assuming the facts remain as stated, the premium payee would be entitled to the credit on (i) August 1, 2021, for the period of coverage of August 1, 2021, through August 31, 2021, and (ii) September 1, 2021, for the period of coverage of September 1, 2021, through September 30, 2021.)

Q-75. How does a premium payee claim the premium assistance credit?

A-75. A premium payee claims the credit by reporting the credit (both the

[8] A period of coverage is defined under § 9501(a)(9)(H) as a monthly or a shorter period with respect to which premiums are charged by the plan or issuer.

nonrefundable and refundable portions of the credit, as applicable) and the number of individuals receiving COBRA premium assistance on the designated lines of its federal employment tax return(s), usually Form 941, Employer's Quarterly Federal Tax Return.

In anticipation of receiving the credit to which it is entitled, the premium payee may (1) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit, and (2) request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19. See Notice 2021-24 for more information regarding the reduction in deposits for the credit and other employment tax credits.

Example 1: Under the facts in the Example in Q&A-74, the premium payee should report the credit for April through June 2021 on the Form 941 for the second quarter of 2021.

Example 2: Same facts as in the Example in Q&A-74, except that the premium payee receives a COBRA election from an Assistance Eligible Individual on July 17, 2021, and the individual elects COBRA continuation coverage as of June 1, 2021. The premium payee becomes entitled to a corresponding credit as of July 17, 2021, for the premiums not paid by the Assistance Eligible Individual for the periods of coverage of (1) June 1 through June 30, 2021, and (2) July 1 through July 31, 2021. The premium payee should report the total credit on the Form 941 for the third quarter of 2021, including the credit for the periods of coverage from June 1, 2021 through June 30, 2021.

Q-76. When may a premium payee reduce its deposits of federal employment taxes and, if applicable, file Form 7200 to request an advance of the anticipated premium assistance credit that exceeds the federal employment tax deposits available for reduction for a quarter?

A-76. A premium payee may reduce its deposits of federal employment taxes in anticipation of the credit to which the premium payee has become entitled with regard to a period of coverage as of the date the premium payee is entitled to the credit as described in Q&A-74. If the anticipated credit exceeds the federal employment tax deposits available for reduction, the premium payee may file Form 7200 to request an advance payment of the credit. The Form 7200 may be filed after the end of the payroll period in which the premium payee became entitled to the credit.

Deposits may not be reduced, and advances may not be requested, for a credit for a period of coverage that has not begun. Form 7200 must be filed before the earlier of (1) the day the employment tax return for the quarter in which the premium payee is entitled to the credit is filed, or (2) the last day of the month following that quarter. The premium payee entitled to the credit should also report any advance payments received in anticipation of the credit for the quarter on the employment tax return.

Example: Same facts as in the Example in Q&A-74. The premium payee may reduce its federal employment tax deposits as of June 17, 2021, the date the Assistance Eligible Individual elected COBRA continuation coverage, in anticipation of the credit to which the premium payee has become entitled. However, if the credit exceeds the available reduction in deposits, the premium payee may file Form 7200 to request an advance for the remaining credit after the end of the semi-monthly payroll period in which the premium payee became entitled to the credit. Thus, because the Assistance Eligible Individual elected COBRA continuation coverage on June 17, 2021, the premium payee may seek an advance beginning on July 1, 2021, the day after the end of the payroll period of June 16 through June 30, 2021.

Assuming the Assistance Eligible Individual did not notify the premium payee that the Assistance Eligible Individual is no longer eligible for COBRA continuation coverage (and the premium payee did not otherwise become aware of the Assistance Eligible Individual's ineligibility), the premium payee becomes entitled to an additional credit as of July 1, 2021, for the premiums not paid by the Assistance Eligible Individual for the period of coverage of July 1 through July 30, 2021. The premium payee may reduce its federal employment deposits as of July 1, 2021, in anticipation of the credit to which the premium payee has become entitled. If the anticipated credit exceeds the federal employment tax deposits available for reduction, the premium payee may file Form 7200 to request an advance for the remaining credit. However, because the semi-monthly payroll period in which the premium payee becomes entitled to the credit does not end until July 15, the premium payee may not seek an advance for the credit until July 16, 2021, even though it may reduce deposits on July 1, 2021, the day the premium payee is entitled to the credit.

Q-77. How is the premium assistance credit claimed if the premium payee does not have any employment tax liability, for example, in the case of a multiemployer plan with no employees?

A-77. If the premium payee entitled to claim the credit does not have any employment tax liability, the premium payee should claim the credit on the Form 941 for the quarter in which the premium payee becomes entitled to the credit. The premium payee entitled to the credit should also report any advance payments received in anticipation of the credit on the same Form 941. The premium payee should enter zero on all remaining non-applicable lines so that the overpayment amount on the Form 941 is the amount of the credit reduced by any advance payment received.

Q-78. If an Assistance Eligible Individual receiving COBRA premium assistance fails to provide notice of the individual's eligibility for coverage under any other disqualifying group health plan or Medicare and continues receiving COBRA premium assistance, is the premium payee required to refund to the IRS the premium assistance credit arising from the period after the individual's eligibility for COBRA premium assistance ended due to eligibility for the other coverage?

A-78. No. If an Assistance Eligible Individual fails to provide notice that the

individual is no longer eligible for the COBRA premium assistance due to eligibility for other disqualifying group health plan coverage or Medicare, the premium payee is still entitled to the credit received for that period of ineligibility, unless the premium payee knew of the individual's eligibility for the other coverage. If the premium payee learns that the individual is eligible for other coverage (and thus of the individual's ineligibility for COBRA premium assistance), the premium payee is not entitled to the credit from that point forward.

Q-79. Is the premium assistance credit included in gross income?

A-79. Yes. Under § 6432(e), the gross income of any premium payee allowed a credit is increased by the amount of the credit for the taxable year which includes the last day of any quarter with respect to which the credit is allowed.

Q-80. May a premium payee claim the premium assistance credit with respect to amounts that are taken into account as qualified wages under § 2301 of the CARES Act or § 3134 of the Code, or as qualified health plan expenses under §§ 7001(d) or 7003(d) of the FFCRA or §§ 3131 or 3132 of the Code?

A-80. No. Under § 6432(e), a premium payee may not claim a double benefit with respect to these amounts.

Q-81. May a premium payee that uses a third-party payer to report and pay employment taxes to the IRS receive the premium assistance credit?

A-81. Yes. The premium payee is entitled to the credit, regardless of whether it uses a third-party payer (such as a reporting agent, payroll service provider, professional employer organization (PEO), certified professional employer organization (CPEO), or § 3504 agent) to report and pay its federal employment taxes. Thus, unless the third-party payer is treated as the premium payee for purposes of the credit in accordance with Q&A-82, the third-party payer is not entitled to the credit, regardless of whether the third party is considered an "employer" for other purposes of the Code. However, the third-party payer may report the credit on behalf of a client that is the premium payee with respect to any federal employment taxes it reports and pays on the premium payee's behalf. Different rules apply depending on the type of third-party payer the premium payee uses, as follows.

If a premium payee uses a reporting agent to file its federal employment tax returns, the reporting agent will need to reflect the credit on the federal employment tax returns it files on behalf of the premium payee. If a premium payee uses a CPEO or a § 3504 agent that received its designation as an agent by submitting Form 2678, Employer/Payer Appointment of Agent, to report its federal employment taxes on an aggregate Form 941, the CPEO or § 3504 agent will report the credit on its aggregate Form 941 and Schedule R, Allocation Schedule for Aggregate Form 941 Filers.

If a premium payee uses a non-certified PEO or other third-party payer (other

than a CPEO or § 3504 agent that submitted Form 2678) that reports and pays the premium payee's federal employment taxes under the third-party payer's Employer Identification Number (EIN), the PEO or other third-party payer will need to report the credit on an aggregate Form 941 and separately report the credit allocable to the premium payees for which it is filing the aggregate Form 941 on an accompanying Schedule R.

A premium payee that uses a third-party payer to report and pay employment taxes to the IRS must nonetheless submit its own Form 7200 to request any advance payment of the credit. The premium payee will need to provide a copy of the Form 7200 to the CPEO, § 3504 agent, or other third-party payer that reports and pays the premium payee's federal employment taxes under the third-party payer's EIN, so the third-party payer can properly report the credit on the employment tax return.

Q-82. May a third-party payer (such as a PEO, CPEO, or § 3504 agent) be treated as a premium payee for purposes of claiming the premium assistance credit?

A-82. Yes, but only under certain circumstances. A third-party payer is treated as the premium payee for purposes of the credit if the third-party payer: (i) maintains the group health plan, (ii) is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries , and (iii) would have received the COBRA premium payments directly from the Assistance Eligible Individuals were it not for the COBRA premium assistance (the TPP Plan Administrator). In this case, the third-party payer's client is not treated as a premium payee and is, therefore, not eligible for the credit. However, in circumstances in which a third-party payer files an aggregate employment tax return to report and pay employment taxes for individuals who are common law employees of the third-party payer's clients, and the conditions set forth in (i) through (iii) above are not satisfied, the third-party payer is not treated as the premium payee and may claim the credit only on behalf of its clients (See Q&A-81).

As the premium payee, the TPP Plan Administrator claims the credit on the applicable lines on Form 941 and, if the TPP Plan Administrator otherwise has to complete Schedule R, the TPP Plan Administrator would report the credit that it is claiming in that capacity on line 8 of the Schedule R, rather than separately with respect to each client for which it was acting as TPP Plan Administrator. (If the third-party payer was not a TPP Plan Administrator for all of its clients, the third-party payer may also claim the credit on behalf of its clients that are premium payees, but would be required to separately report the credit with respect to each of those premium payee clients on Schedule R.)

TPP Plan Administrators may reduce the deposits of federal employment taxes relating to their own employees (that is, those employees for whom they are filing as the common law employer rather than as a third-party payer) in anticipation of the credit in accordance with the procedures described in Q&A-76. If the anticipated credit exceeds the available reduction of these deposits, the TPP Plan Administrator may file Form

7200 to request an advance payment of the credit in accordance with the procedures described in Q&A-76.

The TPP Plan Administrator is subject to § 6432(e) and must, correspondingly, increase its gross income for the taxable year that includes the last day of any calendar quarter with respect to which the credit is allowed to the TPP plan administrator. The TPP Plan Administrator is not allowed a credit with respect to any amount that is taken into account (by any person, including a client for whom it files returns as a third-party payer) as qualified wages under § 2301 of the CARES Act or § 3134 of the Code, or as qualified health plan expenses under §§ 7001(d) or 7003(d) of the FFCRA, or §§ 3131 or 3132 of the Code.

Example: A third-party payer maintains and is the sponsor of a group health plan on behalf of all of its clients. Due to the nature of the arrangement with each client, the third-party payer is responsible for providing its clients' covered employees with the COBRA election notices, and the third-party payer requires individuals enrolled in COBRA continuation coverage to pay the COBRA premiums directly to the third-party payer. Consequently, this third-party payer is treated as a TPP Plan Administrator and is the premium payee that is entitled to any credit.

The plan's COBRA period of coverage is a calendar month with COBRA premium payments due on the first day of each calendar month. The TPP Plan Administrator pays its own employees that perform services for the TPP Plan Administrator on a semi-monthly basis, with payroll periods ending on the fifteenth of the month and the last day of the month, respectively. On June 17, 2021, the TPP Plan Administrator receives a COBRA election from a client's potential Assistance Eligible Individual who elects COBRA continuation coverage as of April 1, 2021. The TPP Plan Administrator is entitled to a credit as of June 17, 2021, for the premiums not paid by the Assistance Eligible Individual for the periods of coverage of April 1 through April 30, 2021, May 1 through May 31, 2021, and June 1 through June 31, 2021. Assuming the Assistance Eligible Individual does not notify the TPP Plan Administrator that the individual is no longer eligible for COBRA premium assistance (and the TPP Plan Administrator does not otherwise become aware that the Assistance Eligible Individual is ineligible), the TPP Plan Administrator becomes entitled to the credit as of July 1, 2021, for the premiums not paid by the Assistance Eligible Individual for the period of coverage of July 1 through July 30, 2021. (Assuming the facts continue as stated, the TPP Plan Administrator would be entitled to the credit on (i) August 1, 2021, for the period of coverage of August 1 through August 31, 2021, and (ii) September 1, 2021, for the period of coverage of September 1 through September 30, 2021.)

Q-83. What information must a third-party payer obtain from its clients that are premium payees to claim the premium assistance credit on their behalf?

A-83. If a third-party payer (such as a CPEO, PEO, or other § 3504 agent) is claiming the credit on behalf of a client that is a premium payee, it must obtain from the premium payee any information that would have been necessary for the premium payee

to accurately claim the credit on its own behalf.

Q-84. Must a premium payee or a third-party payer claiming the premium assistance credit on behalf of a premium payee maintain records to substantiate eligibility for the credit?

A-84. Yes. Records substantiating the premium payee's eligibility for the credit must be maintained, either by the third-party payer or the premium payee. A premium payee, or a third-party payer that is claiming the credit on behalf of a client that is a premium payee, must, at the IRS's request, provide to the IRS records that substantiate eligibility for the credit, including documentation demonstrating that individuals were eligible for the COBRA premium assistance. The premium payee and the third-party payer will be liable for employment taxes that are due as a result of any improper claim of premium assistance credits in accordance with their liability under the Code and applicable regulations for the employment taxes reported on the federal employment tax return filed by the third-party payer on which the credits were claimed.

Q-85. If an Assistance Eligible Individual pays premiums for which the individual should have received COBRA premium assistance under § 9501(a)(1)(A), and the premium payee reimburses the Assistance Eligible Individual for that amount, when is the premium payee entitled to the premium assistance credit with respect to the reimbursement?

A-85. The premium payee is entitled to the credit on the date the premium payee reimburses the Assistance Eligible Individual for the premium amounts for which the individual should have received COBRA premium assistance.

Q-86. If a third party (such as a charity) paid premium charges on behalf of an Assistance Eligible Individual for which the individual should have received COBRA premium assistance, should the premium payee reimburse the third party or the Assistance Eligible Individual for the premium amounts for which the individual should have received COBRA premium assistance?

A-86. The premium payee is responsible for ensuring that reimbursements are made and should reimburse the Assistance Eligible Individual, unless the premium payee is aware that the individual has assigned the right to the reimbursed premium payments to the third party.

ADDITIONAL ISSUES

The Treasury Department and the IRS are aware of certain additional issues related to the COBRA premium assistance provisions in the ARP that are not addressed in this notice, in particular as noted in Q&A-62. The Treasury Department and the IRS are continuing to consider these issues and the possibility of issuing guidance with respect to them.

DRAFTING INFORMATION

The principal author of this notice is Jason Sandoval of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes), and other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Jason Sandoval at (202) 317-5500 (not a toll-free number). For further information on topics addressed in the section of this notice titled Claiming the COBRA Premium Assistance Credit, contact Mikhail Zhidkov at (202) 317-4774 (not a toll-free number).

FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 50, HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION

October 4, 2021

Set out below are Frequently Asked Questions (FAQs) regarding implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Affordable Care Act. These FAQs have been prepared jointly by the Departments of Labor, Health and Human Services (HHS), and the Treasury (collectively, the Departments). Like previously issued FAQs (available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs and https://www.cms.gov/cciio/resources/fact-sheets-and-faqs#Affordable_Care_Act), these FAQs answer questions from stakeholders to help people understand the law and benefit from it, as intended.

Rapid Coverage of Preventive Services for Coronavirus

Section 3203 of the CARES Act and its implementing regulations[1] require non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to cover, without cost-sharing requirements, any qualifying coronavirus preventive service pursuant to section 2713(a) of the Public Health Service Act (PHS Act) and its implementing regulations (or any successor regulations). The term "qualifying coronavirus preventive service" means an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019 (COVID-19) and that is, with respect to the individual involved—

- An evidence-based item or service that has in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force (USPSTF); or
- An immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC) (regardless of whether the immunization is recommended for routine use).

[1] Pub. L. No. 116-136 (2020); 26 CFR 54.9815-2713T(a)(1)(v), 29 CFR 2590.715-2713(a)(1)(v), and 45 CFR 147.130(a)(1)(v).

Plans and issuers must cover qualifying coronavirus preventive services without cost sharing starting no later than 15 business days (not including weekends or holidays) after the date the USPSTF or ACIP makes an applicable recommendation regarding a qualifying coronavirus preventive service. A recommendation from ACIP is considered in effect after it has been adopted by the Director of the CDC.

The Departments are issuing the following FAQs in response to the December 12, 2020 adoption by the Director of the CDC of the ACIP recommendation for vaccination with COVID-19 vaccines within the scope of the Emergency Use Authorization (EUA) or Biologics License Application (BLA) for the particular vaccine.

Q1: How does the December 12, 2020 ACIP recommendation impact when plans and issuers must provide coverage without cost sharing for COVID-19 vaccines under section 3203 of the CARES Act and its implementing regulations?

Plans and issuers must now cover COVID-19 vaccines and their administration, without cost sharing, immediately once the particular vaccine becomes authorized under an EUA or approved under a BLA, and according to the scope of the applicable EUA or BLA.

In a December 12, 2020 meeting, ACIP recommended: "For purposes of ACIP's role under the Affordable Care Act, ACIP recommends use of COVID-19 vaccines within the scope of the Emergency Use Authorization or Biologics License Application for the particular vaccine."[2] On the same day, the Director of the CDC adopted this ACIP recommendation. Although ACIP has made additional recommendations regarding COVID-19 vaccines since December 12, 2020, none of those recommendations affect plan and issuer coverage obligations regarding COVID-19 vaccines under the preventive services regulations, and therefore the December 12, 2020 recommendation remains in effect for this purpose.

The requirement under section 3203 of the CARES Act for plans and issuers to cover COVID-19 vaccines consistent with this ACIP recommendation became effective 15 business days after the December 12, 2020 adoption by the CDC. Therefore, effective January 5, 2021, plans and issuers must cover, without cost sharing, any COVID-19 vaccine authorized under an EUA or approved under a BLA by the FDA immediately upon the vaccine becoming authorized or approved. This coverage must be provided consistent with the scope of the EUA or BLA for the particular vaccine, including any EUA or BLA amendment, such as to allow for the administration of an additional dose to certain individuals, administration of booster doses, or the expansion of the age demographic for whom the vaccine is authorized or approved.

[2] See https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-12/COVID-04-VOTE-508.pdf. See also CDC Adult and Child and Adolescent Immunization Schedules, incorporating the December 12, 2020 ACIP recommendation, respectively at https://www.cdc.gov/vaccines/schedules/downloads/adult/adult-combined-schedule.pdf and https://www.cdc.gov/vaccines/schedules/downloads/child/0-18yrs-child-combined-schedule.pdf.

The Departments' prior guidance, FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44 (FAQs Part 44),[3] issued on February 26, 2021, did not explicitly address the general ACIP recommendation for COVID-19 vaccines. In addition, the Departments understand that plans and issuers may be aware of subsequent ACIP recommendations and that it may be unclear which particular ACIP recommendations are relevant for purposes of triggering a coverage obligation under section 3203 of the CARES Act. This FAQ is intended to notify plans and issuers that the December 12, 2020 ACIP recommendation is the applicable recommendation for purposes of the definition of qualifying coronavirus preventive services under section 3203 of the CARES Act and its implementing regulations. Because plans and issuers may reasonably not have understood when coverage without cost sharing was required to begin under section 3203 of the CARES Act for COVID-19 vaccines authorized or approved (or for which the EUA or BLA was amended) since the December 12, 2020 recommendation was adopted, the Departments will only enforce the timing requirement to cover, without cost sharing, any COVID-19 vaccine authorized under an EUA or approved under a BLA by the FDA immediately upon the vaccine becoming authorized or approved (or the EUA or BLA being amended) prospectively, consistent with the scope of the particular EUA or BLA, to the extent additional coverage beyond what was articulated in previous guidance is required.[4]

Q2: Does FAQs Part 44, Q8, continue to apply?

FAQs Part 44, Q8, which provided guidance from the Departments on when plans and issuers must begin providing coverage of COVID-19 vaccines, is superseded to the extent it provides that the coverage requirement effective date is related to the vaccine-specific recommendations of ACIP, and notations will be made on the HHS and Department of Labor websites to reflect this modification.

HIPAA Nondiscrimination and Wellness Programs

Under PHS Act section 2705,[5] Employee Retirement Income Security Act (ERISA) section 702, Internal Revenue Code (Code) section 9802, and the Departments' implementing regulations, plans and issuers are generally prohibited from discriminating against participants, beneficiaries,

[3] See FAQs about Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 44 (Feb. 26, 2021), available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-44.pdf and https://www.cms.gov/files/document/faqs-part-44.pdf.
[4] The Departments note that all organizations and providers participating in the CDC COVID-19 Vaccination Program (which currently includes any provider administering COVID-19 vaccines) must administer COVID-19 vaccines at no out-of-pocket cost to the individual receiving the vaccine. For more information on the CDC COVID-19 Vaccination Program, see https://www.cdc.gov/vaccines/covid-19/vaccination-provider-support.html.
[5] Section 1201 of the Affordable Care Act amended and moved the nondiscrimination and wellness provisions of the PHS Act from section 2702 to section 2705, and extended the nondiscrimination provisions to issuers offering individual health insurance coverage. The Affordable Care Act also added section 715(a)(1) to ERISA and section 9815(a)(1) to the Code to incorporate the provisions of part A of title XXVII of the PHS Act, including PHS Act section 2705, into ERISA and the Code and make these provisions applicable to group health plans and group health insurance issuers.

and enrollees in eligibility, premiums, or contributions based on a health factor.[6] With respect to group health plans, an exception to this general prohibition allows premium discounts, rebates, or modification of otherwise applicable cost-sharing requirements (including copayments, deductibles, and coinsurance) in return for adherence to certain programs of health promotion and disease prevention, commonly referred to as wellness programs.

On June 3, 2013, the Departments issued final wellness program regulations[7] under PHS Act section 2705 and the parallel provisions of ERISA and the Code that address the requirements for wellness programs provided in connection with group health coverage. Among other things, the final wellness program regulations set the maximum permissible reward (or penalty) under a health-contingent wellness program that is part of a group health plan (and any related health insurance coverage) at 30 percent of the cost of coverage (or 50 percent for wellness programs designed to prevent or reduce tobacco use).[8] The final wellness program regulations also address the reasonable design of health-contingent wellness programs, and, with respect to rewards offered under such programs, the reasonable alternatives that must be offered to avoid prohibited discrimination.

In addition, under section 4980H of the Code, employers may be liable for employer shared responsibility payments if they offer coverage that is not affordable. Under 26 CFR 1.36B-2(c)(3)(v)(A)(*4*), nondiscriminatory wellness program incentives offered by an employer-sponsored plan that affect premiums are treated as "not earned" for the purpose of assessing affordability, with the exception of incentives related exclusively to tobacco use. In other words, those wellness program incentives unrelated to tobacco use that provide discounts to employees are disregarded in assessing affordability, while those incentives unrelated to tobacco use that impose surcharges on employees are taken into account in assessing affordability.

Recently, stakeholders have asked whether group health plans and issuers can provide incentives to encourage individuals to receive COVID-19 vaccines. The Departments are issuing these FAQs to respond to stakeholder questions.

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[6] The statute and its implementing regulations set forth eight health status-related factors, which the 2006 regulations refer to as "health factors" for simplicity. Under the statute and the regulations, the eight health factors are health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), and disability. 71 FR 75014 (Dec. 13, 2006) (the 2006 regulations). In the Departments' view, "[t]hese terms are largely overlapping and, in combination, include any factor related to an individual's health." 66 FR 1379 (Jan. 8, 2001).

[7] *See* 78 FR 33158 (Jun. 3, 2013). These final wellness program regulations update earlier regulations implementing the nondiscrimination and wellness program provisions established under the 2006 regulations. 71 FR 75014 (Dec. 13, 2006). The Affordable Care Act amended the statutory nondiscrimination and wellness provisions to in large part reflect the 2006 regulations regarding wellness programs.

[8] The cost of coverage is determined based on the total amount of employer and employee contributions towards the cost of coverage for the benefit package under which the employee is (or the employee and any dependents are) receiving coverage. 26 CFR 54.9802-1(f)(3)(ii) and (f)(4)(ii), 29 CFR 2590.702-1(f)(3)(ii) and (f)(4)(ii), and 45 CFR 146.121(f)(3)(ii) and (f)(4)(ii).

Q3: May a group health plan (or health insurance issuer offering coverage in connection with a group health plan) offer participants in the plan a premium discount for receiving a COVID-19 vaccination?

Yes, if the premium discount complies with the final wellness program regulations.[9,10] A premium discount that requires an individual to perform or complete an activity related to a health factor, in this case obtaining a COVID-19 vaccination, to obtain a reward would be considered a wellness program that must comply with the five criteria for activity-only wellness programs described in paragraph (f)(3) of the final wellness program regulations.[11]

To satisfy these criteria, a wellness program that provides a premium discount to individuals who obtain a COVID-19 vaccination must be reasonably designed to promote health or prevent disease and must provide a reasonable alternative standard to qualify for the discount. For example, the wellness program may offer a waiver or the right to attest to following other COVID-19-related guidelines to individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination in order to qualify for the full reward. The plan must also provide notice of the availability of the reasonable alternative standard under the wellness program. Further, the reward the plan provides in connection with the vaccine incentive program must not exceed 30 percent of the total cost of employee-only coverage and must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

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[9] Compliance with the final wellness program regulations is not determinative of compliance with any other provision of the PHS Act, ERISA, the Code, or any other State or Federal law, including the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). See 26 CFR 54.9802-1(h), 29 CFR 2590.702(h), 45 CFR 146.121(h), 29 CFR 1630, and 29 CFR 1635. Furthermore, these FAQs address wellness program incentives provided by group health plans and health insurance issuers and do not address incentives offered by employers as part of workplace policies and unrelated to their group health plan. Employers considering the adoption of COVID-19 vaccination programs that provide incentives should consult Section K of the Equal Employment Opportunity Commission's What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws. Questions K.16. through K.21 restate the current guidance under Title I of the ADA and Title II of GINA.

[10] *See* 78 FR 33158 (Jun. 3, 2013).

[11] The final wellness program regulations provide that a health-contingent wellness program that is an activity-only wellness program does not violate the wellness program provisions only if all of the following requirements are satisfied: (1) the program must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year; (2) the reward for the activity-only wellness program, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed the applicable percentage (defined as 30 percent (or 50 percent for wellness programs designed to prevent or reduce tobacco use) of the total cost of employee-only coverage under the plan); (3) the program must be reasonably designed to promote health or prevent disease; (4) the full reward under the activity-only wellness program must be available to all similarly situated individuals (which includes allowing a reasonable alternative standard (or waiver of the otherwise applicable standard) for obtaining the reward for any individual for whom, for that period, it is unreasonably difficult due to a medical condition or medically inadvisable to satisfy the otherwise applicable standard); and (5) the plan or issuer must disclose in all plan materials describing the terms of an activity-only wellness program the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the otherwise applicable standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated. *See* 26 CFR 54.9802-1(f)(3), 29 CFR 2590.702(f)(3), and 45 CFR 146.121(f)(3).

Example: A group health plan offers a 25 percent premium discount of the cost of employee-only coverage to all participants who receive a COVID-19 vaccination in accordance with the recommendations of ACIP (and does not offer any other reward under other health-contingent wellness programs with respect to the plan). To help facilitate participants receiving the vaccination, the plan also maintains a toll-free hotline to answer questions about COVID-19 vaccination and offer assistance to schedule appointments to receive a COVID-19 vaccination. The plan provides the same premium discount to individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain a COVID-19 vaccination if the individual attests to complying with the CDC's mask guidelines for unvaccinated individuals. The plan also provides notice of the availability of this alternative to all participants. Participants may qualify annually for this premium discount.

Conclusion: The vaccine incentive program meets the criteria to be an activity-only health-contingent wellness program. The reward the plan provides in connection with the vaccine incentive program does not exceed 30 percent of the total cost of employee-only coverage and the opportunity to qualify is offered annually. The plan provides a reasonable alternative standard to qualify for the reward, in this case the opportunity to attest to complying with the CDC's mask guidelines, to individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain a COVID-19 vaccination, and the plan provides notice of the availability of the reasonable alternative standard. This program is also reasonably designed to promote health and prevent disease (and is not a subterfuge for discriminating based on a health factor), as the program rewards individuals who obtain a COVID-19 vaccination, while the reasonable alternative standard is not overly burdensome, and is also designed to prevent infection with SARS-CoV-2, the virus that causes COVID-19. Further, the plan's maintenance of a toll-free hotline to provide information about the COVID-19 vaccine and assistance with meeting the underlying standard (in this case, receiving a COVID-19 vaccination or fulfilling the reasonable alternative) are additional facts and circumstances demonstrating that the program is reasonably designed to promote health or prevent disease because they help ensure that the program is not overly burdensome.

Q4: May a group health plan or health insurance issuer condition eligibility for benefits or coverage for otherwise covered items or services to treat COVID-19 on participants, beneficiaries, or enrollees being vaccinated?

No. PHS Act section 2705, ERISA section 702, Code section 9802, and the Departments' implementing regulations generally prohibit plans and issuers from discriminating against participants, beneficiaries, and enrollees in eligibility, premiums, or contributions based on a health factor.[12] The Departments' implementing regulations state that rules for eligibility include, among other things, rules related to benefits (including rules related to covered benefits and

[12] As amended by the Affordable Care Act, the nondiscrimination provisions under PHS Act section 2705 apply to health insurance issuers offering group or individual health insurance coverage. *See supra* note 5.

benefit restrictions).[13] Benefits under the plan must be uniformly available to all similarly situated individuals and any restriction on benefits must apply uniformly to all similarly situated individuals and must not be directed at individuals based on a health factor.[14] Accordingly, plans and issuers may not discriminate in eligibility for benefits or coverage based on whether or not an individual obtains a COVID-19 vaccination. Furthermore, while there is an exception to the general prohibition on discrimination based on a health factor for wellness programs that meet federal standards, this exception is available only for premium discounts or rebates, or modifications of otherwise applicable cost-sharing mechanisms, and not for denying eligibility for benefits or coverage based on a health factor.[15]

Q5: How are premium discounts and surcharges for receiving or not receiving the COVID-19 vaccination, respectively, treated for purposes of determining affordability of coverage with respect to the employer shared responsibility payment under section 4980H(b) of the Code?

Wellness incentives that relate to the receipt of COVID-19 vaccinations are treated as not earned for purposes of determining whether employer-sponsored health coverage is affordable. Although premium incentives are permissible as part of a nondiscriminatory wellness program, premium incentives other than incentives relating exclusively to tobacco use, including wellness programs encouraging vaccinations for COVID-19, are treated as not earned when determining the employee's required contribution for an offer of health coverage under 26 CFR 1.36B-2(c)(3)(v)(A)(*4*). Thus, for example, if the individual premium contribution under a COVID-19 vaccination wellness program was reduced by 25 percent, this reduction is disregarded for purposes of determining whether the offer of that coverage is affordable for purposes of assessing liability for the employer shared responsibility payment. Conversely, if an individual's premium contribution for health coverage under a COVID-19 vaccination wellness program is increased by a 25 percent surcharge for a non-vaccinated individual, that surcharge would not be disregarded in assessing affordability.

[13] *See* 26 CFR 54.9802-1(b)(1)(ii)(F), 29 CFR 2590.702(b)(1)(ii)(F); 45 CFR 146.121(b)(1)(ii)(F) and 147.110.
[14] *See* 26 CFR 54.9802-1(b)(2)(i)(B), 29 CFR 2590.702(b)(2)(i)(B); 45 CFR 146.121(b)(2)(i)(B) and 147.110.
[15] The general prohibition against discrimination in premiums and contributions under PHS Act section 2705(b), ERISA section 702(b), and Code section 9802(b) provides the general prohibition shall not be construed to prevent a group health plan, or a health insurance issuer offering group health insurance coverage, from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention. The general prohibition against discrimination in rules for eligibility under PHS Act section 2705(a), ERISA section 702(a), and Code section 9802(a) contains no such exception.

U.S. Department of Labor
Employee Benefits Security Administration
Washington, D.C. 20210

EBSA Disaster Relief Notice 2021- 01

Guidance on Continuation of Relief for Employee Benefit Plans and Plan Participants and Beneficiaries Due to the COVID-19 (Novel Coronavirus) Outbreak

This notice provides guidance on the duration of the COVID-19-related relief provided by Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01 ("Notice 2020-01") and the Notice of Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID–19 Outbreak ("Joint Notice") issued by the Department of Labor, the Department of the Treasury, and the Internal Revenue Service (IRS) (collectively "Agencies").

The Joint Notice and Notice 2020-01 (collectively "Notices") provide relief for certain actions related to employee benefit plans required or permitted under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"). The relief is focused on employee benefit plans, plan participants and beneficiaries, employers and other plan sponsors, plan fiduciaries, and other service providers impacted by the coronavirus outbreak.

ERISA section 518 (29 U.S.C. § 1148) and Code section 7508A(b) (26 U.S.C. § 7508A(b)) generally provide that, in the case of an employee benefit plan, sponsor, administrator, participant, beneficiary, or other person with respect to such a plan affected by a Presidentially declared disaster, the Secretaries of Labor and the Treasury may prescribe a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 of ERISA further provides that the Secretary of Labor may provide for such extensions of timeframes in the case of a public health emergency declared by the Secretary of Health and Human Services (HHS) pursuant to 42 U.S.C. § 247d. The relief period under the Notices began on March 1, 2020.[1]

The relief provided pursuant to the Notices continues until sixty (60) days after the announced end of the COVID-19 National Emergency (as defined in the Joint Notice) or such other date announced by the relevant Agency or Agencies in a future notification (the "Outbreak Period"), but as noted above, under section 518 of ERISA and section 7508A(b) of the Code, the disregarded period for individual actions "required or permitted" is expressly limited by statute to a period of 1 year from the date the individual action would otherwise have been required or permitted. One year from March 1, 2020, is February 28, 2021, and stakeholders have inquired about the continuation of relief beyond that date.

[1] On March 13, 2020, the President issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak and by separate letter made a determination, under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.,* that a national emergency exists nationwide beginning March 1, 2020, as the result of the COVID–19 outbreak (the National Emergency). *See* 85 FR 26351, 52 (May 4, 2020).

Individuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date they were first eligible for relief,[2] or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.

The following examples are intended to illustrate the duration of the relief under the Notices. If a qualified beneficiary, for example, would have been required to make a COBRA election by March 1, 2020, the Joint Notice delays that requirement until February 28, 2021, which is the earlier of 1 year from March 1, 2020 or the end of the Outbreak Period (which remains ongoing). Similarly, if a qualified beneficiary would have been required to make a COBRA election by March 1, 2021, the Joint Notice delays that election requirement until the earlier of 1 year from that date (i.e., March 1, 2022) or the end of the Outbreak Period. Likewise, if a plan would have been required to furnish a notice or disclosure by March 1, 2020, the relief under the Notices would end with respect to that notice or disclosure on February 28, 2021. The responsible plan fiduciary would be required to ensure that the notice or disclosure was furnished on or before March 1, 2021.[3] In all of these examples, the delay for actions required or permitted that is provided by the Notices does not exceed 1 year.

This guidance has been coordinated with and reviewed by the Department of the Treasury, IRS, and HHS. The Department of the Treasury, IRS, and HHS have advised the Department of Labor that they concur with the guidance provided above regarding the continuation of relief and the application of the laws under their jurisdiction.[4]

The Department of Labor recognizes that affected plan participants and beneficiaries may continue to encounter an array of problems due to the ongoing nature of the COVID-19 pandemic in circumstances under which relief under the Notices is no longer available due to the statutory one-year limit on the Agencies' authority to grant relief. The guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in

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[2] The first date upon which an individual or plan could be eligible for relief was March 1, 2020, the first day of the National Emergency. Therefore, the earliest date upon which a disregarded period can begin to run again is March 1, 2021, including for periods during which an action is required or permitted to be completed that began before March 1, 2020.

[3] The relief provided under Notice 2020-01 for plan distribution of notices and disclosures was subject to the condition that the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. The Notice provided that good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites. The Department of Labor understands that many plans may have already returned to normal compliance procedures for furnishing notices and disclosures. Notices and disclosures properly furnished without relying on the relief in Notice 2020-01 do not need to be re-furnished. Similarly, to the extent the plan can demonstrate that a notice or disclosure was actually received, it would not need to be refurnished even if it was initially furnished in reliance on the relief in Notice 2020-01.

[4] See Centers for Medicare & Medicaid Services, Insurance Standards Bulletin Series -- INFORMATION, "Temporary Period of Relaxed Enforcement of Certain Timeframes Related to Group Market Requirements under the Public Health Service Act in Response to the COVID-19 Outbreak" (May 14, 2020), available at https://www.cms.gov/files/document/Temporary-Relaxed-Enforcement-Of-Group-Market-Timeframes.pdf.

payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.

For example, where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period. Moreover, plan disclosures issued prior to or during the pandemic may need to be reissued or amended if such disclosures failed to provide accurate information regarding the time in which participants and beneficiaries were required to take action, e.g., COBRA election notices and claims procedure notices. Further, in the case of ERISA group health plans, plans should consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace in their state. In this regard, in accordance with the President's Executive Order 14009, a special enrollment period is available to the consumers in the 36 states that use the HealthCare.gov platform starting on February 15 and continuing through May 15. At least 13 states plus the District of Columbia, which operate their own Marketplace platforms, are offering a similar opportunity.5 For more information on the Health Insurance Marketplace special enrollment period, go to HealthCare.gov. For a list of states that do not use HealthCare.gov and links to their Marketplaces, go to: https://www.healthcare.gov/marketplace-in-your-state/.

In addition, the Department of Labor acknowledges that there may be instances when full and timely compliance with ERISA's disclosure and claims processing requirements by plans and service providers may not be possible, including when pandemic or natural disaster-related disruption to a plan or service provider's principal place of business makes compliance with pre-established time frames for certain claims' decisions or disclosures impossible. In the case of fiduciaries that have acted in good faith and with reasonable diligence under the circumstances, the Department of Labor's approach to enforcement will be marked by an emphasis on compliance assistance and includes grace periods and other relief.

The Agencies continue to monitor the effects of the COVID-19 outbreak as they relate to employee benefit plans and have been engaged with stakeholders regarding the continued need for relief. The Agencies are of the view that continued relief may be needed to preserve and protect private-sector employee benefit plans. The Agencies intend to continue to engage with affected stakeholders on whether, and if so, how to better tailor relief, consistent with their respective jurisdictions, to focus on areas in which participants and beneficiaries continue to need relief and as plans continue to move toward a normal compliance status.

Contact Information

For more information, visit the EBSA Disaster Relief pages for Employers and Advisers or Workers and Families, or contact EBSA or 1-866-444-3272. Questions about IRS guidance should be directed to the IRS or 1-202-317-5500.

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[5] 86 FR 7793 (February 2, 2021).

Extension of COBRA election and premium payment deadlines under section 7508A(b)

NOTICE 2021-58

I. Purpose

This notice clarifies the application of certain extensions under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) for the election of COBRA coverage and payment of COBRA premiums under the Joint Notification of Extensions of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice) [1] issued by the Department of Labor (DOL), the Department of the Treasury (Treasury Department), and the Internal Revenue Service (IRS), collectively the "Agencies", and the additional guidance provided by Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2021-01, released by the DOL.[2] The Joint Notice and EBSA Disaster Relief Notice 2021-01 are referred to collectively in this notice as the "Emergency Relief Notices." This notice also addresses the interaction of COBRA continuation coverage under the Emergency Relief Notices with the COBRA premium assistance available for certain individuals under the American Rescue Plan Act of 2021[3] (the ARP). Terms used in this notice have the same meanings as those terms have when used in the guidance referenced in this notice.

This guidance has been coordinated with, and reviewed by, DOL and the Department of Health and Human Services (HHS).[4] DOL and HHS have advised the Treasury Department and the IRS that they concur with the guidance provided in this notice as applicable to the laws under their respective jurisdictions.

II. Background

A. COBRA continuation coverage

COBRA permits qualified beneficiaries who lose coverage under a group health plan to elect continuation health coverage during the 60-day period after receipt of a COBRA election notice. Section 4980B(f)(5). The group health plan under which continuation

[1] 85 FR 26351 (May 4, 2020).
[2] EBSA Disaster Relief Notice 2021-01 (Feb. 26, 2021), available at: https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01.pdf.
[3] Pub. L. 117-2, 135 Stat. 4, (March 11, 2021).
[4] HHS also released non-binding, temporary relaxed enforcement guidance in conjunction with the Joint Notice that extended similar timeframes otherwise applicable to non-Federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan, their participants and beneficiaries, and Small Business Health Options Program (SHOP) issuers offering a qualified health plan through a SHOP. See Insurance Bulletin titled "*Temporary Period of Relaxed Enforcement of Certain Timeframes Related to Group Market Requirements under the Public Health Service Act in Response to the COVID-19 Outbreak*", available at: https://www.cms.gov/files/document/Temporary-Relaxed-Enforcement-Of-Group-Market-Timeframes.pdf.

coverage is provided may not require the payment of any premium before the day that is 45 days after the day on which the qualified beneficiary makes the initial election for continuation coverage. Section 4980B(f)(2)(C)(ii). Additionally, the group health plan must treat COBRA premium payments as timely paid if made within 30 days after the due date or within any longer period as applied to or under the plan. Section 4980B(f)(2)(B)(iii).

B. Summary of Emergency Relief Notices and the ARP

On May 4, 2020, in response to the National Emergency concerning the Novel Coronavirus Disease (COVID-19) Outbreak (National Emergency),[5] the Agencies published the Joint Notice, which extended certain timeframes otherwise applicable to group health plans, disability and other welfare plans, pension plans, and their participants and beneficiaries under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (Code). The Joint Notice extended these timeframes by requiring that plans subject to ERISA or the Code disregard the period for certain action from March 1, 2020, until 60 days after the announced end of the National Emergency or such other date announced by the Agencies in a future notification (the Outbreak Period), subject to a maximum disregarded period of one year.[6]

On February 26, 2021, DOL, with the concurrence of HHS, the Treasury Department, and the IRS, issued EBSA Disaster Relief Notice 2021-01, which clarified that the disregarded periods apply from the date each individual or plan was first eligible for relief under the Joint Notice. Under EBSA Disaster Relief Notice 2021-01, the applicable periods under the Emergency Relief Notices for individuals and plans are therefore disregarded until the earlier of (1) one year from the date the individuals and plans were first eligible for relief,[7] or (2) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). At the end of an individual's or plan's

[5] On March 13, 2020, the President issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak declaring a national emergency, beginning March 1, 2020, under sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq*.). By separate letter, also on March 13, 2020, the President declared under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. section 5121 *et seq.*, that an emergency existed nationwide, as the result of the COVID-19 outbreak (the COVID-19 National Emergency or National Emergency). *See* 85 FR 26351, 26352.

[6] The Joint Notice provided that, subject to the one-year limit under section 518 of ERISA and section 7508A(b) of the Code, all group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the Code were required to disregard the period for certain timeframes because of the National Emergency. The disregarded period applies to specific employee benefit timeframes applicable to plan participants, beneficiaries, qualified beneficiaries, and claimants. The Joint Notice also provided relief for group health plans regarding the requirement to provide a COBRA election notice.

[7] The first date upon which an individual or plan could be eligible for relief was March 1, 2020, the first day of the National Emergency. Therefore, the earliest date upon which a disregarded period could begin to run again was March 1, 2021, including for periods beginning before March 1, 2020, during which an action was required or permitted to be completed.

disregarded period, the applicable timeframes that were disregarded under the Joint Notice resume.

On March 11, 2021, the ARP was enacted. Section 9501 of the ARP provides for temporary COBRA premium assistance for certain "Assistance Eligible Individuals"[8] for periods of coverage beginning on or after April 1, 2021, through periods of coverage beginning on or before September 30, 2021. On May 18, 2021, the IRS and the Treasury Department issued Notice 2021-31[9] providing guidance regarding COBRA continuation coverage and COBRA premium assistance under the ARP.

On July 26, 2021, the Treasury Department and the IRS issued Notice 2021-46,[10] providing further guidance regarding COBRA continuation coverage and COBRA premium assistance under the ARP.

C. COBRA relief under the Emergency Relief Notices

The Joint Notice provided extensions[11] for the following COBRA timeframes:

(1) The 60-day election period for COBRA continuation coverage under section 605 of ERISA and section 4980B(f)(5) of the Code,[12]

(2) The dates for making COBRA premium payments under section 602(2)(C) and (3) of ERISA and section 4980B(f)(2)(B)(iii) and (C) of the Code,[13]

(3) The date for individuals to notify the plan of a qualifying event or determination of disability under section 606(a)(3) of ERISA and section 4980B(f)(6)(C) of the Code, and

(4) The date for providing a COBRA election notice under section 606(c) of ERISA and section 4980B(f)(6)(D) of the Code for group health plans and their sponsors and administrators.

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[8] Under section 9501 of the ARP, an "Assistance Eligible Individual" is an individual (1) who is a qualified beneficiary with respect to a period of COBRA continuation coverage during the period from April 1, 2021, through September 30, 2021, and eligible for that COBRA continuation coverage by reason of a qualifying event specified in section 603(2) of ERISA, section 4980B(f)(3)(B) of the Code, or section 2203(2) of the Public Health Service Act, except for voluntary termination of employment, and (2) who elects COBRA continuation coverage.

[9] Notice 2021-31, 2021-23 IRB 1173 (June 7, 2021).

[10] Notice 2021-46, 2021-33 IRB 303 (August 16, 2021).

[11] The Joint Notice provided extensions for other employee benefit timeframes in addition to the COBRA timeframes addressed in this notice. For more information, see the Joint Notice at 85 FR 26351 (May 4, 2020).

[12] The term ''election period'' is defined as ''the period which—(A) begins not later than the date on which coverage terminates under the plan by reason of a qualifying event, (B) is of at least 60 days' duration, and (C) ends not earlier than 60 days after the later of—(i) the date described in subparagraph (A), or (ii) in the case of any qualified beneficiary who receives notice under section 1166(a)(4) of this title, the date of such notice.'' Section 605(a)(1) of ERISA; section 4980B(f)(5) of the Code.

[13] Regarding coverage during the election period and before an election is made, see Treas. Reg. § 54.4980B–6, Q&A-3; regarding coverage during the period between the election and payment of the premium, see Treas. Reg. § 54.4980B–8, Q&A-5(c).

The Emergency Relief Notices provide that these COBRA timeframes are disregarded until the earlier of (1) one year from the date that individuals and plans were first eligible for relief, or (2) the end of the Outbreak Period.[14]

III. Guidance and Application of the extensions under the Emergency Relief Notices to COBRA elections and payment of COBRA premiums

Under the Emergency Relief Notices, up to one year must be disregarded in determining the due dates for individuals to elect COBRA continuation coverage and pay COBRA premiums during the Outbreak Period. This notice clarifies that the disregarded period for an individual to elect COBRA continuation coverage and the disregarded period for the individual to make initial and subsequent COBRA premium payments generally run concurrently.

The following rules illustrate the timeframes that apply to individuals making initial COBRA premium payments under the Emergency Relief Notices during the Outbreak Period. For purposes of these rules, the phrase the "initial 60-day COBRA election timeframe" refers to the 60-day election timeframe under section 605 of ERISA and section 4980B(f)(5) of the Code without regard to the Emergency Relief Notices.

- If an individual elected COBRA continuation coverage outside of the initial 60-day COBRA election timeframe, that individual generally will have one year and 105[15] days after the date the COBRA notice was provided to make the initial COBRA premium payment.
- If an individual elected COBRA continuation coverage within the initial 60-day COBRA election timeframe, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.

Individuals must make the initial COBRA election by the earlier of (1) one year and 60 days after the individual's receipt of the COBRA election notice, or (2) the end of the Outbreak Period.

Applying the disregarded periods in this way means that individuals who delay electing COBRA may not have more than one year of total disregarded time for the COBRA election and initial COBRA payment.[16] However, these timeframes are subject to the transition relief provided in section IV of this notice, which provides that in no event will

[14] For an individual with a right to COBRA continuation coverage, the date of the applicable event will be the date the individual action would otherwise have been required or permitted. For group health plans, the date of the applicable event will be the date the plan would otherwise be required to provide a COBRA election notice.

[15] The 105-day period is derived by adding together the 60 days to make an initial COBRA election under section 4980B(f)(5) and the 45 days to make the initial COBRA premium payment under section 4980B(f)(2)(C)(ii).

[16] For example, an individual generally may not delay electing COBRA continuation coverage for 6 months and then add another full year to the disregarded period for purposes of determining the deadline for making the initial COBRA premium payment (resulting in a total of 18 months of disregarded time for both the COBRA election and initial COBRA payment). Instead, the maximum disregarded period of one year is applied concurrently to the timeframe for the COBRA election and initial COBRA premium payment.

an initial COBRA premium payment be due before November 1, 2021, as long as the individual makes the initial COBRA premium payment within one year and 45 days after the election date.

For each subsequent COBRA premium payment, the maximum time an individual has to make a payment while the Outbreak Period continues is one year from the date the payment originally would have been due in the absence of the Emergency Relief Notices, including the mandatory 30-day grace period, but subject to the transition relief provided below.

IV. Transition relief for COBRA premium payments due before November 1, 2021 under the Emergency Relief Notices

Because some individuals may have assumed that the disregarded period for making the initial premium payment begins on the date of the COBRA election, individuals who made elections more than 60 days after receipt of the election notice may have less time than they anticipated to make the initial premium payment. Therefore, to avoid inequitable outcomes, in no event will an individual be required to make the initial premium payment before November 1, 2021, even if November 1, 2021 is more than one year and 105 days after the date the election notice was received, provided that the individual makes the initial premium payment within one year and 45 days after the date of the election. This transition relief does not result in an individual having a disregarded period related to a particular COBRA timeframe that is more than one year. This transition relief is an exception to the general rule that disregarded periods for COBRA elections and initial COBRA payments run concurrently with respect to each individual.

V. Interaction with the ARP COBRA premium assistance

The extensions of the timeframes under the Emergency Relief Notices do not apply to the periods for providing the required notice of the ARP extended election period or for electing COBRA continuation coverage with COBRA premium assistance under the ARP. See Notice 2021-31, Q&A-57. An individual who has a disregarded period under the Emergency Relief Notices may elect retroactive COBRA continuation coverage, subject to the guidance in this notice, and may elect COBRA continuation coverage with COBRA premium assistance for any period for which the individual is eligible for COBRA premium assistance. However, the disregarded periods under the Emergency Relief Notices continue to apply to payments of COBRA premiums after the end of the ARP COBRA premium assistance period, to the extent that the individual is still eligible for COBRA continuation coverage and the Outbreak Period has not ended.

VI. Examples

The following examples illustrate how COBRA elections and premium payments are treated under this notice. All of the examples assume that the Outbreak Period has not ended during the periods specified and that individuals are not eligible for COBRA premium assistance under the ARP unless stated otherwise. The examples also assume that the group health plans have calendar month coverage periods, with premium payments due by the first of the month, and that the plans provide that

qualified beneficiaries must make COBRA premium payments within the statutory 30-day grace period.

A. Examples applying the extensions under the Emergency Relief Notices to COBRA elections and payment of COBRA premiums

Example 1. COBRA election made more than 60 days after receipt of COBRA election notice under the Emergency Relief Notices.

(i) Facts. Individual A participates in Employer X's group health plan. On August 1, 2020, Individual A has a qualifying event and receives a COBRA election notice. Individual A elects COBRA continuation coverage on February 1, 2021, retroactive to August 1, 2020. When must Individual A make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual A has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after August 1, 2020), because Individual A did not elect COBRA continuation coverage under the Emergency Relief Notices within 60 days after receipt of the election notice. The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months that Individual A is eligible for COBRA continuation coverage.

Example 2. COBRA election made within 60 days of the receipt of COBRA election notice under the Emergency Relief Notices.

(i) Facts. Individual B participates in Employer Y's group health plan. Individual B has a qualifying event and receives a COBRA election notice on October 1, 2020. Individual B elects COBRA continuation coverage on October 15, 2020 retroactive to October 1, 2020. When must Individual B make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual B has until November 29, 2021, to make the initial COBRA premium payment (one year and 45 days after October 15, 2020) because Individual A elected COBRA within 60 days of receiving the election notice. The initial COBRA premium payment would include only the monthly premium payment for October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual B is eligible for COBRA continuation coverage.

Example 3. Timeframe for electing COBRA under the Emergency Relief Notices.

(i) Facts. Individual C participates in Employer Z's group health plan. Individual C has a qualifying event and is provided a COBRA election notice on August 1, 2020. When must Individual C elect COBRA continuation coverage and, if Individual C elects COBRA continuation coverage, when must Individual C make the initial COBRA premium payment?

(ii) Conclusion. Individual C has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage. If Individual C elects COBRA continuation coverage after September 30, 2020 (but on or before September 30, 2021) Individual C has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after receipt of the election notice). If Individual C makes the initial COBRA premium payment on November 14, 2021, that premium payment would include the monthly premiums for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual C is eligible for COBRA continuation coverage.

Example 4. Failure to make COBRA premium payments under the Emergency Relief Notices.

(i) Facts. The facts are the same as in Example 1. In addition, Individual A timely makes the initial COBRA premium payment covering the months of August 2020 through October 2020, as well as the payment for the November 2020 monthly premium. Individual A does not make a payment for the December 2020 monthly premium as of December 31, 2021. For how many months does Individual A have COBRA continuation coverage?

(ii) Conclusion. Individual A is entitled to COBRA continuation coverage for the months of August 2020 through November 2020, but Individual A is not entitled to COBRA continuation coverage for any month after November 2020 because Individual A did not pay the December 2020 premium by the end of the applicable grace period. Benefits and services provided by the group health plan (for example, doctor's visits or filled prescriptions) that occurred on or before November 30, 2020, would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services for Individual A that were incurred after November 30, 2020.

Example 5. Applying the transition relief for COBRA premium payments due before November 1, 2021.

(i) Facts. The facts are the same as in Example 1, except that Individual A has a qualifying event on April 1, 2020. Individual A receives the COBRA election notice on April 1, 2020 and elects COBRA continuation coverage on October 1, 2020, retroactive to April 1, 2020. As of July 15, 2021, Individual A has not made the initial premium payment. When must Individual A make the initial premium payment for COBRA continuation coverage retroactive to April 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. Under the transition relief provided in this notice, Individual A has until November 1, 2021 to make the initial premium payment, even though November 1, 2021 is more than one year and 105 days after April 1, 2020. Although the disregarded periods for the COBRA election and the initial premium payment run concurrently, under the transition relief provided in this notice, an individual will not be required to make the initial premium payment before November 1, 2021, as long as the individual makes the initial premium payment within one year and 45 days after the date of election. November 1, 2021 is less than one year and 45 days after October 1, 2020. Therefore,

Individual A remains eligible to make the initial premium payment by November 1, 2021. The initial COBRA premium payment would include the monthly premium payments for April 2020 through October 2020. The November 2020 COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

Example 6. Failure to make initial premium payment within one year and 45 days of election.

(i) Facts. The facts are the same as in Example 5, except that Individual A elects COBRA continuation coverage on May 1, 2020. As of October 1, 2021, Individual A has not made the initial premium payment for COBRA continuation coverage beginning April 1, 2020. On October 1, 2021 is Individual A eligible to make the initial premium payment for COBRA continuation coverage retroactive to April 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. No. October 1, 2021 is more than one year and 45 days after May 1, 2020. The maximum disregarded period related to a particular COBRA timeframe cannot be more than one year. Therefore, Individual A is no longer eligible to timely make the initial COBRA premium payment for COBRA continuation coverage retroactive to May 1, 2020 under the Emergency Relief Notices, despite the availability of transition relief. However, if Individual A is an Assistance Eligible Individual, Individual A has COBRA continuation coverage with COBRA premium assistance for the periods of coverage beginning April 1, 2021. Individual A may continue to pay for COBRA continuation coverage after September 2021 through the end of the period that Individual A is eligible for COBRA continuation coverage, if Individual A remains eligible for COBRA continuation coverage.

B. Examples applying the ARP COBRA premium assistance

Example 7. Deadline for retroactive COBRA continuation coverage under the Emergency Relief Notices for a potential Assistance Eligible Individual under the ARP.

(i) Facts. Individual A works for Employer X and participates in Employer X's group health plan. On August 1, 2020, Individual A has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual A receives a COBRA election notice on August 1, 2020, but, as of September 1, 2021, has not yet elected COBRA continuation coverage. Individual A also receives the notice of the ARP extended election period on May 31, 2021, but does not elect COBRA continuation coverage with premium assistance under the ARP. When is the last date for Individual A to elect COBRA continuation coverage retroactive to August 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. Individual A has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage retroactive to August 1, 2020 under the Emergency Relief Notices. Provided Individual A elects COBRA continuation coverage by September 30, 2021, Individual A would have until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after

August 1, 2020). The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

Example 8. Failure to elect retroactive COBRA continuation coverage under the Emergency Relief Notices by a potential Assistance Eligible Individual under the ARP.

(i) Facts. Individual B works for Employer Y and participates in Employer Y's group health plan. On March 1, 2021, Individual B has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual B receives the COBRA election notice the same day. Individual B receives the COBRA election notice for the ARP extended election period on May 31, 2021, and elects COBRA continuation coverage with COBRA premium assistance beginning April 1, 2021 but does not elect COBRA continuation coverage retroactive to March 1, 2021. Must Individual B be permitted on or after August 1, 2021, to elect retroactive COBRA continuation coverage beginning March 1, 2021?

(ii) Conclusion. No. Because Individual B elected COBRA coverage with premium assistance under the ARP, Individual B remained eligible only until July 30, 2021 (60 days after the receipt of the notice of the ARP extended election period) to elect COBRA continuation coverage retroactive to March 1, 2021. Employer Y's group health plan may require Individual B to elect COBRA continuation coverage retroactive to the loss of coverage within 60 days of receiving the notice of the ARP extended election period or lose eligibility for retroactive coverage under the Emergency Relief Notices. Because Individual B did not elect retroactive COBRA continuation coverage (beginning March 1, 2021) under the Emergency Relief Notices by July 30, 2021, Employer Y's plan is not required to permit Individual B to elect COBRA continuation coverage retroactive to March 1, 2021 under the Emergency Relief Notices. If Individual B had not elected COBRA continuation coverage with premium assistance under the ARP, Individual B would remain eligible to elect COBRA continuation coverage retroactive to March 1, 2021, until April 30, 2022 (one year and 60 days after March 1, 2021). However, COBRA premium assistance under the ARP would not be available for this coverage.

Example 9. Payment for retroactive COBRA continuation coverage under the Emergency Relief Notices by a potential Assistance Eligible Individual under the ARP.

(i) Facts. On November 1, 2020, Individual C has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual C receives the COBRA election notice on the same date. On April 30, 2021, Individual C receives the notice of the ARP extended election period. On May 31, 2021, Individual C elects both retroactive COBRA continuation coverage beginning on November 1, 2020, and COBRA continuation coverage with premium assistance for the first period of coverage beginning on or after April 1, 2021. When are the deadlines for Individual C to make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual C has until February 14, 2022 to make the initial COBRA premium payment (one year and 105 days after November 1, 2020). The initial COBRA premium payment would include premium payments for November 2020 through January 2021. The February 2021 premium payment would be due by March 3, 2022 (one year and 30 days after February 1, 2021), and the March 2021 premium payment would be due by March 31, 2022 (one year and 30 days after March 1, 2021). Premium payments would be due every month after that for the months Individual C is eligible for COBRA continuation coverage, except that no payments would be due for the periods beginning on or after April 1, 2021, through September 30, 2021.

Example 10. COBRA premium payment after the end of the period of COBRA premium assistance by an Assistance Eligible Individual under the ARP and application of the Emergency Relief Notices.

(i) Facts. The facts are the same as in Example 9, except that Individual C makes the initial COBRA premium payment by February 14, 2022, fails to make the premium payment for the February 2021 period of coverage by March 3, 2022, and fails to make the premium payment for the March 2021 period of coverage by March 31, 2022. Individual C then makes a COBRA premium payment on May 1, 2022. For which months does Individual C have COBRA continuation coverage?

(ii) Conclusion. Individual C has retroactive COBRA continuation coverage for November 2020, December 2020, and January 2021 because Individual C made a timely initial COBRA premium payment under the Emergency Relief Notices. Individual C does not have coverage for the months of February or March 2021 because Individual C did not make timely COBRA premium payments by March 3, 2022 (one year and 30 days after February 1, 2021) or March 31, 2022 (one year and 30 days after March 1, 2021). Individual C has COBRA continuation coverage with COBRA premium assistance for the periods of coverage from April 1, 2021 through September 30, 2021 because Individual C is an Assistance Eligible Individual and made a timely election under the ARP. Individual C also has COBRA continuation coverage for October 2021 (because Individual C made a premium payment on May 1, 2022) unless Individual C indicates that the May 1, 2022 premium payment was intended to pay premiums for a period during which Individual C was eligible for COBRA premium assistance.[17] If the premium payment was not erroneously paid for coverage during a premium assistance period, the COBRA premium payment made on May 1, 2022 must be credited to the period following the ARP COBRA period because that COBRA premium payment is timely under the Emergency Relief Notices (the payment on May 1, 2022 is made within one year and 30 days after October 1, 2021). Individual C may continue to pay for COBRA continuation coverage for the period after October 2021 until Individual C has paid for the last of the months that Individual C is eligible for COBRA continuation coverage.

[17] Section 9501(b)(1)(D) of the ARP requires premium payees (as described in Notice 2021-31) to reimburse Assistance Eligible Individuals for premium amounts that those individuals would have been required to pay if not for the COBRA premium assistance available under the ARP.

VII. Effect on other Documents

This document clarifies the relief for COBRA continuation coverage elections, COBRA premium payments, and COBRA notices provided in the Joint Notification of Extensions of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak and EBSA Disaster Relief Notice 2021-01.

VIII. Effective Date

This notice is effective upon release.

IX. Drafting Information

The principal author of this notice is William Fischer of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes), and other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Mr. Fischer at (202) 317-5500 (not a toll-free number).

OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective September 1, 2021)

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Note: Except for Latin terms, words and phrases that appear in italicized type in each rule denote terms that are defined in Rule 1.0.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice.

[2] In representing clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client and consistent with requirements of honest dealings with others. As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. See, *e.g.,* Rules 1.12 and 2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, diligent, and loyal. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Ohio Rules of Professional Conduct or other law.

[5] Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] A lawyer should seek improvement of the law, ensure access to the legal system, advance the administration of justice, and exemplify the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation

and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] [RESERVED]

[8] [RESERVED]

[9] The Ohio Rules of Professional Conduct often prescribe rules for a lawyer's conduct. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[10] [RESERVED]

[11] The legal profession is self-governing in that the Ohio Constitution vests in the Supreme Court of Ohio the ultimate authority to regulate the profession. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] [RESERVED]

[13] [RESERVED]

SCOPE

[14] The Ohio Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do

not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[15] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances,

such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

[21] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

RULE 1.0: TERMINOLOGY

As used in these rules:

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See division (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) "Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(m) “Substantial” when used in reference to degree or extent denotes a matter of real importance or great consequence.

(n) “Substantially related matter” denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

(o) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(p) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within division (c) can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purposes of fee division in Rule 1.5(e). The terms of any agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[3] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Ohio Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

[4A] Government agencies are not included in the definition of "firm" because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope of these rules.

Fraud

[5] The terms "fraud" or "fraudulent" incorporate the primary elements of common law fraud. The terms do not include negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law.

Informed Consent

[6] Many of the Ohio Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (*e.g.,* a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, *e.g.,* Rules 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will

require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see divisions (p) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, *e.g.,* Rules 1.8(a) and (g). For a definition of "signed," see division (p).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Substantial and "Substantially Related Matter"

[11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.0 replaces and expands significantly on the Definition portion of the Code of Professional Responsibility. Rule 1.0 defines fourteen terms that are not defined in the Code and alters the Code definitions of "law firm" and "tribunal."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.0 contains four substantive changes to the Model Rule terminology and revisions to the corresponding comments.

The definition in Model Rule 1.0(c) of "firm" and "law firm" is rewritten to expressly include legal aid and public defender offices. Comments [2] and [3] have been altered, and Comment [4A] has been added. Comment [2] is revised to address the status of of-counsel lawyers and practitioners who share office space. Comment [3] is amended to eliminate the reference to government lawyers. The rationale for this deletion and application of the Ohio Rules of Professional Conduct to lawyers in government practice are addressed in a new Comment [4A].

The Model Rule 1.0(d) definition of "fraud" or "fraudulent" is amended to replace the phrase "under the substantive or procedural law of the applicable jurisdiction" with the elements of fraud that have been established by Ohio law. See e.g., *Domo v. Stouffer* (1989), 64 Ohio App.3d 43, 51 and Ohio Jury Instructions, Sec. 307.03. Comment [5] is revised accordingly.

Added to Rule 1.0 is a definition of "illegal" in division (e). This definition clarifies that rules referring to "illegal or fraudulent conduct," including Rules 1.2(d), 1.6(b)(3), 1.16(b)(2), 4.1(b), and 8.4(c), apply to statutory and regulatory prohibitions that are not classified as crimes.

Model Rule 1.0(l), which defines "substantial," is relettered as Rule 1.0(m) and revised to incorporate a definition from Ohio case law. See *State v. Self* (1996), 112 Ohio App.3d 688, 693. The new definition of "substantially related" is taken from Rule 1.9, Comment [3]. A new Comment [11] is added to state that the definition of "substantial" does not extend to the term "substantially," as used in various rules, and to reference specific definitions in Rules 1.9, 1.11, and 1.12.

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [RESERVED]

[4] A lawyer may accept representation where the requisite level of competence can be achieved through study and investigation, as long as such additional work would not result in unreasonable delay or expense to the client. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the

representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). The lawyer should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs involved under the circumstances.

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with another lawyer outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of the client. See also Rule 1.2, 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with another lawyer outside the lawyer's own firm will depend on the circumstances, including the education, experience, and reputation of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and the legal protections, professional conduct rules, and ethical environments of the jurisdiction in which the services will be performed, particularly relating to confidential information. The decision to contract with a lawyer for purposes other than the provision of legal services, such to serve as an expert witness, may be governed by other rules. See Rule 1.4 and 1.5.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers should ordinarily consult with each other and the client about the scope of their respective representations and the allocation of responsibility between or among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law and beyond the scope of these rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.1, requiring a lawyer to handle each matter competently, replaces DR 6-101(A)(1) and DR 6-101(A)(2). The rule eliminates the existing tension between DR 6-101(A)(1), which forbids a lawyer to handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle the matter, and EC 6-3, which suggests that a lawyer can accept a matter that the lawyer is not initially competent to handle "if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Rule 1.1 does not confine a lawyer to associating with competent counsel in order to satisfy the lawyer's duty to provide competent representation. As highlighted by the addition to Comment [4], no matter how a lawyer gains the necessary competence to handle a matter, the lawyer must be diligent and may charge no more than a reasonable fee.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.1 is identical to Model Rule 1.1. Certain comments have been revised.

Comment [3] is stricken. The rule itself recognizes that competence is evaluated in the context of what is reasonably necessary under the circumstances. To the extent that Comment [3] was intended to affirm that this test would apply in an emergency situation, it does not add to the rule. On the other hand, Comment [3], as written, could erroneously be understood by practitioners to create an exception to the duty of competence.

Comment [4] is amended to incorporate language of EC 6-3. EC 6-3 cautions that if a lawyer intends to achieve the requisite competence to handle a matter through study and investigation, the lawyer's additional work must not result in unreasonable delay or expense to the client.

Although a lawyer must always perform competently, a lawyer can provide competent assistance within a range of thoroughness and preparation. Comment [5] is revised to suggest that a lawyer consult with a client regarding the costs and extent of work to be performed.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.

(d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Comment

Allocation of Authority between Client and Lawyer

[1] Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued,

the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is guided by reference to Rule 1.14.

[4A] Division (a) makes it clear that regardless of the nature of the representation the lawyer does not breach a duty owed to the client by maintaining a professional and civil attitude toward all persons involved in the legal process. Specifically, punctuality, the avoidance of offensive tactics, and the treating of all persons with courtesy are viewed as essential components of professionalism and civility, and their breach may not be required by the client as part of the representation.

Independence from Client's Views or Activities

[5] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] Although division (c) affords the lawyer and client substantial latitude in defining the scope of the representation, any limitation must be reasonable under the circumstances. If, for

example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

[7A] Written confirmation of a limitation of a new or existing representation is preferred and may be any writing that is presented to the client that reflects the limitation, such as a letter or electronic transmission addressed to the client or a court order. A lawyer may create a form or checklist that specifies the scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the scope of that representation.

[8] All agreements concerning a lawyer's representation of a client must accord with the Ohio Rules of Professional Conduct and other law. See, *e.g.*, Rules 1.1, 1.8 and 5.6.

Illegal, Fraudulent and Prohibited Transactions

[9] Division (d)(1) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. See Rules 3.3(b) and 4.1(b).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Division (d)(1) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability. Division (d)(1) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of division

(d)(1) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d)(1) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d)(1) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d)(1) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language "criminal" was changed to "illegal" in Rule 1.2(d)(1), and Model Rule 1.2(d) was split into two sentences in 1.2(d)(1).

Rule 1.2(d)(2) does not exist in the Model Rules.

Rule 1.2(e) does not exist in the Model Rules.

RULE 1.3: DILIGENCE

A lawyer shall act with *reasonable* diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

[2] A lawyer must control the lawyer's work load so that each matter can be handled competently.

[3] Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

[4] A lawyer should carry through to conclusion all matters undertaken for a client, unless the client-lawyer relationship is terminated as provided in Rule 1.16. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about post-trial alternatives including the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to pursue those alternatives or prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rules 1.2(c) and 1.5(b).

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* Rule V, Section 26 of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.3 replaces both DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him) and DR 7-101(A)(1) (with limited exceptions, a lawyer shall not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules).

Neither Model Rule 1.3 nor any of the Model Rules on advocacy states a duty of "zealous representation." The reference to acting "with zeal in advocacy" is deleted from Comment [1] because "zeal" is often invoked as an excuse for unprofessional behavior. Despite the title of Canon 7 of the Ohio Code of Professional Responsibility and the content of EC 7-1, no disciplinary rule requires "zealous" advocacy. Moreover, the disciplinary rules recognize that courtesy and punctuality are not inconsistent with diligent representation [DR 6-101(A)(3)], that a lawyer, where permissible, may exercise discretion to waive or fail to assert a right or position [DR 7-101(B)(1)], and that a lawyer may refuse to aid or participate in conduct the lawyer believes to be unlawful, even though there is some support for an argument that it is lawful [DR 7-101(B)(2)].

Comparison to ABA Model Rules of Professional Conduct

There is no change to the text of Model Rule 1.3.

The reference in Comment [1] to a lawyer's use of "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and the last three sentences of the comment have been stricken. The choice of means to accomplish the objectives of the representation are governed by the lawyer's professional discretion, and the lawyer's duty to communicate with the client, as specified in Rules 1.2(a) and 1.4(a)(2).

The reference to a lawyer's duty to act "with zeal in advocacy upon the client's behalf" also is deleted. Zealous advocacy is often invoked as an excuse for unprofessional behavior.

Comment [3] is revised to state more concisely the consequences of lawyer delay and neglect in handling a client matter and explain when charges of neglect are likely to be the subject of professional discipline.

The first sentence of Comment [4] is reworded and the balance of that sentence and the second sentence are deleted. The content of the deleted language is addressed in Rule 1.2.

Comment [5] is revised to refer to Gov. Bar R. V, Section 26. That rule authorizes Disciplinary Counsel or the chair of a certified grievance committee to appoint a lawyer to inventory client files and protect the interests of clients when a lawyer does not or cannot (because of suspension or death) attend to clients and no partner, executor, or other responsible party capable of conducting the lawyer's practice is available and willing to assume responsibility.

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Client's Signature

_____
Date

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations, depending on both the importance of the action under consideration and the feasibility of consulting with the client, this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer

to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, division (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation and the fees and costs incurred to date.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly notify

the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

(d) A lawyer shall not enter into an arrangement for, charge, or collect any of the following:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support, or property settlement in lieu thereof;

(2) a contingent fee for representing a defendant in a criminal case;

(3) a fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is *reasonable*.

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.

Comment

Reasonableness of Fee

[1] Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

Nature and Scope of Representation; Basis or Rate of Fee and Expenses

[2] The detail and specificity of the communication required by division (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee. A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be established promptly. Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable cost of services performed in-house, such as copying.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of division (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i).

However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] If all funds held by the lawyer are not disbursed at the time the closing statement required by division (c)(2) is prepared, the lawyer's obligation with regard to those funds is governed by Rule 1.15.

Prohibited Contingent Fees

[6] Division (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support or other financial orders because such contracts do not implicate the same policy concerns.

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [*e.g.*, factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be

able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial lawyer. Division (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. Except where court approval of the fee division is obtained, closing statements must be in a writing signed by the client and each lawyer and must otherwise comply with division (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rules 1.1 and 1.17.

[8] Division (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes between a client and a lawyer, such as an arbitration or mediation procedure established by a local bar association, the Ohio State Bar Association, or the Supreme Court of Ohio, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[10] A procedure has been established for resolution of fee disputes between lawyers who are sharing a fee pursuant to division (e) of this rule. This involves use of an arbitration or mediation procedure established by a local bar association or the Ohio State Bar Association. The lawyer must comply with the procedure. A dispute between lawyers who are splitting a fee shall not delay disbursement to the client. See Rule 1.15.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.5 replaces DR 2-106 and DR 2-107; makes provisions of EC 2-18 and EC 2-19 mandatory, as opposed to aspirational, with substantive modifications; and makes the provisions of R.C. 4705.15 mandatory, with technical modifications.

Rule 1.5(a) adopts the language contained in DR 2-106(A) and (B), which prohibits illegal or clearly excessive fees and establishes standards for determining the reasonableness of fees. Eliminated from Rule 1.5(a) is language regarding expenses.

Rule 1.5(b) expands on EC 2-18 by mandating that the nature and scope of the representation and the arrangements for fees and expenses shall promptly be communicated to the client, preferably in writing, to avoid potential disputes, unless the situation involves a regularly represented client who will be represented on the same basis as in the other matters for which the lawyer is regularly engaged.

Rule 1.5(c)(1) also expands on EC 2-18 and R.C. 4705.15(B) by requiring that all contingent fee agreements shall be reduced to a writing signed by the client and the lawyer. Rule 1.5(c)(2) directs that a closing statement shall be prepared and signed by both the lawyer and the client in matters involving contingent fees. It closely parallels the current R.C. 4705.15(C).

Rule 1.5(d) prohibits the use of a contingent fee arrangement when the contingency is securing a divorce, spousal support, or property settlement in lieu of support. It finds its basis in EC 2-19, which provides that "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." Rule 1.5(d)(2) prohibits the use of contingent fee arrangements in criminal cases and parallels DR 2-106(C).

Rule 1.5(d)(3) prohibits fee arrangements denominated as "earned upon receipt," "nonrefundable," or other similar terms that imply the client may never be entitled to a refund, unless the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund so the client is not misled by such terms. The rationale for this rule is contained in Comment [6A].

Rule 1.5(e) deals with the division of fees among lawyers who are not in the same firm. Rule 1.5(e)(1) restates the provisions of DR 2-107(A)(1), with the additional requirement that in the event the division of fees is on the basis of joint responsibility, each lawyer must be available for consultation with the client. Rule 1.5(e)(2) clarifies DR 2-107(A)(2) and Advisory Opinion 2003-3 of the Board of Commissioners on Grievances and Discipline regarding the matters that must be disclosed in writing to the client.

Rule 1.5(e)(3) is a new provision directing that the closing statement contemplated by Rule 1.5(c)(2) must be signed by the client and all lawyers who are not in the same firm who will share in the fees, except where the fee division is court-approved. Rule 1.5(e)(4) is a restatement of DR 2-107(A)(3) regarding the requirement that the total fee must be reasonable.

Rule 1.5(f) is a restatement of DR 2-107(B) requiring mandatory mediation or arbitration regarding disputes between lawyers sharing a fee under this rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.5 is amended to conform to Disciplinary Rules and ensure a better understanding of the relationship between the client and the lawyers representing the client, thereby reducing the likelihood of future disputes. Also, the comments are modified to bring them into conformity with the proposed changes to Model Rule 1.5 and clarify certain aspects of fees for the benefit of the bench, bar, and the public.

Although ABA Model Rule 1.5(a) directs that a lawyer shall not charge "unreasonable" fees or expenses, the terminology in DR 2-106 (A) prohibiting "illegal or clearly excessive" fees is more encompassing and better suited to use in Ohio. Charging an "illegal fee" differs from charging an "unreasonable fee" and, accordingly, the existing Ohio language is retained.

Model Rule 1.5(c), while dealing with contingent fees, is expanded and clarified. The closing statement provisions of the Model Rule are expanded to bring them in line with existing R.C. 4705.15(C). Additionally, the Model Rule is divided into two parts, the first dealing with the lawyer's obligations at the commencement of the relationship and the second dealing with the lawyer's obligations at the time a fee is earned.

The provisions of Model Rule 1.5(d) are modified to add division (d)(3) and Comment [6A] in light of the number of disciplinary cases involving "retainers."

Model Rule 1.5(e) and Comment [7] dealing with division of fees are modified to bring both the requirements of the rule and the commentary into line with existing practice in Ohio.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(3) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, division (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Ohio Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of

such complicity has been made. Division (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by division (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, division (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Division (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.,* the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, division (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

[14] Any information disclosed pursuant to division (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Division (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to division (b)(7). Division (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, division (b)(6) permits the lawyer to comply with the court's order.

[16] Division (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. A disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

[17] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by division (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by division (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

Acting Competently to Preserve Confidentiality

[18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.,* by making

a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forego security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state or federal laws that govern data privacy or that impose specific notification requirements upon the loss of or unauthorized access to electronic information is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm see Rule 5.3, Comments [3] and [4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent," including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is new and has no comparable Code provision. Rule 1.6(b)(2) is

the future crime exception and corresponds to DR 4-101(C)(3), with the addition of "or other person" from the Model Rule. Rule 1.6(b)(3) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client's illegal or fraudulent act and the client has used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. Rule 1.6(b)(6) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

Comparison to ABA Model Rules of Professional Conduct

The additions to Rule 1.6(a) are intended to clarify that "information relating to the representation" includes information protected by the attorney-client privilege.

The exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio's exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer's discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to "substantial injury to the financial interests of another." Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words "prevent" and "rectify;" and it allows for disclosure to mitigate the effects of the client's commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of "criminal" to "illegal" is consistent with the use of the term "illegal" in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds “disciplinary matter” to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent*, *confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Comment

General Principles

[1] The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule. In addition, a lawyer must consider whether any of the specific rules in Rule 1.8, regarding certain conflicts of interest involving current clients, applies. For former clients, see Rule 1.9; for conflicts involving those who have consulted a lawyer about representation but did not retain that lawyer, see Rule 1.18. [analogous to Model Rule Comment 1]

[2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. [analogous to Model Rule Comment 2]

[3] To determine whether a conflict of interest would be created by accepting or continuing a representation, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, for collecting and reviewing information about the persons and issues in all matters handled by the lawyer. See also Comment to Rule 5.1. Ignorance caused by a failure to institute or follow such procedures will not excuse a lawyer's violation of this rule. [derived from Model Rule Comment 3]

[4] A lawyer must decline a new representation that would create a conflict of interest, unless representation is permitted under division (b). [derived from Model Rule Comment 3]

[5] If unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, create a conflict of interest during a representation, the lawyer must withdraw from representation unless continued representation is permissible under divisions (b)(1) and (c) and the lawyer obtains informed consent, confirmed in writing, of each affected client under the conditions of division (b)(2). See Rule 1.16. [analogous to a portion of Model Rule Comment 4]

[6] Just as conflicts can emerge in the course of a representation, the nature of a known conflict of interest can change in the course of a representation. For example, the proposed joint representation of a driver and her passenger to sue a person believed to have caused a traffic accident may initially present only a material limitation conflict, as to which the proposed clients may give informed consent. However, if the lawyer's investigation suggests that the driver may be at fault, the interests of the driver and the passenger are then directly adverse, and the joint representation cannot be continued. A lawyer must be alert to the possibility that newly acquired information requires reevaluating of a conflict of interest, and taking different steps to resolve it. [derived from Model Rule Comment 5]

[7] When a lawyer withdraws from representation in order to avoid a conflict, the lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). [analogous to a portion of Model Rule Comment 5]

[8] When a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon whether: (1) the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the

lawyer's duties to the former client (see Rule 1.9); and (2) any necessary client consent is obtained. [analogous to a portion of Model Rule Comment 4]

Identifying the Client

[9] In large part, principles of substantive law outside these rules determine whether a client-lawyer relationship exists or is continuing. See Scope [17]. These rules, including Rules 1.2, 1.8(f)(2), 1.13, and 6.5, must also be considered.

Identifying Conflicts of Interest: Directly Adverse Representation

[10] The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest. A directly adverse conflict can occur in a litigation or transactional setting. [derived from Model Rule Comment 6]

[11] *In litigation.* The representation of one client is directly adverse to another in litigation when one of the lawyer's clients is asserting a claim against another client of the lawyer. A directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit. A lawyer may not represent, in the same proceeding, clients who are directly adverse in that proceeding. See Rule 1.7(c)(2). Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. [derived from Model Rule Comment 6]

[12] *Class-action conflicts.* When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying division (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. [analogous to Model Rule Comment 25]

[13] *In transactional and counseling practice.* The representation of one client can be directly adverse to another in a transactional matter. For example, a buyer and a seller or a borrower and a lender are directly adverse with respect to the negotiation of the terms of the sale or loan. [*Stark County Bar Assn v. Ergazos* (1982), 2 Ohio St. 3d 59; *Columbus Bar v. Ewing* (1992), 63 Ohio St. 3d 377]. If a lawyer is asked to represent the seller of a business in negotiations with a buyer whom the lawyer represents in another, unrelated matter, the lawyer cannot undertake the new representation without the informed, written consent of each client. [analogous to Model Rule Comment 7]

Identifying Conflicts of Interest: Material Limitation Conflicts

[14] Even where clients are not directly adverse, a conflict of interest exists if there is a substantial risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The mere possibility of subsequent harm does not, itself, require disclosure and consent. The critical questions are: (1) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of any affected client. [analogous to Model Rule Comment 8]

Lawyer's Responsibility to Current Clients-Same Matter

[15] *In litigation*. A "material limitation" conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal matter is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of division (b) are met. [analogous to Model Rule Comment 23]

[16] *In transactional practice.* In transactional and counseling practice, the potential also exists for material limitation conflicts in representing multiple clients in regard to one matter. Depending upon the circumstances, a material limitation conflict of interest may be present. Relevant factors in determining whether there is a material limitation conflict include the nature of the clients' respective interests in the matter, the relative duration and intimacy of the lawyer's relationship with each client involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to each client from the conflict. These factors and others will also be relevant to the lawyer's analysis of whether the lawyer can competently and diligently represent all clients in the matter, and whether the lawyer can make the disclosures to each client necessary to secure each client's informed consent. See Comments 24-30. [analogous to a portion of Model Rule Comment 26]

Lawyer's Responsibility to Current Client-Different Matters

[17] A material limitation conflict between the interests of current clients can sometimes arise when the lawyer represents each client in different matters. Simultaneous representation, in unrelated matters, of clients whose business or personal interests are only generally adverse, such as competing enterprises, does not present a material limitation conflict. Furthermore, a lawyer may ordinarily take inconsistent legal positions at different times on behalf of different clients. However, a material limitation conflict of interest exists, for example, if there is a substantial risk that a lawyer's action on behalf of one client in one case will materially limit the lawyer's effectiveness in concurrently representing another client in a different case. For example, there is

a material limitation conflict if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to seriously weaken the position taken on behalf of another client in another case. Factors relevant in determining whether there is a material limitation of which the clients must be advised and for which consent must be obtained include: (1) where the cases are pending; (2) whether the issue is substantive or procedural; (3) the temporal relationship between the matters; (4) the significance of the issue to the immediate and long-term interests of the clients involved; and (5) the clients' reasonable expectations in retaining the lawyer. [derived from Model Rule Comments 6 and 24]

Lawyer's Responsibilities to Former Clients and Other Third Persons

[18] A lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties. [Model Rule Comment 9]

[19] If a lawyer for a corporation or other organization serves as a member of its board of directors, the dual roles may present a "material limitation" conflict. For example, a lawyer's ability to assure the corporate client that its communications with counsel are privileged may be compromised if the lawyer is also a board member. Alternatively, in order to participate fully as a board member, a lawyer may have to decline to advise or represent the corporation in a matter. Before starting to serve as a director of an organization, a lawyer must take the steps specified in division (b), considering whether the lawyer can adequately represent the organization if the lawyer serves as a director and, if so, reviewing the implications of the dual role with the board and obtaining its consent. Even with consent to the lawyer's acceptance of a dual role, if there is a material risk in a given situation that the dual role will compromise the lawyer's independent judgment or ability to consider, recommend, or carry out an appropriate course of action, the lawyer should abstain from participating as a director or withdraw as the corporation's lawyer as to that matter. [analogous to Model Rule Comment 35]

Personal Interest Conflicts

[20] *Types of personal interest.* The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, the lawyer may have difficulty or be unable to give a client detached advice in regard to the same manner. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to certain personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm). [Model Rule Comment 10]

[21] *Related lawyers.* When lawyers who are closely related by blood or marriage represent different clients in the same matter or in substantially related matters, there may be a

substantial risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling, or spouse, ordinarily may not represent a client in a matter where the related lawyer represents another party, unless each client gives informed, written consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10. [Model Rule Comment 11]

[22] *Sexual activity with clients.* A lawyer is prohibited from engaging in sexual activity with a current client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j). [Model Rule Comment 12]

Interest of Person Paying for a Lawyer's Service

[23] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f), and the special notice requirement for clients of insurance defense counsel in Rule 1.8(f)(4). If acceptance of the payment from any other source presents a substantial risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of division (b) before accepting the representation. [analogous to Model Rule Comment 13]

Adequacy of Representation Burdened by a Conflict

[24] After a lawyer determines that accepting or continuing a representation entails a conflict of interest, the lawyer must assess whether the lawyer can provide competent and diligent representation to each affected client consistent with the lawyer's duties of loyalty and independent judgment. When the lawyer is representing more than one client, the question of adequacy of representation must be resolved as to each client. [derived from Model Rule Comment 15]

Special Considerations in Common Representation

[25] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties is antagonistic, the possibility that

the clients' interests can be adequately served by common representation is low. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties. [Model Rule Comment 29]

[26] Particularly important factors in determining the appropriateness of common representation are the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation does later occur between the clients, the privilege will not protect communications made on the subject of the joint representation, while it is in effect, and the clients should be so advised. [Model Rule Comment 30]

[27] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation on behalf of a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients. [Model Rule Comment 31]

[28] Any limitations on the scope of the representation made necessary as a result of the common representation must be fully explained to the clients at the outset of the representation and communicated to the client, preferably in writing. See Rule 1.2(c). Subject to such limitations, each client in a common representation has the right to loyal and diligent representation and to the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in Rule 1.16. [analogous to Model Rule Comments 32 and 33]

Informed Consent

[29] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that a conflict could have adverse effects on the interests of that client. See Rule 1.0(f). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the advantages and risks of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege. [Model Rule Comment 18]

[30] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. [analogous to Model Rule Comment 19]

Consent Confirmed in Writing

[31] Division (b)(2) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document signed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b) and (p) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). Written confirmation of consent does not supplant the need, in most cases, for the lawyer to talk with the client: (1) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (2) to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of written consent. [Model Rule Comment 20]

Revoking Consent

[32] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result. [Model Rule Comment 21]

Consent to Future Conflict

[33] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of division (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, except when it is reasonably likely that the client will have understood the material risks involved. Such exceptional circumstances might be presented if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, particularly if the client is independently

represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make a waiver prohibited under division (b). [Model Rule Comment 22]

Prohibited Representations

[34] Often, clients may be asked to consent to representation notwithstanding a conflict. However, as indicated in divisions (c)(1) and (2) some conflicts cannot be waived as a matter of law, and the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. [analogous to Model Rule Comment 14]

[35] Before requesting a conflict waiver from one or more clients in regard to a matter, a lawyer must determine whether either division (c)(1) or (2) bars the representation, regardless of waiver.

[36] As provided by division (c)(1), certain conflicts cannot be waived as a matter of law. For example, the Supreme Court of Ohio has ruled that regardless of client consent, a lawyer may not represent both spouses in the preparation of a separation agreement. [*Columbus Bar Assn v. Grelle* (1968), 14 Ohio St.2d 208] Similarly, federal criminal statutes prohibit certain representations by a former government lawyer, despite the informed consent of the former client. [analogous to Model Rule Comment 16]

[37] Division (c)(2) bars representation, in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client's position. A lawyer may not represent both a claimant and the party against whom the claim is asserted whether in proceedings before a tribunal or in negotiations or mediation of a claim pending before a tribunal. [derived from Model Rule Comment 17]

[38] Division (c)(2) does not address all nonconsentable conflicts. Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently or both clients cannot give informed consent. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent. [derived from Model Rule Comment 28]

Comparison to former Ohio Code of Professional Responsibility

Rule 1.7 replaces DR 5-101(A)(1) and 5-105(A), (B), and (C). Some of the Ethical Considerations in Canon 5 have direct parallels in the comments to Rule 1.7, although no effort has been made to conform the text of any comment to the analogous Ethical Consideration.

No change in the substance of the referenced Ohio rules on conflicts and conflict waivers is intended, except the requirement that conflict waivers be confirmed in writing. Specifically, the current "obviousness" test for the representation of multiple clients and the tests of Rule 1.7(b) and (c) are the same. In both instances, a lawyer must consider whether

the lawyer can adequately represent all affected clients, whether there are countervailing public policy considerations against the representation, and whether the lawyer must obtain informed consent. Unlike DR 5-101(A)(1), Rule 1.7 makes clear that this same analysis must be applied when a lawyer's personal interests create a conflict with a client's interests.

Client consent is not required for every conceivable or remote conflict, as stated in Comment [14]. On the other hand, practicing lawyers recognize that many situations require the lawyer to evaluate the adequacy of representation and request client consent, not only those in which an adverse effect on the lawyer's judgment is patent or inevitable, as DR 5-105(B) can be interpreted to state. Rule 1.7 will more effectively guide lawyers in practice than DR 5-105(B) and anticipates that a lawyer will be subject to discipline for assuming or continuing a representation burdened by a conflict of interest only when a lawyer has failed to recognize a clear present or probable conflict and has not obtained informed consent, or where the conflict is not consentable. Nonconsentable conflicts include: (1) those where a lawyer could not possibly provide competent and diligent representation to the affected clients; (2) those where a lawyer cannot, because of conflicting duties, fully inform one or more affected clients of the implications of representation burdened by a conflict; and (3) representations prohibited under Rule 1.7(c).

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.7 is revised for clarity. Division (a) states the two broad circumstances in which a conflict of interest exists between the interests of two clients or the interest of a lawyer and a client. Division (b) prohibits a lawyer from accepting or continuing a representation that creates a conflict of interest unless certain conditions are satisfied. Division (c) defines certain conflicts of interest that are not waivable as a matter of public policy, even if clients consent. Lawyers are reminded that a conflict of interest may exist at the time that a representation begins or may arise later. The term "concurrent conflict," which was introduced in the most recent ABA revisions of Model Rule 1.7, is stricken as unnecessary. Division (a)(2) uses phrases borrowed from Model Rule 1.7, Comment [8] and DR 5-101 to explain the nature of a "material limitation" conflict and substitutes the defined term "substantial" in place of "significant."

Rule 1.7 differs in substance from the Ohio Code in its requirement that a client's consent to a conflict be confirmed in writing. Although the rule requires only the client's consent, and not the lawyer's disclosure to be confirmed in writing, the writing requirement will remind the lawyer to communicate to the client the information necessary to make an informed decision about this material aspect of the representation.

Division (c) has no parallel in the Code or Ohio law, except to the extent that it would be "obvious," under DR 5-105(C), that a lawyer could not engage in a representation prohibited by law or represent two parties in the same proceeding whose interests are directly adverse. The principles of division (c), which are drawn from Model Rule 1.7(b)(2) and (3), are unexceptional, and their inclusion in the rule is appropriate. Note, however, that unlike Rule 1.7(c)(2), corresponding Model Rule 1.7(b)(3) was drafted to permit a lawyer to represent two parties with directly opposing interests in a mediation, although simultaneous representation of such parties in a related proceeding is prohibited. (See Model Rule 1.7, Comment [17]). Such a distinction is unacceptable.

The comments to Model Rule 1.7 are rewritten for clarity and are reordered to help practitioners find relevant comments. Portions of Comments [28] and [34] have been deleted because they appear to state conclusions of law for which we have found no precedent in Ohio law or advisory opinions of the Board of Commissioners on Grievances and Discipline.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or *knowingly* acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless all of the following apply:

(1) the transaction and terms on which the lawyer acquires the interest are fair and *reasonable* to the client and are fully disclosed to the client in *writing* in a manner that can be *reasonably* understood by the client;

(2) the client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel on the transaction;

(3) the client gives *informed consent*, in a *writing* signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.

(c) A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule:

(1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

(2) "gift" includes a testamentary gift.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in *substantial* part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:

(1) the client gives *informed consent*;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(3) information relating to representation of a client is protected as required by Rule 1.6;

(4) if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. Your Lawyer: Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.

2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.

3. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent

policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless the settlement or agreement is subject to court approval or each client gives *informed consent*, in a *writing* signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement or agreement.

(h) A lawyer shall not do any of the following:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability unless all of the following apply:

(i) the settlement is not unconscionable, inequitable, or unfair;

(ii) the client or former client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel in connection therewith;

(iii) the client or former client gives *informed consent*.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may do either of the following:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses;

(2) contract with a client for a *reasonable* contingent fee in a civil case.

(j) A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a *firm*, a prohibition in divisions (a) to (i) of this rule that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of division (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical

services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in division (a) are unnecessary and impracticable.

[2] Division (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Division (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Division (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of division (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, division (a)(2) of this rule is inapplicable, and the division (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as division (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. See also Rule 1.9(b). Division (b) applies whether or not the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of a land-use regulation during the representation of one client may properly use that information to benefit other clients. Division (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, division (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in division (c).

[7] If effectuation of a gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.

[8] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Division (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and divisions (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is substantial risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

[12A] Divisions (f)(1) to (f)(3) apply to insurance defense counsel compensated by an insurer to defend an insured, subject to the unique aspects of that relationship. Whether employed or retained by an insurance company, insurance defense counsel owes the insured the same duties to avoid conflicts, keep confidences, exercise independent judgment, and communicate as a lawyer owes any other client. These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, to control the defense, receive information relating to the defense or settlement of the claim, and settle the case. Insurance defense counsel may not permit

an insurer's right to control the defense to compromise the lawyer's independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense. The lawyer may not permit an insurer's right to receive information to result in the disclosure to the insurer, or its agent, of confidences of the insured. The insured's consent to the insurer's payment of defense counsel, required by Rule 1.8(f)(1), can be inferred from the policy contract. Nevertheless, an insured may not understand how defense counsel's relationship with and duties to the insurer will affect the representation. Therefore, to ensure that such consent is informed, these rules require a lawyer who undertakes defense of an insured at the expense of an insurer to provide to the client insured, at the commencement of representation, the "Statement of Insured Client's Rights."

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Alternatively, where a settlement is subject to court approval, as in a class action, the interests of multiple clients are protected when the lawyer complies with applicable rules of civil procedure and orders of the court concerning review of the settlement.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. Division (h)(1) also prohibits a lawyer from prospectively entering into an agreement with the client to arbitrate any claim unless the client is independently represented. This division, however, does not limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this rule. However, the settlement may not be unconscionable, inequitable, or unfair, and, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former

client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Division (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like division (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these rules. The exception for certain advances of the costs of litigation is set forth in division (e). In addition, division (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of division (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from engaging in sexual activity with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client, unless the sexual relationship predates the client-lawyer relationship. A lawyer also is prohibited from soliciting a sexual relationship with a client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the

lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, division (j) of this rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under division (k), a prohibition on conduct by an individual lawyer in divisions (a) to (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with division (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in division (j) is personal and is not applied to associated lawyers.

Comparison to former Ohio Code of Professional Responsibility

With the exception of division (f)(4), each part of Rule 1.8 corresponds to an Ohio disciplinary rule or decided case, as stated below.

Rule 1.8(a) corresponds, in substance, to DR 5-104(A) and the ruling in *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65, except for the addition of a requirement that the client's consent be in writing. This writing requirement is consistent with the requirement for confirmation of conflict waivers in Rule 1.7.

Rule 1.8(b) is similar to DR 4-101(B)(2), but the prohibition against adverse use of confidential information applies to all information relating to the representation, consistent with Rule 1.6(a). As suggested by Comment [5], these rules, unlike DR 4-101(B)(3), do not expressly prohibit the lawyer from using information relating to the representation for the benefit of the lawyer or another person. Because of the peril that such use would violate another duty that the lawyer has to the client (or to a third party, for example, by reason of a confidentiality agreement), lawyers should approach such issues carefully.

Rule 1.8(c) has been revised principally to conform it to the absolute ban, now stated in DR 5-101(A)(2), upon a lawyer's preparing an instrument for a client by which a gift would be made to the lawyer, or a relative or colleague of the lawyer. DR 5-101(A)(2) does not prohibit a lawyer from soliciting a gift. The first portion of Rule 1.8(c) addresses a matter not specifically addressed in the Ohio Code in that Rule 1.8(c) would permit a lawyer to solicit an insubstantial gift from a client. This rule would permit, for example, a lawyer to request that a client make a small gift to a charity on whose board the lawyer serves, but not to abuse the attorney-client relationship by requesting a substantial gift.

Rule 1.8(d) is similar to DR 5-104(B), but creates greater latitude for a lawyer to enter a contract for publication or media rights with a client because Rule 1.8(d) prohibits making such

an arrangement only during the representation, and only if the portrayal or account would be based, in substantial part, on information relating to the representation. In contrast, DR 5-104(B) forbids a lawyer to make any such arrangement during the pendency of the matter, even if the representation has ended.

Rule 1.8(e) is similar to DR 5-103(B). Unlike DR 5-103(B), Rule 1.8(e) expressly permits a lawyer to pay court costs and expenses on behalf of an indigent client.

Rule 1.8(f)(1), (2), and (3) use different terms, but are virtually identical to DR 5-107(A) and (B). Rule 1.8(f)(4) and the "Statement of Insured Client's Rights" is new and is based on the reports of the Ohio State Bar Association's House Counsel Task Force and the Insurance and Audit Practices and Controls Committee. Both reports were accepted by the House of Delegates of the Ohio State Bar Association.

Rule 1.8(g) corresponds to DR 5-106. Unlike DR 5-106, Rule 1.8(g) permits aggregate agreements in criminal cases and agreements subject to court approval.

Rule 1.8(h) corresponds to DR 6-102, as interpreted by the Supreme Court in *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431. A portion of Rule 1.8(h)(1) is based on Opinion 96-9 of the Board of Commissioners on Grievances and Discipline.

Rule 1.8(i) corresponds to DR 5-103(A).

Rule 1.8(j) has no analogue in the Disciplinary Rules, but is consistent with the Supreme Court's rulings in *Cleveland Bar Assn v. Feneli* (1999), 86 Ohio St.3d 102 and *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261.

Rule 1.8(k) may be compared to DR 5-105(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 1.8 contains several changes from the Model Rule. Rule 1.8(c) is revised to conform to DR 5-101(A)(2). Rule 1.8(f)(4) references specific obligations of insurance defense counsel. Rule 1.8(h) conforms the rule—on the circumstances in which a lawyer may enter into an agreement with a client settling a claim against the lawyer—with Ohio law as stated in *Clavner.*

Division (f)(4) and a "Statement of Insured Client's Rights" is added based on a recommendation from the Ohio State Bar Association's House Counsel Task Force. Comment [12A] also is added to correspond to speak directly to the insurance defense lawyer's ethical duties. The defense provided to an insured by a lawyer retained by an insurer is the most frequent situation in which a lawyer is paid by someone other than the lawyer's client. The comment is based on Advisory Opinions 2000-2 and 2000-3 of the Board of Commissioners on Grievances and Discipline, as well as the Report of the House Counsel Task Force of the Ohio State Bar Association, as adopted by the OSBA House of Delegates in November 2002, which the Supreme Court charged the Task Force to review, and the Report of the OSBA's Insurance and Audit Practices and Controls Committee, as adopted by the OSBA House of Delegates in May 2004.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) Unless the former client gives *informed consent, confirmed in writing*, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person's interests are materially adverse to the interests of the former client.

(b) Unless the former client gives *informed consent, confirmed in writing*, a lawyer shall not *knowingly* represent a person in the same or a *substantially related matter* in which a *firm* with which the lawyer formerly was associated had previously represented a client where both of the following apply:

(1) the interests of the client are materially adverse to that person;

(2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known*;

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent, confirmed in writing. See Comment [9]. Current and former government lawyers must comply with this rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other

hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. For a former government lawyer, "matter" is defined in Rule 1.11(e).

[3] See Rule 1.0(n) for a definition of "substantially related matter". For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Division (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of division (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Division (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under divisions (a) and (b). See Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [33] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.9 addresses the lawyer's continuing duty of client confidentiality when the lawyer-client relationship ends. The rule articulates the substantial relationship test adopted by the Supreme Court in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St. 3d 1, citing with approval Advisory Opinion 89-013 of the Board of Commissioners on Grievances and Discipline, which also relied on the substantial relationship test to judge former client conflicts.

In *Kala,* the Court extended the confidentiality protection of DR 4-101 to former clients by creating a presumption of shared confidences between the former client and lawyer [Rule 1.9(a)]. It further held that this presumption could be rebutted by evidence that the lawyer had no personal contact with or knowledge of the former client matter [Rule 1.9(b)]. In doing so it clarified that

the DR 4-101(B) prohibition against using or revealing client confidences or secrets without consent applied to former clients [Rule 1.9(c)].

Kala did not address the issue of what constitutes a substantial relationship, because the lawyer in question switched sides in the same case. The comments are consistent with appellate decisions, as well as with the Restatement (Third) of the Law Governing Lawyers §132 (2000). The only change from current Ohio law is the requirement that conflict waivers be "confirmed in writing," consistent with other conflict provisions such as Rules 1.7 and 1.8.

Division (a) restates the substantial relationship test, which extends confidentiality protection to clients the lawyer has formerly represented. This test presumes that the lawyer obtained and cannot use information relating to the representation of the former client in the same or substantially related matters, the first prong of the *Kala* test.

Division (b) applies where the lawyer's firm (but not the lawyer personally) represented a client, and requires that the former client show that the lawyer in question actually acquired confidential information, the second prong of the *Kala* test.

Division (c) provides that in either actual or law firm prior representation, the prohibitions against use [Model Rule 1.8(b)] and disclosure (Model Rule 1.6) that protect current clients also extend to former clients. This is the foundation of the *Kala* opinion, which extended the prohibitions against use or disclosure of client confidences or secrets in DR 4-101(B) to former clients.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.9 is substantively identical to Model Rule 1.9. The definition of "substantially related matter," which appears in Comment [3] of the Model Rule is moved to Rule 1.0(n).

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

(b) When a lawyer is no longer associated with a *firm*, no lawyer in that *firm* shall thereafter represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the *firm*, if the lawyer *knows* or *reasonably should know* that either of the following applies:

(1) the formerly associated lawyer represented the client in the same or a *substantially related matter*;

(2) any lawyer remaining in the *firm* has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer has had *substantial* responsibility in a matter for a former client and becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

(d) In circumstances other than those covered by Rule 1.10(c), when a lawyer becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent a person in a matter in which the lawyer is personally disqualified under Rule 1.9 unless both of the following apply:

(1) the new *firm* timely *screens* the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;

(2) *written* notice is given as soon as practicable to any affected former client.

(e) A disqualification required by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(f) The disqualification of lawyers associated in a *firm* with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Ohio Rules of Professional Conduct, the term "firm" denotes lawyers associated in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4A].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in division (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Division (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, imputation of that lawyer's conflict to the lawyers remaining in the firm is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in division (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where the usual concerns justifying imputation are not present, the rule eliminates imputation in the case of conflicts between the interests of a client and a lawyer's own personal interest. Note that the specific personal conflicts governed by Rule 1.8 are imputed to the firm by Rule 1.8(k). Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in division (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does division (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] Rule 1.10(b) prohibits lawyers in a law firm from representing a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client or any other lawyer currently in the firm has material

information protected by Rule 1.6 or 1.9(c). "Substantially related matter" is defined in Rule 1.0(n), and examples are given in Rule 1.9, Comment [3].

Removing Imputation

[5A] Divisions (c) and (d) address imputation to lawyers in a new firm when a personally disqualified lawyer moves from one law firm to another. Division (c) imputes the conflict of a lawyer who has had substantial responsibility in a matter to all lawyers in a law firm to which the lawyer moves and prohibits the new law firm from assuming or continuing the representation of a client in the same matter if the client's interests are materially adverse to those of the former client. Division (d) provides for removal of imputation of a former client conflict of one lawyer to a new firm in all other instances in which a personally disqualified lawyer moves from one firm to another, provided that the personally disqualified lawyer is properly screened from participation in the matter and the former client or client's counsel is given notice.

[5B] Screening is not effective to avoid imputed disqualification of other lawyers in the firm if the personally disqualified lawyer had substantial responsibility for representing the former client in the same matter in which the lawyer's new firm represents an adversary of the former client. A lawyer who was sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer's role in representing the former client was substantial in other circumstances involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter.

[5C] Requirements for effective screening procedures are stated in Rule 1.0(l). Division (d) does not prohibit the screened lawyer from receiving compensation established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5D] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[5E] Screening will not remove imputation where screening is not timely undertaken, or where the circumstances provide insufficient assurance that confidential information known by the personally disqualified lawyer will remain protected. Factors to be considered in deciding whether an effective screen has been created are the size and structure of the firm, the likelihood of contact between the disqualified lawyer and lawyers involved in the current representation, and the existence of safeguards or procedures that prevent the disqualified lawyer from access to information relevant to the current representation.

[6] Rule 1.10(e) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require

the lawyer to determine that the lawyer can represent all affected clients competently, diligently, and loyally, that the representation is not prohibited by Rule 1.7(c), and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [33]. For a definition of informed consent, see Rule 1.0(f).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, division (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.10 governs imputed conflicts of interest and replaces Ohio DR 5-105(D), which imputes the conflict of any lawyer in the firm to all others in the firm. Rule 1.10(a) embodies this rule. The text of DR 5-105(D) lacks clarity about whether its provisions extended to all conflicts, including personal conflicts. Rule 1.10(a) imputes all conflicts, except personal conflicts that are not likely to affect adversely the representation of a client by other lawyers in the firm. Rule 1.10(b) clarifies that imputation generally ends when the personally disqualified lawyer leaves the firm, unless the firm proposes to represent a client in the same or substantially related case or another lawyer in the firm has confidential information about the former client.

Divisions (c) and (d) are added to codify the rule in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, where the Supreme Court allowed law firm screens in some cases when personally disqualified lawyers change law firms. Rule 1.10(c) is consistent with the holding in *Kala* that imputes to a new firm the disqualification of a lawyer who had substantial responsibility for a matter and prevents any lawyer in that firm from representing, in that matter, a client whose interests are materially adverse to the former client. Consistent with the syllabus in *Kala*, Rule 1.10(d) allows the presumption of shared confidences within the new firm to be rebutted by effective screening when a personally disqualified lawyer did not have substantial responsibility in the matter or the new firm is asked to represent a client in a different matter.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.10 corresponds to the Model Rule, with the addition of divisions (c) and (d), which separately address the issue of imputation and removing imputation to lawyers in a new firm when a lawyer changes law firms and no longer represents a former client. Rule 1.10(b) is stated in the form of a disciplinary rule. Rule 1.10 (d) permits the use of law firm screens to remove imputation, consistent with *Kala*, except in the circumstances stated in Rule 1.10(c)—that is where a lawyer who is changing firms had a substantial role in the same matter in which the lawyer's new firm

represents or proposes to represent a client with adverse interests. Comments [5A] to [5E] explain Rules 1.10(c) and (d), including a cross-reference to Rule 1.0(l), which defines the requirements for proper screening procedures. Comments [5A] and [5B] are added to explain the *Kala* rule. Comments [5C] and [5D] are based on the original ABA Ethics 2000 proposal. Comment [5E] is based on *Kala*.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) A lawyer who has formerly served as a public officer or employee of the government shall comply with both of the following:

(1) all applicable laws and Rule 1.9(c) regarding conflicts of interest;

(2) not otherwise represent a client in connection with a matter in which the lawyer participated personally and *substantially* as a public officer or employee, unless the appropriate government agency gives its *informed consent, confirmed in writing*, to the representation.

(b) When a lawyer is disqualified from representation under division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter unless both of the following apply:

(1) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom;

(2) *written* notice is given as soon as practicable to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer *knows* is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public. A *firm* with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) Rules 1.7 and 1.9;

(2) shall not do either of the following:

(i) participate in a matter in which the lawyer participated personally and *substantially* while in private practice or nongovernmental

employment, unless the appropriate government agency gives its *informed consent, confirmed in writing*;

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially*, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this rule, the term "matter" includes both of the following:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties;

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Ohio Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and provisions regarding former client conflicts contained in Rule 1.9(c). For purposes of Rule 1.9(c), which applies to former government lawyers, the definition of "matter" in division (e) applies. In addition, such a lawyer may be subject to criminal statutes and other government regulations regarding conflict of interest. See R.C. Chapters 102. and 2921. Such statutes and regulations may circumscribe the extent to which and length of time before the government agency may give consent under this rule. See Rule 1.0(f) for the definition of informed consent.

[2] Divisions (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, division (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, division (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Divisions (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under division (a). Similarly, a lawyer who has pursued a claim on

behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by division (d). As with divisions (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in division (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by division (d), the latter agency is not required to screen the lawyer as division (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See Rule 1.13, Comment [9].

[6] Divisions (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[8] Division (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer. See R.C. 102.03(B).

[9] Divisions (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of division (e) of this rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.11 spells out special conflict of interest rules for lawyers who are current or former government employees. The movement of lawyers from public service and practice to private practice and involvement in the same or similar issues and controversies requires rules that expressly spell out when a conflict exists that prevents representation or permits such representation if certain conditions are met, including screening where appropriate. The rule likewise governs the conduct of lawyers moving from private practice into the public sector. DR 9-101(B) includes only a broad prohibition forbidding a lawyer from accepting private employment in a matter in which he or she had substantial responsibility while a public employee. This prohibition is based on avoiding the appearance of impropriety and gives no specific guidance to former government lawyers.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.11 reflects the Model Rule except for minor changes. The rule makes clear that a lawyer subject to these special rules on conflicts shall comply with all the conditions set forth in Rule 1.11(a), (b), and (d). Also division (a)(1) requires compliance with all applicable laws and Rule 1.9(c) regarding conflicts of interest. This includes provisions of the Ohio Ethics Law contained in R.C. Chapters 102. and 2921. as well as the regulations of the Ohio Ethics Commission. These statutes and regulations include specific definitions of a prohibited conflict of interest and language forbidding the same for present and former government employees.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in division (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and *substantially* as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give *informed consent, confirmed in writing*.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially* as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and *substantially*, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in the matter unless both of the following apply:

(1) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom;

(2) *written* notice is promptly given to the parties and any appropriate *tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, magistrates, special masters, hearing officers, and other parajudicial officers, and also lawyers who serve as parttime judges. Part III of the Application section of the Ohio Code of Judicial Conduct provides that a parttime judge shall not "act as a lawyer in any proceeding in which the judge served as a judge or in any other related proceeding." Although phrased differently from this rule, the provisions correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators, or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated

personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Lawyers who serve as mediators and other third-party neutrals also are governed by Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, division (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this division are met.

[4] Requirements for screening procedures are stated in Rule 1.0(l). Division (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[6] By its terms, Rule 1.12(b) prohibits a lawyer from negotiating for employment with a party or lawyer involved in a matter in which the lawyer is presently acting as an adjudicative officer or neutral, during the time that the lawyer has such a role. The lawyer should not negotiate for such employment during the pendency of the matter, regardless of whether the lawyer is active in the matter at the time that the employment opportunity arises, except where the lawyer's role has completely ended. Thus, a lawyer who, while acting as an independent mediator, attempted to settle a matter that remains pending is not prohibited from negotiating for employment with one of the parties or one of the lawyers in the matter after the mediation has concluded but while the case is still pending. If the lawyer were to be hired, however, Rule 1.12(a) would prohibit the lawyer from being involved in the matter on behalf of a party, and Rule 1.12(c) would effect the disqualification of the rest of the firm, absent effective screening and notice to the other parties and the tribunal.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.12 addresses the duty of arbitrators, mediators, other third-party neutrals, and former judges to promote public confidence in our legal system and in the legal profession. DR 9-101(A) and (B) prohibit a lawyer from accepting private employment in a matter upon the merits of which the lawyer acted in a judicial capacity or the lawyer had substantial responsibility while the lawyer was a public employee. Because the same potential for misunderstanding exists with respect to lawyers acting as arbitrators or mediators, EC 5-21 recommends that lawyers be prohibited from thereafter representing in the dispute any of the parties involved in the mediation or arbitration. Rule 1.12 codifies the aspirational goal of EC 5-21, creates a standard for disqualification of a lawyer who "personally and substantially" participated in the same matter

while serving as a judge, mediator, arbitrator, or third party neutral, establishes an informed consent standard by which the lawyer may avoid personal disqualification, and provides a process through which the personally disqualified lawyer's firm may avoid disqualification.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.12 is substantively identical to Model Rule 1.12. Comment [6] has been added to provide further clarification regarding application of the rule.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows* or *reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that *reasonably* might be imputed to the organization and that is likely to result in *substantial* injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (d).

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer *knows* or *reasonably should know* that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's *written* consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. "Other constituents" as used in this rule and comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. The duties defined in this rule apply equally to unincorporated associations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the lawyer must keep the communication confidential as to persons other than the organizational client as required by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate

allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may disclose to the organizational client a communication related to the representation that a constituent made to the lawyer, but the lawyer may not disclose such information to others except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Division (b) makes clear, however, that when the lawyer knows or reasonably should know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining whether "up-the-ladder" reporting is required under division (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

[5] Division (b) also makes clear that, if warranted by the circumstances, a lawyer must refer a matter to the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (d) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(d) would advance or interfere with the purpose of the disclosure.

[7] [RESERVED]

[8] [RESERVED]

Government Agency

[9] The duty to "report up the ladder" defined in this rule also applies to lawyers for governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Comparison to former Ohio Code of Professional Responsibility

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2003. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects:

- Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.

- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the

governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as *reasonably* possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer *reasonably believes* that the client has diminished capacity, is at risk of *substantial* physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take *reasonably* necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to division (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent *reasonably* necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under division (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in division (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then division (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to division (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, division (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provisions are EC 7-11 and 7-12, which discuss the representation of a client with a mental or physical disability that renders the client incapable of making independent decisions.

Rule 1.14 is both broader and narrower than EC 7-12. It is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, it explicitly permits the lawyer to take reasonably necessary protective action, and

it explicitly permits the disclosure of confidential information to the extent necessary to protect the client's interest.

Rule 1.14 is narrower to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.14 is identical to the ABA Model Rule.

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

(1) maintain a copy of any fee agreement with each client;

(2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:

(i) the name of the client;

(ii) the date, amount, and source of all funds received on behalf of such client;

(iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;

(iv) the current balance for such client.

(3) maintain a record for each bank account that sets forth all of the following:

(i) the name of such account;

(ii) the date, amount, and client affected by each credit and debit;

(iii) the balance in the account.

(4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;

(5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

(f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.

(g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm* purchasing the law practice at the time client files are transferred.

(h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a business that provides a law-related service shall:

(1) maintain funds of clients or third persons that cannot earn any net income for the clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Access to Justice Foundation pursuant to section 120.52 of the Revised Code.

(2) notify the Ohio Access to Justice Foundation, in a manner required by rules adopted by the Ohio Access to Justice Foundation pursuant to section 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

(3) comply with the reporting requirement contained in Gov. Bar R. VI, Section 1(F).

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts. A lawyer should maintain separate trust accounts when administering estate moneys. A lawyer must maintain the records listed in division (a)(1) to (5) of this rule to effectively safeguard client funds and fulfill the role of professional fiduciary. The records required by this rule may be maintained electronically.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, division (b) provides that it is permissible when necessary to pay or obtain a waiver of bank service charges on that account. The following charges or fees assessed by an IOLTA depository may be deducted from account proceeds: (1) bank transaction charges (*i.e.*, per check, per deposit charge); and (2) standard monthly maintenance charges. The following charges or fees assessed by a client trust account depository may not be deducted from account proceeds: (1) check printing charges; (2) not-sufficient-funds charges; (3) stop payment fees; (4) teller and ATM fees; (5) electronic fund transfer fees (*i.e.*, wire transfer fees); (6) brokerage and credit card charges; and (7) other business-related expenses, which are not part of the two permissible types of fees. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3A] Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the lawyer determines the funds can otherwise earn income for the client in excess of the costs incurred to secure such income (*i.e.*, net income). In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm should consider the following factors: (1) the amount of the funds to be deposited; (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; (3) the rates of interest or yield at the financial institutions where the funds are to be deposited; (4) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit; (5) the capability of financial institutions, lawyers or law firms to calculate

and pay income to individual clients; (6) any other circumstances that affect the ability of the client's funds to earn a net return for the client. The lawyer or law firm should review its IOLTA account at reasonable intervals to determine whether changed circumstances require action with respect to the funds of any client.

[4] Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect third-person interests of which the lawyer has actual knowledge against wrongful interference by the client. When there is no dispute regarding the funds or property in the lawyer's possession, the lawyer's ethical duty is to promptly notify and deliver the funds or property to which the client or third person is entitled. When the lawyer has actual knowledge of a dispute between the client and a third person who has a lawful interest in the funds or property in the lawyer's possession, the lawyer's ethical duty is to notify both the client and the third person, hold the disputed funds in accordance with division (a) of this rule until the dispute is resolved, and consider whether it is necessary to file an action to have a court resolve the dispute. The lawyer should not unilaterally assume to resolve the dispute between the client and the third person. When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client.

[5] [RESERVED]

[6] [RESERVED]

[7] A lawyer's fiduciary duties are independent of the lawyer's employment at a particular firm or the rendering of legal services. Law firms frequently merge or dissolve. Division (f) provides that whenever a law firm dissolves, the former partners, managing partners, or supervisory lawyers must appropriately account for all client funds. This responsibility may be satisfied by an appropriate designee.

[8] All lawyers involved in the sale or purchase of a law practice as provided by Rule 1.17 should make reasonable efforts to safeguard and account for client property. Division (g) requires the lawyer, law firm or estate of a deceased lawyer who sells a practice to account for and transfer all client property at the time the client files are transferred.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.15 replaces DR 9-102, which is silent on the handling of property belonging to third persons.

Rule 1.15(a) includes several provisions which are not explicitly provided for in DR 9-102. The rule requires that client and third-person funds are maintained:

1. In an insured, interest-bearing account;

2. In a financial institution permitted under Ohio law and in the state where the lawyer's office is situated; and

3. In an account designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title.

To ensure the proper handling of funds, Rule 1.15 requires the lawyer to maintain the following financial records for a period of seven years:

1. Any fee agreements.

2. A record for each client's funds that sets forth:

   a. the client's name,
   b. the date, amount, and source of the funds received,
   c. the date, amount, payee, and purpose of each disbursement,
   d. the current balance.

3. A record of each bank account that sets forth:

   a. the name of the account,
   b. the date, amount, and client affected by each credit and debit,
   c. the balance in the account.

4. All bank statements, all deposit slips, and canceled checks, if provided by the bank, for each account.

5. A monthly reconciliation of the items listed in 2, 3, and 4 above.

Under DR 9-102 lawyers must keep financial records indefinitely.

Rule 1.15(b) is a restatement of DR 9-102(A)(1), which authorizes lawyers to deposit their own funds into the trust account for the sole purpose of paying or obtaining a waiver of bank service charges.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is a change from DR 9-102(A), which precludes a lawyer from placing advances for expenses in the lawyer's trust account. The vast majority of jurisdictions consider advances for expenses to be client funds that must be deposited in the trust account.

There are no Disciplinary Rules comparable to Rules 1.15(d), (e), (f), and (g).

Rule 1.15(h) requires lawyers to comply with R.C. 120.52, 3953.231, 4705.09, and 4705.10, all rules adopted by the Ohio Access to Justice Foundation, and Gov. Bar R. VI, (1)(F). This provision is the same as the requirements of DR 9-102(D) and (E).

Comparison to ABA Model Rules of Professional Conduct

Rule 1.15 is altered from the ABA Model Rule to clarify the lawyer's fiduciary responsibility. The primary divergence from the Model Rule is the adoption of the specific recordkeeping requirements in Rule 1.15(a)(1) to (5). These provisions are based on analogous rules adopted in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Indiana, New Jersey, New York, Massachusetts, Minnesota, Oregon, Rhode Island, South Carolina, Vermont, and Virginia, as well as the ABA Model Rule on Financial Recordkeeping. Each of these jurisdictions, as well as the ABA Model Rule, incorporates similar recordkeeping requirements. The rules help ensure that Ohio lawyers fulfill their fiduciary duties.

Model Rule 1.15(a) requires lawyers to identify and appropriately safeguard all property other than funds. Rule 1.15(a) requires the lawyer to maintain a journal that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is the same as the Model Rule.

Rule 1.15(f) designates persons responsible for distributing client funds and maintaining financial records upon the dissolution of a law firm. This provision is not in the Model Rule. The frequency with which law firms are dissolved necessitates this requirement.

Rule 1.15(g), which also is not in the Model Rule, provides for the handling of funds upon the sale of a law practice. This provision is consistent with the careful attention to protecting client's interests during the sale of a law practice pursuant to Rule 1.17.

Rule 1.15(h) incorporates the requirements of DR 9-102(D) and (E).

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

(1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged.

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if any of the following applies:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is *illegal* or *fraudulent*;

(3) the client has used the lawyer's services to perpetrate a crime or *fraud*;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(7) the client gives *informed consent* to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a *tribunal*, a lawyer shall not withdraw from employment in a proceeding before that *tribunal* without its permission.

(d) As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

(e) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.

Comment

[1] A lawyer shall not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Ohio Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the discharge may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These

consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[8A] A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of the withdrawal. Even when the lawyer justifiably withdraws, a lawyer should protect the welfare of the client by giving due notice of the withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Clients receive no benefit from a lawyer keeping a copy of the file and therefore can not be charged for any copying costs. Further, the lawyer should refund to the client any compensation not earned during the employment.

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.16 governs withdrawal from representation and replaces DR 2-110.

Rule 1.16(a)(1) corresponds to DR 2-110(B)(1) and (2), Rule 1.16(a)(2) corresponds to DR 2-110(B)(3), and Rule 1.16(a)(3) corresponds to DR 2-110(B)(4).

Rule 1.16(b)(1) generally corresponds to DR 2-110(A)(2).

Rule 1.16(b)(2) corresponds to DR 2-110(C)(1)(b).

Rule 1.16(b)(3) corresponds to DR 2-110 (C)(1)(c).

Rule 1.16(b)(4) corresponds to DR 2-110(C)(1)(c) and (d).

Rule 1.16(b)(5) corresponds to DR 2-110(C)(1)(f).

Rule 1.16(b)(6) corresponds to DR 2-110(C)(1)(d).

Rule 1.16(b)(7) corresponds to DR 2-110(C)(5).

Rule 1.16(b)(8) corresponds to DR 2-110(C)(7).

Rule 1.16(b)(9) corresponds to DR 2-110(C)(6).

Rule 1.16(c) is identical to DR 2-110(A)(1).

Rule 1.16(d) corresponds to DR 2-110(A)(2) and also requires the withdrawing lawyer to promptly return client papers and property to the client. "Client papers and property" are defined as including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

Rule 1.16(e) is identical to DR 2-110(A)(3) except that the reference to the sale of a law practice rule is appropriately designated as Rule 1.17.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.16(b)(2) is revised to change "criminal" to "illegal." This allows the lawyer to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal. This would include violations of statutes or administrative regulations for which there are no criminal penalties.

Rules 1.16(b)(7) and (8) are added to recognize additional circumstances in which withdrawal may be permitted.

Rule 1.16(d) is revised to include a list of items typically included in "client papers and property." This provision is further modified to require that a withdrawing lawyer must afford the client a reasonable time to secure new counsel. Comment [8A] is added to elaborate on the duties of a lawyer who is contemplating or effectuating withdrawal from representation.

RULE 1.17: SALE OF LAW PRACTICE

(a) Subject to the provisions of this rule, a lawyer or *law firm* may sell or purchase a law practice, including the good will of the practice. The law practice shall be sold in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients. This rule shall not permit the sale or purchase of a law practice where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or *law firm*.

(b) As used in this rule:

(1) "Purchasing lawyer" means either an individual lawyer or a *law firm*;

(2) "Selling lawyer" means an individual lawyer, a *law firm*, the estate of a deceased lawyer, or the representatives of a disabled or disappeared lawyer.

(c) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve information relating to the representation of the clients of the selling lawyer, consistent with Rule 1.6, as if those clients were clients of the prospective purchasing lawyer.

(d) The selling lawyer and the purchasing lawyer may negotiate the terms of the sale of a law practice, subject to all of the following:

(1) The sale agreement shall include a statement by selling lawyer and purchasing lawyer that the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services.

(2) The sale agreement shall provide that the purchasing lawyer will honor any fee agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale. The purchasing lawyer may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale.

(3) The sale agreement may include terms that *reasonably* limit the ability of the selling lawyer to reenter the practice of law, including, but not limited to, the ability of the selling lawyer to reenter the practice of law for a specific period of time or to practice in a specific geographic area. The sale agreement shall not include terms limiting the ability of the selling lawyer to practice law or reenter the practice of law if the selling lawyer is selling his or her law practice to enter

academic, government, or public service or to serve as in-house counsel to a business.

(e) Prior to completing the sale, the selling lawyer and purchasing lawyer shall provide *written* notice of the sale to the clients of the selling lawyer. For purposes of this rule, clients of the selling lawyer include all current clients of the selling lawyer and any closed files that the selling lawyer and purchasing lawyer agree to make subject of the sale. The *written* notice shall include all of the following:

(1) The anticipated effective date of the proposed sale;

(2) A statement that the purchasing lawyer will honor all existing fee agreements for legal representation that is ongoing at the time of sale and that fees for legal representation commenced after the date of sale will be negotiated by the purchasing lawyer and client;

(3) The client's right to retain other counsel or take possession of case files;

(4) The fact that the client's consent to the sale will be presumed if the client does not take action or otherwise object within ninety days of the receipt of the notice;

(5) Biographical information relative to the professional qualifications of the purchasing lawyer, including but not limited to applicable information consistent with Rule 7.2, information regarding any disciplinary action taken against the purchasing lawyer, and information regarding the existence, nature, and status of any pending disciplinary complaint certified by a probable cause panel pursuant to Gov. Bar R. V, Section 11.

(f) If the seller is the estate of a deceased lawyer or the representative of a disabled or disappeared lawyer, the purchasing lawyer shall provide the *written* notice required by division (e) of this rule, and the purchasing lawyer shall obtain *written* consent from each client to act on the client's behalf. The client's consent shall be presumed if no response is received from the client within ninety days of the date the notice was sent to the client at the client's last *known* address as shown on the records of the seller or the client's rights would be prejudiced by a failure to act during the ninety day period.

(g) If a client cannot be given the notice required by division (e) of this rule, the representation of that client may be transferred to the purchaser only after the selling lawyer and purchasing lawyer have caused notice of the sale to be made by at least one publication in a newspaper of general circulation in the county in which the sale will occur or in an adjoining county if no newspaper is published in the county in which the sale will occur. Upon completion of the publication, the client's consent to the sale is presumed.

(h) The *written* notice to clients required by division (e) and (f) of this rule shall be provided by regular mail with a certificate of mailing or other comparable proof of mailing. In lieu of providing notice by mail, either the selling lawyer or purchasing lawyer, or both, may personally deliver the notice to a client. In the case of personal delivery, the lawyer providing the notice shall obtain *written* acknowledgement of the delivery from the client.

(i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or *law firm* from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6. A sale of a law practice is prohibited where the purchasing lawyer does not intend to engage in the practice of law but is buying the practice for the purpose of reselling the practice to another lawyer or law firm.

[2] [RESERVED]

[3] The purchasing and selling lawyer may agree to a reasonable limitation on the selling lawyer's ability to reenter the practice of law following consummation of the sale. These limitations may preclude the selling lawyer from engaging in the practice of law for a specific period of time or in a defined geographical area, or both. However, the sale agreement may not include such limitations if the selling lawyer is selling his practice to enter academic service, assume employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] [RESERVED]

[5] [RESERVED]

Sale of Entire Practice

[6] The rule requires that the seller's entire practice~~,~~ be sold. This requirement protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice, subject to conflict clearance, client consent, and the purchasing lawyer's competence to assume representation in those matters. This requirement is

satisfied even if a purchaser is unable to undertake a particular client matter because of a conflict of interest or if the seller, in good faith, makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Pursuant to Rule 1.1, the purchasing lawyer may be required to associate with other counsel in order to provide competent representation.

Client Confidences, Consent, and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation and to client files requires the purchaser and seller to take steps to ensure confidentiality of information related to the representation. The rule provides that before such information can be disclosed by the seller to the purchaser, the purchaser and seller must enter into a confidentiality agreement that binds the purchaser to preserve information related to the representation in a manner consistent with Rule 1.6. This agreement binds the purchaser as if the seller's clients were clients of the purchaser and regardless of whether the sale is eventually consummated by the parties. After the confidentiality agreement has been signed and before the prospective purchaser reviews client-specific information, a conflict check should be completed to assure that the prospective purchaser does not review client-specific information concerning a client whom the prospective purchaser cannot represent because of a conflict of interest.

[7A] Before a sale is completed, written notice of the proposed sale must be provided to the clients of the selling lawyer whose matters are included within the scope of the proposed sale. The notice must be provided jointly by the selling and purchasing lawyers, except where the seller is the estate or representative of a deceased, disabled, or disappeared lawyer, in which case the notice is provided by the purchaser. At a minimum, the notice must include information about the proposed sale and the purchasing lawyer that will allow each client to make an informed decision regarding consent to the sale. A client may elect to opt out of the sale and seek other representation. However, consent is presumed if the client does not object or take other action within ninety days of receiving the notice of the proposed sale.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires the parties to provide notice of the proposed sale via a newspaper publication.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. However, the purchaser may negotiate new fee agreements with clients of the seller for representation that is undertaken after the sale is completed.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); the obligation to avoid agreements limiting a lawyer's liability to a client for malpractice (see Rule 1.8(h)); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This rule applies to the sale of a law practice of a deceased, disabled, or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice that does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans, and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

[16] The purchaser can not continue to use the seller's name unless the seller is deceased, disabled, or retired pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.17 restates the existing provisions of DR 2-111, substituting "information relating to the representation" in place of "confidences and secrets."

Although there is little textual similarity between Rule 1.17 and the ABA Model Rule, most of the substantive provisions of the Model Rule are incorporated into the rule, with the major exceptions being that Rule 1.17 (1) does not permit the sale of only a portion of a law practice, and (2) allows a missing client to be provided notice of the proposed sale by publication. The comments are modified to track the rule and Ohio law.

Comment [1] is modified to clearly indicate that the provisions of the rule are not intended to permit sale to a lawyer who will merely act as a "broker" and resell the practice.

Comment [2] is relocated to Comment [6] where the language of the Model Rule comment is revised to address the unanticipated return to practice of the selling lawyer. The latter modification is deemed unnecessary due to the prohibition in division (d)(3) directing that the sale agreement may not restrict the ability of the selling lawyer to reenter the practice if the sale is the result of the lawyer selling the practice "to enter academic, government, or public service or to serve as in-house counsel to a business" and the commentary contained in Comment [3].

Comments [4] and [5] are deleted, and comments [6], [9], and [15] are modified, to reflect the fact that Rule 1.17 does not permit the sale of a part of a lawyer's practice.

Comments [7] and [7A] are modified to reflect the actual mechanisms contained in the rule respecting the preservation of information related to the representation of clients.

Comment [10] is clarified to indicate that new fee arrangements may be negotiated with clients after the sale of a law practice "for representation that is undertaken after the sale is completed."

Comment [11] is modified to specifically ensure that the parties to the sale of a law practice understand that the sale may not limit the liability of either the buyer or the seller for malpractice.

Comment [16] is added to give notice to prospective purchasers that it is improper to utilize the seller's name in the practice unless the seller is deceased, disabled, or retired pursuant to Gov. Bar R. VI.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.17 differs from Model Rule 1.17 as noted above.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to division (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a *substantially related matter* if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter, except as provided in division (d).

(d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

(1) both the affected client and the prospective client have given *informed consent, confirmed in writing*;

(2) the lawyer who received the information took *reasonable* measures to avoid exposure to more disqualifying information than was *reasonably* necessary to determine whether to represent the prospective client, and both of the following apply:

(i) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) *written* notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites

the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and thus is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Division (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] [RESERVED]

[6] Under division (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under division (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under division (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of division (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l) (requirements for screening procedures). Division (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.18 addresses the lawyer's duty relating to the formation of the client-lawyer relationship. This duty implicates the lawyer's obligations addressed by Canon 4 (confidentiality) and Canon 6 (competence) of the Code of Professional Responsibility. The only mention of prospective clients in the Ohio Code occurs in EC 4-1, which states that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." To the extent the Code encourages seeking legal advice as soon as possible, it does not provide a clear statement as to when the lawyer-client relationship is established so as to determine when the lawyer's duty of confidentiality arises. However, Ohio case law indicates that the lawyer-client relationship may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation. See *e.g., Cuyahoga County Bar Assn v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596. Therefore, Rule 1.18 does not materially change the current law of Ohio, but clarifies the directives set forth by the Supreme Court in *Hardiman*.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.18 attempts to address the realities of the practice of law. There are no substantive changes between Rule 1.18 and the Model Rule. Rule 1.18 defines a "prospective client." Rule 1.18(b) prohibits the lawyer from using or revealing information learned in the consultation when no professional relationship ensues. This prohibition applies regardless of whether the information learned in the consultation may be defined as a "confidence or secret." Rule 1.18(c) disqualifies the lawyer from representing a client in "the same or a substantially related matter" when that client's interests are "materially adverse to those of a prospective client" and the "information received" is harmful to the prospective client in the matter, and prohibits lawyers in the disqualifying lawyer's law firm from "knowingly undertaking or continuing representation in such a matter." Rule 1.18(d) negates the disqualification if appropriate "notice" is provided to the affected parties and "screening" established to eliminate the potential harm from the use of the information learned during the consultation.

Comment [5] of Model Rule 1.18 is stricken.

II. COUNSELOR

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules comparable to Rule 2.1. However, EC 7-8 addresses the scope of the rule.

Comparison to ABA Model Rules of Professional Conduct

Rule 2.1 is identical to Model Rule 2.1.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer *reasonably believes* that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer *knows* or *reasonably should know* that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives *informed consent*.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] Because an evaluation for someone other than the client involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related

transaction. Even when making an evaluation is consistent with the lawyer's responsibilities to the client, the lawyer should advise the client of the implications of the evaluation, particularly the necessity to disclose information relating to the representation and the duties to the third person that these rules and the law impose upon the lawyer with respect to the evaluation. The legal duties, if any, that the lawyer may have to the third person are beyond the scope of these rules.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(f).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.3.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 2.3(a) and Comment [3] are revised to clarify the intent of the rule.

RULE 2.4: LAWYER SERVING AS ARBITRATOR, MEDIATOR, OR THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer *knows* or *reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator, or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator, or decision-maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] In the role of a third-party neutral, the lawyer may be subject to statutes, court rules, or other laws that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, including but not limited to the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, division (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this division will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration [see Rule 1.0(o)], the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.4. EC 5-21, while not specifically addressing the exact same role of the lawyer, nonetheless does embody some of the same responsibilities as contained in the rule.

Comparison to ABA Model Rules of Professional Conduct

Comment [2] is modified to include "statutes" that may govern the conduct of a third-party neutral. This is consistent with the Ohio situation in which mediators are governed by statutory requirements.

III. ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.2: EXPEDITING LITIGATION

Note

ABA Model Rule 3.2 is not adopted in Ohio. The substance of Model Rule 3.2 is addressed by other provisions of the Ohio Rules of Professional Conduct, including Rules 1.3 [Diligence], 3.1 [Meritorious Claims and Contentions], and 4.4(a) [Respect for Rights of Third Persons].

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

(1) make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, division (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary

proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in division (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Division (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [RESERVED]

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its

presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] [RESERVED]

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action including making such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, division (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law or fact must be established. A final determination of the issue to which the duty relates by the highest tribunal that may consider the issue, or the expiration of the time for such consideration, is a reasonably definite point for the termination of the obligation. Division (c) modifies the rule set forth in *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260 to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

***Ex Parte* Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(c) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.3(a)(1) is comparable to DR 7-102(A)(5), Rule 3.3(a)(2) is comparable to DR 7-106(B)(1), and Rule 3.3(a)(3) is comparable to DR 7-102(A)(1) and (4).

Rule 3.3(b) is comparable to DR 7-102(B)(1) and (2). There are two differences. First, Rule 3.3(b) does not necessarily require disclosure to the tribunal. Rather, the rule requires the lawyer to take steps to remedy the situation, including, if necessary, disclosure to the tribunal. Second, the rule does not adopt the DR 7-102(B)(1) requirement that the lawyer reveal the client's fraudulent act, during the course of the representation, upon any person. Requiring a lawyer to disclose any and all frauds a client commits during the course of the representation is unworkable. There is no Ohio precedent where a lawyer was disciplined for failing to disclose a client's fraud upon a third person. This rule requires a lawyer to take remedial measures with respect to criminal or fraudulent conduct relating to a proceeding in which the lawyer represents or has represented a client.

Rule 3.3(c) provides that the duties set forth in divisions (a) and (b) continue until a final determination on the issue to which the duty relates has been made by the highest tribunal that may consider the issue or the expiration of time for such a determination. The Code provisions that correspond to Rule 3.3 have no comparable time limitation. But see *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260, which is modified by Rule 3.3(c) to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

Rule 3.3(d) has no analogous Disciplinary Rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 3.3(c) is replaced by a standard analogous to that used in Rule 3.3 of the North Dakota Rules of Professional Conduct.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed, or if the testimony of a person with knowledge is unavailable, incomplete, or false. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also

generally a criminal offense. A lawyer is permitted to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the lawyer is required to turn the evidence over to the police or other prosecuting authority, depending on the circumstances. Applicable law also prohibits the use of force, intimidation, or deception to delay, hinder, or prevent a person from attending or testifying in a proceeding.

[3] With regard to division (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee for testifying and it is improper to pay an expert witness a contingent fee.

[3A] Division (e) does not prohibit a lawyer from arguing, based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced in that division.

[4] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

DR 7-102, DR 7-106(C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.4 is revised to add a "good-faith belief" provision consistent with the holding in *State v. Gillard* (1988), 40 Ohio St.3d 226. Model Rule 3.4(f) is deleted because its provisions are inconsistent with a lawyer's obligations under Ohio law, and the corresponding Comment [4] also is removed. Division (g) is inserted to incorporate Ohio DR 7-109(B).

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a *tribunal*;

(3) communicate *ex parte* with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

(4) communicate with a juror or prospective juror after discharge of the jury if any of the following applies:

(i) the communication is prohibited by law or court order;

(ii) the juror has made *known* to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

(5) engage in conduct intended to disrupt a *tribunal*;

(6) engage in undignified or discourteous conduct that is degrading to a *tribunal*.

(b) A lawyer shall reveal promptly to the *tribunal* improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has *knowledge*.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Ohio Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. As used in division (a)(2), "*de minimis*" means an insignificant item or interest that could not raise a reasonable question as to the impartiality of a judicial officer, official, or employee of a tribunal.

[2] During a proceeding a lawyer may not communicate *ex parte* with persons serving in an official capacity in the proceeding, such as judges, masters, magistrates, or jurors, unless authorized to do so by law, court order, or these rules.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified, or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(o).

Comparison to former Ohio Code of Professional Responsibility

Rule 3.5 corresponds to DR 7-108 (communication with or investigation of jurors) and DR 7-110 (contact with officials).

Rule 3.5(a)(1) prohibits an attorney from seeking to "influence a judicial officer, juror, prospective juror, or other official." This provision generally corresponds to DR 7-108(A) and (B) and DR 7-110, which contain express prohibitions against improper conduct toward court officials and jurors, both seated and prospective.

Rule 3.5(a)(2) restates the prohibition contained in DR 7-110(A), and Rule 3.5(a)(3) incorporates the prohibitions on improper *ex parte* communications contained in DR 7-108(A) and 7-110(B). Rule 3.5(a)(4) corresponds to DR 7-108(D) and prohibits certain communications with a juror or prospective juror following the juror's discharge from a case. Rule 3.5(a)(5) has no analogue in the Code of Professional Responsibility. Rule 3.5(a)(6) corresponds to DR 7-106(C)(6).

Rule 3.5(b) is revised to add the provisions of DR 7-108(G).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.5 differs from the Model Rule in four respects. First, a new division (a)(2) is added that incorporates the language of DR 7-110(A). The change makes clear the Ohio rule that a lawyer can never give or loan anything of more than *de minimis* value to a judicial officer, juror, prospective juror, or other official. "*De minimis*" is defined in Comment [1] to incorporate the definition contained in the Ohio Code of Judicial Conduct.

The second revision is to division (a)(3), which has been divided into two parts to treat separately communications with judicial officers and jurors. Division (a)(3)(i) follows DR 7-110(B) by prohibiting *ex parte* communications with judicial officers only with regard to the merits of the case. This language states that *ex parte* communications with judicial officers concerning matters not involving the merits of the case are excluded from the rule. In contrast, division (a)(3)(ii) prohibits any communication with a juror or prospective juror, except as permitted by law or court order.

The third change in the rule is a new division (a)(6) that incorporates DR 7-106(C)(6). Rule 3.5(a)(5) addresses a wide range of conduct that, although disruptive to a pending proceeding, may not be directed to the tribunal itself, such as comments directed toward opposing counsel or a litigant before the jury. Rule 3.5(a)(6) speaks to conduct that is degrading to a tribunal, without regard to whether the conduct is disruptive to a pending matter. See *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048 and *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630.

The fourth change in the rule is a new division (b) that incorporates DR 7-108(G). The rule mandates that a lawyer must reveal promptly to a court improper conduct by a juror or prospective juror or the conduct of another toward a juror, prospective juror, or member of the family of a juror or prospective juror.

Comment [1] is revised to explain that, with regard to Rule 3.5(a)(2), the impartiality of a public servant may be impaired by the receipt of gifts or loans and, therefore, it is never justified for a lawyer to make a gift or loan to a judge, hearing officer, magistrate, official, or employee of a tribunal.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved when there is reason to *believe* that there exists the likelihood of *substantial* harm to an individual or to the public interest;

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest;

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a *reasonable* lawyer would *believe* is required to protect a client from the *substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a *firm* or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, disciplinary, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules. The provisions of this rule do not supersede the confidentiality provisions of Rule 1.6.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.6 reflects DR 7-107 in the Model Rule format. Ohio adopted Model Rule 3.6 in 1996.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.6 is identical to Model Rule 3.6 in format and substance, except for the addition to division (b) that makes clear a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6. Also, Comment [8] is stricken to reflect the deletion of Model Rule 3.8(f).

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work *substantial* hardship on the client.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's *firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.

(c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, division (a) prohibits a lawyer from simultaneously serving as counsel and necessary witness except in those circumstances specified in divisions (a)(1) to (3). Division (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Division (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these exceptions, division (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the

tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, division (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer also must consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by division (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to serve simultaneously as an advocate and witness by division (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Division (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by division (a). If, however, the testifying lawyer also would be disqualified by Rule 1.7 or 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10, unless the client gives informed consent under the conditions stated in Rule 1.7.

[8] Government agencies are not included in the definition of "firm." See Rule 1.0(c) and Comment [4A]. Nonetheless, the ethical reasons for restrictions in serving as an advocate and a witness apply with equal force to lawyers in government offices and lawyers in private practice. Division (c) reflects the difference between relationships among salaried lawyers working in government agencies and relationships between law firm lawyers where financial ties among the partners and associates in the firm are intertwined. Division (c) permits a lawyer to testify, or offer the testimony of a lawyer in the same government agency as the lawyers participating in the case, where permitted by division (a) or by common law.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.7 replaces DR 5-101(B) and 5-102 and changes the rule governing the ability of other lawyers who are associated in a firm with a testifying lawyer to continue the representation of a client.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.7 is identical to ABA Model Rule 3.7 with the exception of the addition of division (c) and Comment [8].

Rule 3.7(c) and Comment [8] are added to recognize the difference between relationships among salaried lawyers in government agencies and relationships between law firm lawyers, where "financial ties among the partners and associates of the firm are intertwined." See *In re Disqualification of Carr*, 105 Ohio St. 3d 1233, 1235-36, 2004-Ohio-7357, ¶13-16. The testimony of a prosecutor, who is effectively screened from any participation in the case, may be permitted in extraordinary circumstances. *State v. Coleman* (1989), 45 Ohio St. 3d 298 was a death penalty case. In allowing such testimony, the Court said: "We recognize that a prosecuting attorney should avoid being a witness in a criminal prosecution, where it is a complex proceeding where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not a violation of DR 5-102." *Id.* at 302.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause;

(b) [RESERVED]

(c) [RESERVED]

(d) fail to make timely disclosure to the defense of all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;

(e) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor *reasonably believes* all of the following apply:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(3) there is no other feasible alternative to obtain the information.

(f) [RESERVED]

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

[2] [RESERVED]

[3] The exception in division (d) recognizes that a prosecutor may seek an appropriate order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Division (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] [RESERVED]

[6] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.8(a) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment).

EC 7-13 recognizes the distinctive role of prosecutors:

> The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

- The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;
- Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;
- Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;
- Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;
- Division (d) is modified to comport with Ohio law;
- Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) to (c), 3.4(a) to (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) to (c), 3.4(a) to (c), and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislative bodies and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule applies only when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 to 4.4.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.9 has no analogous provision in Ohio law. Rule 3.9 may be considered as having antecedents in DR 7-102(A)(3) and DR 9-101(C).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.9 is identical to Model Rule 3.9.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not *knowingly* do either of the following:

(a) make a false statement of material fact or law to a third person;

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an *illegal* or *fraudulent* act by a client.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Disclosure to Prevent Illegal or Fraudulent Client Acts

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer's assistance in the client's illegal or fraudulent act. See also Rule 8.4(c). The client can, of course, prevent such disclosure by refraining from the wrongful conduct. If the client persists, the lawyer usually can avoid assisting the client's illegal or fraudulent act by withdrawing from the representation. If withdrawal is not sufficient to avoid such assistance, division (b) of the rule requires disclosure of material facts necessary to prevent the assistance of the client's illegal or fraudulent act. Such disclosure may include disaffirming

an opinion, document, affirmation, or the like, or may require further disclosure to avoid being deemed to have assisted the client's illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer's work product to assist the client's illegal or fraudulent act.

[4] Division (b) of this rule addresses only ongoing or future illegal or fraudulent acts of a client. With respect to past illegal or fraudulent client acts of which the lawyer later becomes aware, Rule 1.6(b)(3) permits, but does not require, a lawyer to reveal information reasonably necessary to mitigate substantial injury to the financial or property interests of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.1 addresses the same issues contained in several provisions of the Ohio Code of Professional Responsibility. Division (a) of the rule is virtually identical to DR 7-102(A)(5). Division (b) parallels DR 7-102(A)(3) and the "fraud on a person" portion of DR 7-102(B)(1). The "fraud on a tribunal" portion of DR 7-102(B)(1) is now found in Rule 3.3.

No Ohio case has construed DR 7-102(B) in the context of a lawyer failing to disclose a fraud on a person. Nevertheless, revealing such an ongoing or future fraud is justified under Rule 4.1(b) when the client refuses to prevent it, and the lawyer's withdrawal from the matter is not sufficient to prevent assisting the fraud.

The mitigation of past fraud on a person, addressed in DR 7-102(B), is now found in Rule 1.6(b)(3).

Comparison to ABA Model Rules of Professional Conduct

Rule 4.1 incorporates two changes in Model Rule 4.1(b) that are intended to track Ohio law. First, division (b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts) consistent with proposed Rule 1.2(d) and DR 7-102(A)(7). Second, the "unless" clause at the end of division (b), which conditions the lawyer's duty to disclose on exceptions in Rule 1.6, is deleted. Deleting this phrase results in a clearer stand alone anti-fraud rule because it does not require reference to Rule 1.6, and also because such a provision is more consistent with DR 7-102(B)(1).

Comment [3] is rewritten and Comment [4] inserted to clarify the scope and meaning of division (b), and to add appropriate cross-references to other rules.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.2 is analogous to DR 7-104(A)(1), with the addition of language that allows an otherwise prohibited communication with a represented person to be made pursuant to court order. Also see Advisory Opinions 96-1 and 2005-3 from the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 4.2 is identical to Model Rule 4.2.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.3 is analogous to DR 7-104(A)(2). The first and second sentences of Rule 4.3 expand on DR 7-104(A)(2) by requiring a lawyer to: (1) refrain from stating or implying that the lawyer is disinterested in the matter at issue; and (2) take reasonable steps to correct any misunderstanding that the unrepresented person may have with regard to the lawyer's role in the matter. The third sentence of Rule 4.3 tracks DR 7-104(A)(2), but provides that the prohibition on giving legal advice to an unrepresented person applies only where the lawyer knows or reasonably should know that the unrepresented person and the lawyer's client have conflicting interests.

Comparison to ABA Model Rules of Professional Conduct

Rule 4.3 is identical to Model Rule 4.3.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Division (b) recognizes that lawyers sometimes receive a document or electronically stored information that was inadvertently sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender. For purposes of this rule, "document or electronically stored information" includes paper and electronic documents, electronic communications, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was sent inadvertently to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was sent inadvertently. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer, subject to applicable law that may govern deletion. See Rules 1.2 and 1.4.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.4(a) incorporates elements addressed by several provisions of the Ohio Code of Professional Responsibility. Specifically, it contains elements of: (1) DR 7-102(A)(1), which, in part, prohibits a lawyer from taking action on behalf of a client that serves merely to harass another; (2) DR 7-106(C)(2), which, in part, prohibits a lawyer from asking any question that the lawyer

has no reasonable basis to believe is relevant and that is intended to degrade a third person; and (3) DR 7-108(D) and (E), which, in part, prohibit a lawyer from taking action that merely embarrasses or harasses a juror.

Rule 4.4(b) addresses the situation of when a lawyer receives a document that was inadvertently sent to the lawyer. There is no Disciplinary Rule comparable to Rule 4.4(b).

Comparison to ABA Model Rules of Professional Conduct

Rule 4.4(a) is identical to Model Rule 4.4(a), with the additional prohibition of actions that have no substantial purpose other than to "harass" a third person.

Rule 4.4(b) is identical to Model Rule 4.4(b).

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) [RESERVED]

(b) [RESERVED]

(c) A lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if either of the following applies:

(1) the lawyer orders or, with *knowledge* of the specific conduct, ratifies the conduct involved;

(2) the lawyer is a *partner* or has comparable managerial authority in the *law firm* or government agency in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.

Comment

[1] [RESERVED]

[2] Lawyers with managerial authority within a firm or government agency should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or government agency will conform to the Ohio Rules of Professional Conduct. Such policies and procedures could include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[3] Other measures may be advisable depending on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the firm's policies may be appropriate. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be prudent. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and lawyers with managerial authority should not assume that all lawyers associated with the firm will inevitably conform to the rules. These principles apply to lawyers practicing in government agencies.

[4] Division (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Division (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm or government agency, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Lawyers with managerial authority have at least indirect responsibility for all work being done by the firm or government agency, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm or government agency lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] [RESERVED]

[7] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm or government agency to abide by the Ohio Rules of Professional Conduct. See Rule 5.2(a).

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.1

Comparison to ABA Model Rules of Professional Conduct

Rule 5.1 revises Model Rule 5.1 to delete divisions (a) and (b) and insert references to "government agency" in division (c)(2) and the corresponding comments. Some of the principles contained in Model Rule 5.1(a) and (b) are retained as aspirational provisions of the comments. The addition of "government agency" is consistent with deletion of the reference to "government" in Rule 1.0, Comment [3] and the addition of Rule 1.0, Comment [4A]. One sentence from Comment [3] is deleted in light of Ohio's mandatory continuing legal education requirements.

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable* resolution of a question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the resolution is unclear, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.2.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.2 contains one change from Model Rule 5.2. Division (b) is revised to strike the word "arguable." Some wording in Comment [2] is altered to clarify the duty of a supervising attorney to resolve close calls.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a *law firm* or government agency shall make *reasonable* efforts to ensure that the *firm* or government agency has in effect measures giving *reasonable* assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

(1) the lawyer orders or, with the *knowledge* of the specific conduct, ratifies the conduct involved;

(2) the lawyer has managerial authority in the *law firm* or government agency in which the person is employed, or has direct supervisory authority over the person, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.

Comment

[1] Division (a) requires lawyers with managerial authority within a law firm or government agency to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm or government agency, and nonlawyers outside the firm or agency who work on firm or agency matters, will act in a way compatible with the professional obligations of the lawyer. See Rule 1.1, Comment [6]. Division (b) applies to lawyers who have supervisory authority. Division (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer, within or outside the firm or government agency, that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers within the Firm or Agency

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The

measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm or Agency

[3] A lawyer may use nonlawyers outside the firm or government agency to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, or using an Internet-based service to store client information. When using such services outside the firm or agency, the lawyer must make reasonable efforts to ensure that the services are provided in a manner compatible with the lawyer's professional obligations. The extent of the obligation to make reasonable efforts will depend on the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm or agency, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] When the client directs the selection of a particular nonlawyer service provider outside the firm or agency, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these rules.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.3. DR 4-101(D) and EC 4-2 speak to a lawyer's obligation in selecting and training secretaries so that a client's confidences and secrets are protected. The Supreme Court of Ohio cited Model Rule 5.3 with approval as establishing a lawyer's duty to maintain a system of office procedure that ensures delegated legal duties are completed properly. See *Disciplinary Counsel v. Ball* (1993), 67 Ohio St.3d 401 and *Mahoning Cty. Bar Assn v. Lavelle*, 107 Ohio St.3d 92, 2005-Ohio-5976.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.3 is similar to the Model Rule with changes to conform the rule and comments to Rule 5.1.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or *law firm* shall not share legal fees with a nonlawyer, except in any of the following circumstances:

(1) an agreement by a lawyer with the lawyer's *firm*, *partner*, or associate may provide for the payment of money, over a *reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or *law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter;

(5) a lawyer may share legal fees with a nonprofit organization that recommended employment of the lawyer in the matter, if the nonprofit organization complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if any of the following applies:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a *reasonable* time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation;

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in division (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Comparison to former Ohio Code of Professional Responsibility

Rule 5.4 addresses the same subject addressed by DR 3-102(A), which prohibits dividing fees with nonlawyers, DR 3-103 and DR 5-107(C), which prohibit forming a partnership or practicing in a professional corporation with nonlawyers, and DR 5-107(B), which prohibits direction or regulation of a lawyer's professional judgment by any person who recommends, employs, or pays the lawyer to render legal services to another.

Rule 5.4 is not intended to change any of the provisions in the Ohio Code. Slight modifications in language between Ohio Code provisions and the Model Rule are intended to promote clarity of meaning. Rule 5.4(a) is substantially the same as DR 3-102(A). Rule 5.4(b) is identical to DR 3-103. Rule 5.4(c) is substantially the same as DR 5-107(B). Rule 5.4(d) is substantially the same as DR 5-107(C).

Comparison to ABA Model Rules of Professional Conduct

Rule 5.4(a) contains two changes from the Model Rule. Division (a)(4) is modified to retain the ability of a lawyer to share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter.

Division (a)(5) is added to limit the ability of a lawyer to share legal fees with a nonprofit organization that recommended employment of the lawyer. Unlike Model Rule 5.4, the Ohio version of the rule limits the ability of a lawyer to share legal fees under these circumstances to nonprofit organizations that comply with provisions of the Supreme Court Rules for the Government of the Bar of Ohio that regulate lawyer referral and information services. See Gov. Bar R. XVI.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW; REMOTE PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

(1) the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or *reasonably* expects to be so authorized;

(3) the services are *reasonably* related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6;

(4) the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction, provided the lawyer does not do any of the following:

(i) solicit or accept clients for representation within this jurisdiction or appear before Ohio tribunals, except as otherwise authorized by rule or law;

(ii) state, imply, or hold himself or herself out as an Ohio lawyer or as being admitted to practice law in Ohio;

(iii) violate the provisions of Rules 5.4, 7.1, and 7.5.

(e) A lawyer who is practicing pursuant to division (d)(2) or (4) of this rule and the lawyer's law firm shall indicate the jurisdictional limitations of the lawyer. If any Ohio presence is indicated on any lawyer or law firm materials available for public view, such as the lawyer's letterhead, business cards, website, advertising materials, fee agreement, or office signage, the lawyer and the law firm should affirmatively state the lawyer is not admitted to practice law in Ohio. See also Rule 7.1 and 7.5.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are

authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law of this jurisdiction. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of divisions (d)(1) through (d)(4), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII,

Section 1(A), as "a court, legislative body, administrative agency, or other body acting in an adjudicative capacity."

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a tribunal, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the tribunal. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Division (d) identifies four circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) through (d)(4), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Lawyers practicing remotely in Ohio must determine whether additional safeguards are necessary to comply with their duties of confidentiality, competence, and supervision, including, without limitation, their use of technology to facilitate working remotely. These measures may include ensuring secure transmission of information to the lawyer's remote computer; procedures to securely store and back up confidential information; mitigation of an inadvertent disclosure of confidential information; and security of remote forms of communication to minimize risk of interference or breach.

[17] If a lawyer employed by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration requirements set forth in Gov. Bar R. VI, Section 3.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or Ohio law, which includes statute, court rule, executive regulation, or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Divisions (c) and (d) do not authorize communications advertising legal services in Ohio by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in Ohio is governed by Rules 7.1 to 7.5.

[22] Division (d)(4) allows an attorney admitted in another United States jurisdiction to practice the law of that jurisdiction while working remotely from Ohio. A lawyer practicing remotely will not be found to have engaged in the unauthorized practice of law in Ohio based solely on the lawyer's physical presence in Ohio, though the lawyer could through other conduct violate the rules governing the unauthorized practice of law. A lawyer practicing remotely in Ohio must continue to comply with the rules of the lawyer's home jurisdiction regarding client trust accounts, and any client property consisting of funds should be handled as if the lawyer were located in the lawyer's home jurisdiction.

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

Pro hac vice admission of an out-of-state lawyer to represent a client before a tribunal was formerly a matter within the sole discretion of the tribunal before which the out-of-state lawyer sought to appear, without any registration requirements. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Effective January 1, 2011, however, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 for the more general language used in the Model Rule. Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a "systematic and continuous" presence, as that term is used in division (b).

Comments [9] and [11] are modified effective January 1, 2011, to recognize Gov. Bar R. XII, which also became effective on that date. Gov. Bar R. XII governs *pro hac vice* registration and defines "tribunal" for purposes of such registrations.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making either of the following:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a claim or controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Division (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Division (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim or controversy.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Comparison to former Ohio Code of Professional Responsibility

Rule 5.6 is analogous to DR 2-108.

Rule 5.6(a) tracks DR 2-108(A) by prohibiting restrictive agreements, except in conjunction with payment of retirement benefits. Unlike DR 2-108(A), however, Rule 5.6(a) does not reference an exception in conjunction with a sale of a law practice, as that situation is addressed separately in Rule 1.17.

Rule 5.6(b) is substantially similar to DR 2-108(B), except that Rule 5.6(b) prohibits restrictive agreements in connection with settling "a claim or controversy." DR 2-108(B) uses the phrase "controversy or suit."

Comparison to ABA Model Rules of Professional Conduct

Rule 5.6(b) is modified to track current Ohio prohibitions relative to restrictive agreements. Specifically, Model Rule 5.6(b) prohibits restrictive agreements only in conjunction with the settlement of a "client controversy." The Ohio version of Rule 5.6(b) does not limit the prohibition in conjunction with settling a claim on behalf of a client but, instead, prohibits restrictive agreements in conjunction with any "claim or controversy."

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Ohio Rules of Professional Conduct with respect to the provision of law-related services, as defined in division (e) of this rule, if the law-related services are provided in either of the following circumstances:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;

(2) in other circumstances by an entity controlled or owned by the lawyer individually or with others, unless the lawyer takes *reasonable* measures to ensure that a person obtaining the law-related services *knows* that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business. A lawyer who controls or owns an interest in a business that provides law-related services shall disclose the interest to a customer of that business, and the fact that the customer may obtain legal services elsewhere, before performing legal services for the customer.

(c) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require the lawyer's client to agree to use that business as a condition of the engagement for legal services. A lawyer who controls or owns an interest in a business that provides a law-related service shall disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, before providing the law-related services to the client.

(d) Limitations or obligations imposed by this rule on a lawyer shall apply to both of the following:

(1) every lawyer in a *firm* who *knows* that another lawyer in his or her *firm* controls or owns an interest in a business that provides a law-related service;

(2) every lawyer in a *firm* that controls or owns an interest in a business that provides a law-related service.

(e) The term "law-related services" denotes services that might *reasonably* be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services, sometimes referred to as "ancillary business," or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Ohio Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, *e.g.,* Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Ohio Rules of Professional Conduct as provided in division (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Ohio Rules of Professional Conduct apply to the lawyer as provided in division (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations or owns an interest in the entity, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Ohio Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in division (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Ohio Rules of Professional Conduct, the lawyer should communicate to the

person receiving the law-related services, in a manner sufficient to ensure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

[8] A lawyer should take special care to keep separate the provision of law-related and legal services to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by division (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Ohio Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest [Rules 1.7 to 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)], and scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 to 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Ohio Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4.

[12] Division (d) makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer knows that another lawyer in the firm controls or owns an interest in a business that provides law-related services, and every lawyer in a firm that controls or owns an interest in a business that provides law-related services.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility contains no provision analogous to Rule 5.7. However, the rule is consistent with Advisory Opinion No. 94-7 of the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.7(a)(2) is expanded to include a lawyer who owns an interest in an entity, in addition to a lawyer who controls an entity.

Added to Rule 5.7 are divisions (b) and (c), which contain reciprocal prohibitions and disclosures when a lawyer controls or owns an interest in a business that provides law-related services. Specifically, division (b) prohibits a lawyer who controls or owns an interest in a business that provides a law-related service from requiring customers of the business to agree to legal representation by the lawyer as a condition of engagement of the law-related services. Additionally, prior to performing legal services for a customer of a business that provides law-related services, division (b) requires the lawyer to notify the customer that the customer may obtain legal services elsewhere.

Conversely, division (c) prohibits a lawyer who controls or owns an interest in a business that provides law-related services from requiring a client to use the services of the law-related business as a condition of the engagement for legal services. Additionally, a lawyer who controls or owns an interest in a business that provides law-related services must disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, prior to providing the law-related services to the client.

Rule 5.7 also includes a new division (d), which makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to (1) all lawyers in a lawyer's firm who know about the lawyer's interest in a law-related business, and (2) all lawyers who work in a firm that controls or owns an interest in a business that provides a law-related service.

Model Rule 5.7(b) has been redesignated as division (e) with no substantive changes.

VI. PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Note

The Supreme Court of Ohio has deferred consideration of Model Rule 6.1 in light of recommendations contained in the final report of the Supreme Court Task Force on Pro Se and Indigent Representation and recommendations from the Ohio Access to Justice Foundation.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a court to represent a person except for good cause, such as either of the following:

(a) representing the client is likely to result in violation of the Ohio Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Comparison to former Ohio Code of Professional Responsibility

Rule 6.2 is similar to Ohio Code of Professional Responsibility EC 2-25 through EC 2-32, Acceptance and Retention of Employment, and, in particular, EC 2-28.

Comparison to ABA Model Rules of Professional Conduct

Stricken from Rule 6.2 is division (c) of the Model Rule, the substance of which is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client. In addition, the word "court" is substituted for "tribunal" in the first line of the rule to reflect that the inherent authority to make appointments is limited to courts and does not extend to other bodies included within the Rule 1.0(o) definition of "tribunal."

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Note

ABA Model Rule 6.3 is not adopted in Ohio. The substance of Model Rule 6.3 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest, including Rule 1.7(a) [Conflicts of Interest: Current Clients].

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Note

ABA Model Rule 6.4 is not adopted in Ohio. The substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to both of the following:

(1) Rules 1.7 and 1.9(a) only if the lawyer *knows* that the representation of the client involves a conflict of interest;

(2) Rule 1.10 only if the lawyer *knows* that another lawyer associated with the lawyer in a *law firm* is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in division (a)(2) of this rule, Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See *e.g.,* Rules 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must communicate with the client, preferably in writing, regarding the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Ohio Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, division (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, division (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by division (a)(2).

Division (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of division (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility does not have a specifically comparable rule regarding short-term limited legal services for programs sponsored by a nonprofit organization or court. Rule 6.5 codifies an exception to the general conflict provisions of Rule 1.7 (formerly DR 5-105) in order to encourage lawyers in firms to participate in short-term legal service projects sponsored by courts or nonprofit organizations.

Comparison to ABA Model Rules of Professional Conduct

Rule 6.5 contains no substantive changes to the Model Rule.

VII. INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] Characterization of rates or fees chargeable by the lawyer or law firm such as "cut-rate," "lowest," "giveaway," "below cost," "discount," or "special" is misleading.

[5] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the DR 2-101 prohibition on unverifiable claims.

In addition, Rule 7.1 contains none of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see comment [2] of Rule 7.1), or the directives found in DR 2-101(D), (E), and (G).

For DR 2-101(F) and DR 2-101(H) see Rule 7.3.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.1 is similar to Model Rule 7.1 except for the inclusion of a prohibition on the use of nonverifiable communications about the lawyer or the lawyer's services.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through *written*, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay any of the following:

(1) the *reasonable* costs of advertisements or communications permitted by this rule;

(2) the usual charges of a legal service plan;

(3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;

(4) for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or *law firm* responsible for its content.

(d) A lawyer shall not seek employment in connection with a matter in which the lawyer or *law firm* does not intend to participate actively in the representation, but that the lawyer or *law firm* intends to refer to other counsel. This provision shall not apply to organizations listed in Rules 7.2(b)(2) or (3) or if the advertisement is in furtherance of a transaction permitted by Rule 1.17.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names

of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, advertising going beyond specified facts about a lawyer, or "undignified" advertising. Television, the Internet, and other forms of electronic communication are among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, or other forms of electronic advertising would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as provided by these rules, lawyers are not permitted to give anything of value to another for recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. A reciprocal referral agreement between lawyers, or between a lawyer and a nonlawyer, is prohibited. *Cf.* Rule 1.5.

[5A] Division (b)(1) allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, including Internet-based client leads, provided the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5 and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer shall not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rules 5.3 and 8.4(a).

[6] A lawyer may pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or

malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a nonprofit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved pursuant to Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Relative to fee sharing, see Rule 5.4(a)(5).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from the advertising and solicitation rules contained in DR 2-101 through DR 2-104.

The following are provisions of DR 2-101 that have not been included in Rule 7.1, 7.2, or 7.3:

- The specific reference to types of fees or descriptions, such as "give-away" or "below cost" found in DR 2-101(A)(5), although Rule 7.1, Comment [4] specifically indicates that these characterizations are misleading;
- Specific references to media types and words, as set forth in DR 2-101(B)(1) and (2);
- Specific reference that brochures or pamphlets can be disclosed to "others" as set forth in DR 2-101(B)(3);
- The list of items that were permissible for inclusion in advertising, contained in DR 2-101(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.2(b)(3) is modified to remove a reference to a qualified legal referral service and substitute a reference to the lawyer referral service provisions contained in Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Rule 7.2 does not include Model Rule 7.2(b)(4) and thus prohibits reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Rule 7.2(d) is added to incorporate the prohibition contained in DR 2-101(A)(2) relative to soliciting employment where the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

(1) the person contacted is a lawyer;

(2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by *written*, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if any of the following applies:

(1) the person being solicited has made *known* to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment;

(3) the lawyer *knows* or *reasonably should know* that the person to whom the communication is addressed is a minor or an incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every *written*, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer *reasonably believes* to be in need of legal services in a particular matter shall comply with all of the following:

(1) Disclose accurately and fully the manner in which the lawyer or *law firm* became aware of the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(d) Prior to making a communication soliciting professional employment pursuant to division (c) of this rule to a party who has been named as a defendant in a civil action, a lawyer or *law firm* shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of the court in which the action was filed to determine whether mail, personal, or residence

service has been perfected or whether service by publication has been completed. Division (d) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(e) If a communication soliciting professional employment from anyone is sent within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" shall be included with the communication.

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. It is important for you to consider the following:

1. Make and keep records - If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.

2. You do not have to sign anything - You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. Your interests versus interests of insurance company - Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.

4. There is a time limit to file an insurance claim - Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.

5. Get it in *writing* - You may want to request that any offer of settlement from anyone be put in *writing*, including a *written* explanation of the type of damages which they are willing to cover.

6. Legal assistance may be appropriate - You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights

against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. How to find an attorney - If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer, or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages or on the Internet.

8. Check a lawyer's qualifications - Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. How much will it cost? - In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

    a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

    b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

    c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

***THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.**

(f) Notwithstanding the prohibitions in division (a) of this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not *known* to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is (a) directed to the general public, such as through a billboard, an Internet-based advertisement, a web site, or a commercial, (b) in response to a request for information, or (c) automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject the person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since a lawyer has alternative means of conveying necessary information to those who may be in need of legal services. Communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communication make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the person's judgment. In using any telephone or other electronic communication, a lawyer remains subject to all applicable state and federal telemarketing laws and regulations.

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, division (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service

organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to members or beneficiaries.

[6] Even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient may violate Rule 7.3(b).

[7] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] None of the requirements of Rule 7.3 applies to communications sent in response to requests from clients or others. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a person known to be in need of legal services within the meaning of this rule.

[8A] The use of written, recorded, and electronic communications to solicit persons who have suffered personal injuries or the loss of a loved one can potentially be offensive. Nonetheless, it is recognized that such communications assist potential clients in not only making a meaningful determination about representation, but also can aid potential clients in recognizing issues that may be foreign to them. Accordingly, the information contained in division (e) must be communicated when the solicitation occurs within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

[9] Division (f) of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, division (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of

affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Comparison to former Ohio Code of Professional Responsibility

Rule 7.3 embraces the provisions of DR 2-104(A), DR 2-101(F) and DR 2-101(H), with modifications.

At division (c), the rule broadens the types of communications that are permitted by authorizing the use of recorded telephone messages and electronic communication via the Internet. Further, in keeping with the new methods of communication that are authorized, the provisions of DR 2-101(F) regarding disclosures are incorporated and modified to apply to all forms of permissible direct solicitations.

The provisions of DR 2-101(F)(2) have been incorporated in division (c) and modified to reduce the micromanagement of lawyer contact, which previously had been the subject of abuse, by requiring that the disclaimers "ADVERTISEMENT ONLY" and "ADVERTISING MATERIAL" be "conspicuously" displayed. The requirements contained in DR 2-101(F)(2)(b) regarding disclaimers of prior acquaintance or contact with the addressee and avoidance of personalization have not been retained.

The provisions of DR 2-101(F)(4) [pre-service solicitation of defendants in civil actions] have been inserted as a new division (d), and the provisions of DR 2-101(H) [solicitation of accident or disaster victims] have been inserted as a new division (e).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.3 contains the following substantive changes to Model Rule 7.3:

- With the modifications discussed above, the requirements placed upon the lawyer involved in the direct solicitation of prospective clients are more stringent than the requirements contained in division (c) of the Model Rule. Because a lawyer is not likely to have actual knowledge [Rule 1.0(g)] of a prospective client's need for legal services, the Model Rule standard contained in division (c) is changed to "* * * soliciting professional employment from a prospective client whom the lawyer *reasonably believes* to be in need of legal services * * *." See Rule 1.0(j).

- Division (d), regarding preservice solicitation of defendants in civil actions, has been inserted.

- Division (e), regarding direct solicitation requirements respecting solicitation of accident or disaster victims and their families, has been inserted.

Added to the rule is Comment [7A], which discusses the rationale for inclusion of the new division (e).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or limits his or her practice to or concentrates in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a *substantially* similar designation.

(c) A lawyer engaged in trademark practice may use the designation "Trademarks," "Trademark Attorney," or a *substantially* similar designation.

(d) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a *substantially* similar designation.

(e) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, unless both of the following apply:

(1) the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists;
(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Division (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Divisions (b) and (c) recognize the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the office. Division (d) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Division (e) permits a lawyer to state that the lawyer is a specialist in a field of law if such certification is granted by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.4 is comparable to DR 2-105 except that it permits a lawyer to state that he or she is a "specialist," practices a "specialty," or "specializes in" particular fields, subject to the "false and misleading" standard contained in Rule 7.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.4(a) is modified to include the existing ability of a lawyer to indicate that the lawyer's practice is limited to or concentrates in particular fields of law. Division (c) is added from DR 2-105(A)(1) and the remaining divisions are relettered.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a *firm* name, letterhead or other professional designation that violates Rule 7.1. A lawyer in private practice shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a *firm* name containing surnames other than those of one or more of the lawyers in the *firm*, except that the name of a professional corporation or association, legal clinic, limited liability company, or limited liability partnership shall contain symbols indicating the nature of the organization as required by Gov. Bar R. III. If otherwise lawful, a *firm* may use as, or continue to include in, its name the surname of one or more deceased or retired members of the *firm* or of a predecessor *firm* in a continuing line of succession.

(b) A *law firm* with offices in more than one jurisdiction that lists attorneys associated with the *firm* shall indicate the jurisdictional limitations on those not licensed to practice in Ohio.

(c) The name of a lawyer holding a public office shall not be used in the name of a *law firm*, or in communications on its behalf, during any *substantial* period in which the lawyer is not actively and regularly practicing with the *firm*.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of the surname of a deceased partner to designate law firms is a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a nonlawyer.

[2] With regard to division (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. The use of a disclaimer such as "not a partnership" or "an association of sole practitioners" does not render the name or designation permissible.

[3] A lawyer may be designated "Of Counsel" if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.

[4] A legal clinic operated by one or more lawyers may be organized by the lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office may include the phrase "legal clinic" or words of similar import. The name of any active lawyer in the clinic may be retained in the name of the legal clinic after the lawyer's death,

retirement, or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, and profits or losses cannot be shared with, nonlawyers or lawyers who are not actively engaged in the practice of law in the organization.

Comparison to former Ohio Code of Professional Responsibility

With the exception of DR 2-102(E) and (F), Rule 7.5 is comparable to DR 2-102.

The provisions of DR 2-102(E), which prohibits truthful statements about a lawyer's actual businesses and professions, are not included in Rule 7.5. The Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees.

DR 2-102(F) is an exception to DR 2-102(E) and is unnecessary in light of the decision to not retain DR 2-102(E).

Comment [3] is substantially the same as the Ohio provision on the "of counsel" designation.

Comment [4] addresses the restrictions of DR 2-102(G) relative to operating a "legal clinic" and using the designation "legal clinic."

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

Note

ABA Model Rule 7.6 is not adopted in Ohio. The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law, particularly R.C. 102.03(F) and (G), and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) *knowingly* make a false statement of material fact;

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omit a material fact in connection with a disciplinary investigation of the lawyer's own conduct. Rule I of the Supreme Court Rules for the Government of the Bar of Ohio addresses the obligations of applicants for admission to the bar.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.1 is comparable to DR 1-101.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.1 differs from Model Rule 8.1 in two respects.

Rule 8.1(a) is modified to strike the provision that would make the rule applicable to bar applicants. The constraints and obligations placed upon applicants for admission to the bar are more appropriately and distinctly addressed in Rule I of the Supreme Court Rules for the Government of the Bar of Ohio.

Rule 8.1(b) is modified for clarity. The clause, "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter," is too unwieldy and creates a standard too difficult for explanation and comprehension. The elimination of that clause does not lessen the standard of candor expected of a lawyer in bar admission or disciplinary matters.

RULE 8.2: JUDICIAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

(c) A lawyer who is a retired or former judge or magistrate may use a title such as "justice," "judge," "magistrate," "Honorable" or "Hon." when the title is preceded or followed by the word "retired," if the lawyer retired in good standing with the Supreme Court, or "former," if the lawyer, due to the loss of an election, left judicial office in good standing with the Supreme Court.

(d) A lawyer who is a retired or former judge shall not state or imply that the lawyer's former service as a judge enables the lawyer to improperly influence any person or entity, including a government agency or official, or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] [RESERVED]

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

[4] This rule controls over any conflicts with Advisory Opinion 93-8 and Advisory Opinion 2013-3 of the Board of Commissioners on Grievances and Discipline.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule. Rule 8.2(b) corresponds to DR 1-102(A)(1).

Comparison to ABA Model Rules of Professional Conduct

Rule 8.2(a) has been modified from the Model Rule to remove the phrase "public legal officers." Those officers are not included in DR 8-102, and disciplinary authorities should not be responsible for investigating statements made during campaigns for county attorney, attorney

general, or any other public legal position. The title of Rule 8.2 is modified to reflect this revision. Rule 8.2(b) is recast in terms of an express prohibition consistent with DR 1-102(A)(1).

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are

in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 20 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. Effective January 1, 2011, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Division (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Division (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, division (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule. With respect to conflicts of interest and determining a lawyer's reasonable belief pursuant to division (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that division may be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility has no provision analogous to Rule 8.5.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.5 is substantively identical to Model Rule 8.5. Comment [1A] is modified, effective January 1, 2011, to reflect Ohio law regarding extension of *pro hac vice* status to out-of-state lawyers.

Form of Citation, Effective Date, Application

(a) These rules shall be known as the Ohio Rules of Professional Conduct and cited as “Prof. Cond. Rule _____.”

(b) The Ohio Rules of Professional Conduct shall take effect February 1, 2007, at which time the Ohio Rules of Professional Conduct shall supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of lawyers occurring on or after that effective date. The Ohio Code of Professional Responsibility shall continue to apply to govern conduct occurring prior to February 1, 2007 and shall apply to all disciplinary investigations and prosecutions relating to conduct that occurred prior to February 1, 2007.

(c) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5(d) and Comment [17] of the Ohio Rules of Professional Conduct effective September 1, 2007.

(d) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 7.4 of the Ohio Rules of Professional Conduct effective April 1, 2009.

(e) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.15 of the Ohio Rules of Professional Conduct effective January 1, 2010.

(f) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 5.5 and 8.5 of the Ohio Rules of Professional Conduct effective January 1, 2011.

(g) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.4, Comment [8], and 7.5 of the Ohio Rules of Professional Conduct effective January 1, 2012.

(h) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 8.2(c) and (d) and Comment [4] of the Ohio Rules of Professional Conduct effective June 1, 2014.

(i) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.3, Comment [5], 1.17(e)(5), and 8.5, Comment [1] of the Ohio Rules of Professional Conduct effective January 1, 2015.

(j) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.0, 1.1, 1.4, 1.6, 1.12, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, 7.3, and 8.5 effective April 1, 2015.

(k) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5 effective December 1, 2015.

(l) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.7, Comment [36] effective March 15, 2016.

(m) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.2(d) and Comments [9] and [12] of the Ohio Rules of Professional Conduct effective September 20, 2016.

(n) The Supreme Court of Ohio adopted amendments to Prof. Cond. R. 1.13, Comment [6] of Prof.Cond.R. 1.13, and Comment [15] of Prof. Cond. R. 5.5 effective May 2, 2017.

(o) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.15 and 6.1 effective February 11, 2020.

(p) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 7.5 and Comments [1] and [4] of Prof. Cond. R. 7.5 effective June 17, 2020.

(q) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5 and Comments [4], [5], [15], [16], and [22] of Prof. Cond. R. 5.5 effective September 1, 2021.

APPENDIX A

CORRELATION TABLE
OHIO RULES OF PROFESSIONAL CONDUCT TO
OHIO CODE OF PROFESSIONAL RESPONSIBILITY

The following is a numerical listing of the Ohio Rules of Professional Conduct with cross-references to provisions of the Ohio Code of Professional Responsibility or other Ohio law that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility or other Ohio law has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

Ohio Rules of Professional Conduct	Ohio Code of Professional Responsibility or Other Law
Rule 1.1 Competence	DR 6-101(A)(1) & (2)
Rule 1.2 Scope of Representation and Allocation of Authority	
Rule 1.2(a)	DR 7-101(A)(1), EC 7-7, 7-8, 7-10
Rule 1.2(c)	None
Rule 1.2(d)	DR 7-102(A)(7); EC 7-4
Rule 1.2(e)	DR 7-105
Rule 1.3 Diligence	DR 6-101(A)(3), 7-101(A)(1)
Rule 1.4 Communication	
Rule 1.4(a) & (b)	EC 7-8, 9-2
Rule 1.4(c)	DR 1-104
Rule 1.5 Fees and Expenses	
Rule 1.5(a)	DR 2-106(A) & (B)
Rule 1.5(b)	EC 2-18
Rule 1.5(c)	EC 2-18; R.C. 4705.15
Rule 1.5(d)	DR 2-106(C); EC 2-19
Rule 1.5(e) & (f)	DR 2-107
Rule 1.6 Confidentiality	
Rule 1.6(a)	DR 4-101(A), (B), & (C)(1)
Rule 1.6(b)(1)	None
Rule 1.6(b)(2)	DR 4-101(C)(3)
Rule 1.6(b)(3)	DR 7-102(B)(1)
Rule 1.6(b)(4)	None
Rule 1.6(b)(5)	DR 4-101(C)(4)

Rule 1.6(b)(6)	DR 4-101(C)(2)
Rule 1.6(c)	None
Rule 1.7 Conflict of Interest: Current Clients	DR 5-101(A)(1), 5-105(A), (B), & (C)
Rule 1.8 Conflict of Interest: Current Clients: Specific Rules	
Rule 1.8(a)	DR 5-104(A); *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65
Rule 1.8(b)	DR 4-101(B)(2)
Rule 1.8(c)	DR 5-101(A)(2) & (3)
Rule 1.8(d)	DR 5-104(B)
Rule 1.8(e)	DR 5-103(B)
Rule 1.8(f)(1), (2), & (3)	DR 5-107(A) & (B)
Rule 1.8(f)(4)	None
Rule 1.8(g)	DR 5-106
Rule 1.8(h)	DR 6-102; *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431
Rule 1.8(i)	DR 5-103(A)
Rule 1.8(j)	*Cleveland Bar Assn v. Feneli* (1996), 86 Ohio St. 3d 102 & *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261
Rule 1.8(k)	DR 5-105(D)
Rule 1.9 Duties to Former Clients	DR 4-101(B); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.10 Imputation of Conflicts of Interest: General Rule	DR 5-105(D); *Kala v. Aluminum Smelting & Refining Co*. (1998), 81 Ohio St. 3d 1
Rule 1.11 Special Conflicts of Interest for Former and Current Governmental Employees	DR 9-101(B)
Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third Party Neutral	DR 9-101(A) & (B); EC 5-21
Rule 1.13 Organization as Client	EC 5-19
Rule 1.14 Client With Diminished Capacity	EC 7-11 & 7-12

Rule 1.15 Safekeeping Property	
Rule 1.15(a)	DR 9-102
Rule 1.15(b)	DR 9-102(A)(1)
Rule 1.15(c)	DR 9-102(A)
Rule 1.15(d), (e), (f), & (g)	None
Rule 1.15(h)	DR 9-102(D) & (E)
Rule 1.16 Terminating Representation	
Rule 1.16(a)	DR 2-110(B)
Rule 1.16(b)	DR 2-110(A)(2), (C)(1), (C)(2), (C)(5), (C)(6), & (C)(7)
Rule 1.16(c)	DR 2-110(A)(1)
Rule 1.16(d)	DR 2-110(A)(2)
Rule 1.16(e)	DR 2-110(A)(3)
Rule 1.17 Sale of Law Practice	DR 2-111
Rule 1.18 Duties to Prospective Client	EC 4-1; *Cuyahoga Cty Bar Assn v. Hardiman* (2003), 100 Ohio St.3d 260
Rule 2.1 Advisor	EC 7-8
Rule 2.3 Evaluation for Use by Third Persons	None
Rule 2.4 Lawyer Serving as Arbitrator, Mediator, or Third-Party Neutral	EC 5-21
Rule 3.1 Meritorious Claims and Contentions	DR 7-102(A)(2); EC 7-25
Rule 3.3 Candor Toward the Tribunal	
Rule 3.3(a)	DR 7-102(A)(1), (4), & (5) & 7-106(B)(1)
Rule 3.3(b)	DR 7-102(B)
Rule 3.3(c)	DR 7-106(B)
Rule 3.3(d)	None
Rule 3.4 Fairness to Opposing Party and Counsel	
Rule 3.4(a)	DR 7-102(A)(8) & 7-109(A); EC 7-27

Rule 3.4(b)	DR 7-102(A)(6) & 7-109(C); EC 7-26 & 7-28
Rule 3.4(c)	DR 7-106(A)
Rule 3.4(d)	DR 7-106(C)(7); EC 7-25
Rule 3.4(e)	DR 7-106(C)(1) & (4); EC 7-24
Rule 3.4(g)	DR 7-109(B); EC 7-27
Rule 3.5 Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	DR 7-106(C)(6), 7-108(A) & (B), & 7-110
Rule 3.5(b)	DR 7-108(G)
Rule 3.6 Trial Publicity	DR 7-107
Rule 3.7 Lawyer as Witness	DR 5-101(B) & 5-102
Rule 3.8 Special Responsibilities of Prosecutor	
Rule 3.8(a)	DR 7-103(A)
Rule 3.8(d)	DR 7-103(B), EC 7-13
Rule 3.8(e)	None
Rule 3.8(g)	None
Rule 3.9 Advocate in Nonadjudicative Proceedings	None
Rule 4.1 Truthfulness in Statements to Others	
Rule 4.1(a)	DR 7-102(A)(5)
Rule 4.1(b)	DR 7-102(A)(3) & 7-102(B)(1)
Rule 4.2 Communication with Person Represented by Counsel	DR 7-104(A)(1)
Rule 4.3 Dealing with Unrepresented Persons	DR 7-104(A)(2)
Rule 4.4 Respect for Rights of Third Persons	
Rule 4.4(a)	DR 7-102(A)(1), 7-106(C)(2), & 7-108(D) & (E)
Rule 4.4(b)	None

Rule 5.1 Responsibilities of Partners and Supervisory Lawyers	None
Rule 5.2 Responsibilities of a Subordinate Lawyer	None
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants	DR 4-101(D); EC 4-2; *Disciplinary Counsel v. Ball* (1993), 67 Ohio St. 3d 401 & *Mahoning Cty. Bar Assn v. Lavelle* (2005), 107 Ohio St.3d 92
Rule 5.4 Professional Independence of a Lawyer	
Rule 5.4(a)	DR 3-102(A)
Rule 5.4(b)	DR 3-103
Rule 5.4(c)	DR 5-107(B)
Rule 5.4(d)	DR 5-107(C)
Rule 5.5 Unauthorized Practice of Law	
Rule 5.5(a)	DR 3-101
Rule 5.5(b)	None
Rule 5.5(c)	None
Rule 5.5(d)	None
Rule 5.6 Restrictions on Right to Practice	
Rule 5.6(a)	DR 2-108(A)
Rule 5.6(b)	DR 2-108(B)
Rule 5.7 Responsibilities Regarding Law-Related Services	None
Rule 6.2 Accepting Appointments	EC 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-31, & 2-32
Rule 6.5 Non-Profit and Court Annexed Limited Legal Service Programs	None
Rule 7.1 Communications Concerning a Lawyer's Services	DR 2-101

Rule 7.2 Advertising and Recommendation of Professional Employment	DR 2-101, 2-103, & 2-104(B)
Rule 7.3 Direct Contact with Prospective Clients	DR 2-104(A)
Rule 7.3(a)	DR 2-101(F)(1)
Rule 7.3(b)	None
Rule 7.3(c)	DR 2-101(F)(2)
Rule 7.3(d)	DR 2-101(F)(4)
Rule 7.3(e)	DR 2-101(H)
Rule 7.3(f)	DR 2-103(D)(4)
Rule 7.4 Communication of Fields of Practice and Specialization	DR 2-105
Rule 7.5 Firm Names and Letterheads	DR 2-102
Rule 8.1 Bar Admission and Disciplinary Matters	DR 1-101
Rule 8.2 Judicial Officials	
Rule 8.2(a)	DR 8-102
Rule 8.2(b)	DR 2-102(A)(1)
Rule 8.3 Reporting Professional Misconduct	DR 1-103
Rule 8.4 Misconduct	
Rule 8.4(a)	DR 1-102(A)(1) & (2)
Rule 8.4(b)	DR 1-102(A)(3)
Rule 8.4(c)	DR 1-102(A)(4)
Rule 8.4(d)	DR 1-102(A)(5)
Rule 8.4(e)	DR 1-102(A)(5) & 9-101(C)
Rule 8.4(f)	DR 1-102(A)(5)
Rule 8.4(g)	DR 1-102(B)
Rule 8.4(h)	DR 1-102(A)(6)
Rule 8.5 Disciplinary Authority, Choice of Law	None

APPENDIX B

CORRELATION TABLE
OHIO CODE OF PROFESSIONAL RESPONSIBILITY TO OHIO MODEL RULES OF PROFESSIONAL CONDUCT

The following is a numerical listing of the Ohio Code of Professional Responsibility with cross-references to provisions of the Ohio Rules of Professional Conduct that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

Ohio Code of Professional Responsibility	Ohio Rules of Professional Conduct
CANON 1	
DR 1-101 Maintaining Integrity and Competence of the Legal Profession	Rule 8.1
DR 1-102 Misconduct	
DR 1-102(A)(1)	Rules 8.2(b) & 8.4(a)
DR 1-102(A)(2)	Rule 8.4(a)
DR 1-102(A)(3)	Rule 8.4(b)
DR 1-102(A)(4)	Rule 8.4(c)
DR 1-102(A)(5)	Rules 8.4(d), (e), & (f)
DR 1-102(A)(6)	Rule 8.4(h)
DR 1-102(B)	Rule 8.4(g)
DR 1-103 Disclosure of Information to Authorities	Rule 8.3
DR 1-104 Disclosure of Information to the Clients	Rule 1.4(c)
CANON 2	
DR 2-101 Publicity	Rules 7.1, 7.2(a), (c), & (d), & 7.3(a), (c), (d), & (e)
DR 2-102 Professional Notices, Letterheads, and Offices	Rules 7.5 & 8.2(b)
DR 2-103 Recommendation of Professional Employment	Rules 7.2 & 7.3(f)

DR 2-104 Suggestion of Need of Legal Services	
DR 2-104(A)	Rule 7.3
DR 2-104(B)	Rule 7.2
DR 2-105 Limitation of Practice	Rule 7.4
DR 2-106 Fees for Legal Services	
DR 2-106(A) & (B)	Rule 1.5(a)
DR 2-106(C)	Rule 1.5(d)
DR 2-107 Division of Fees Among Lawyers	Rules 1.5(e) & (f)
DR 2-108 Agreements Restricting the Practice of a Lawyer	Rule 5.6
DR 2-109 Acceptance of Employment	None
DR 2-110 Withdrawal from Employment	Rule 1.16
DR 2-111 Sale of Law Practice	Rule 1.17
CANON 3	
DR 3-101 Aiding Unauthorized Practice of Law	Rule 5.5(a)
DR 3-102 Dividing Legal Fees with a Nonlawyer	Rule 5.4(a)
DR 3-103 Forming a Partnership with a Nonlawyer	Rule 5.4(b)
CANON 4	
DR 4-101 Preservation of Confidences and Secrets of a Client	
DR 4-101(A), (B), & (C)(1)	Rule 1.6(a)
DR 4-101(B)	Rule 1.9
DR 4-101(B)(2)	Rule 1.8(b)
DR 4-101(C)(2)	Rule 1.6(b)(6)
DR 4-101(C)(3)	Rule 1.6(b)(2)
DR 4-101(C)(4)	Rule 1.6(b)(5)
DR 4-101(D)	Rule 5.3

CANON 5

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment	
DR 5-101(A)(1)	Rule 1.7
DR 5-101(A)(2) & (3)	Rule 1.8(c)
DR 5-101(B)	Rule 3.7
DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness	Rule 3.7
DR 5-103 Avoiding Acquisition of Interest in Litigation	
DR 5-103(A)	Rule 1.8(i)
DR 5-103(B)	Rule 1.8(e)
DR 5-104 Limiting Business Relations with a Client	
DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)
DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer	
DR 5-105(A), (B), & (C)	Rule 1.7
DR 5-105(D)	Rules 1.8(k) & 1.10
DR 5-106 Settling Similar Claims of Clients	Rule 1.8(g)
DR 5-107 Avoiding Influence by Others Than the Client	
DR 5-107(A) & (B)	Rule 1.8(f)(1), (2), & (3)
DR 5-107(B) & (C)	Rule 5.4(c) & (d)

CANON 6

DR 6-101 Failing to Act Competently	
DR 6-101(A)(1) & (2)	Rule 1.1
DR 6-101(A)(3)	Rule 1.3
DR 6-102 Limiting Liability to Client	Rule 1.8(h)

CANON 7

DR 7-101 Representing a Client Zealously	
DR 7-101(A)(1)	Rules 1.2(a) & 1.3
DR 7-102 Representing a Client Within the Bounds of the Law	
DR 7-102(A)(1)	Rules 3.3(a)(3) & 4.4(a)
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3), (4), & (5)	Rules 3.3 & 4.1
DR 7-102(A)(4) & (6)	Rule 3.3(a)
DR 7-102(A)(6)	Rule 3.4(b)
DR 7-102(A)(7)	Rule 1.2(d)
DR 7-102(A)(8)	Rule 3.4(a)
DR 7-102(B)	Rules 1.6(b)(3), 3.3(b), & 4.1
DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer	Rule 3.8
DR 7-104 Communicating With One of Adverse Interest	
DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3
DR 7-105 Threatening Criminal Prosecution	Rule 1.2(e)
DR 7-106 Trial Conduct	
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a) & (c)
DR 7-106(C)(1) & (4)	Rule 3.4(e)
DR 7-106(C)(2)	Rule 4.4(a)
DR 7-106(C)(6)	Rule 3.5(a)(6)
DR 7-106(C)(7)	Rule 3.4(d)
DR 7-107 Trial Publicity	Rule 3.6
DR 7-108 Communication With or Investigation of Jurors	
DR 7-108(A) & (B)	Rule 3.5(a)
DR 7-108(D) & (E)	Rule 4.4(a)
DR 7-108(G)	Rule 3.5(b)

DR 7-109 Contact With Witnesses	
DR 7-109(A)	Rule 3.4(a)
DR 7-109(B)	Rule 3.4(g)
DR 7-109(C)	Rule 3.4(b)
DR 7-110 Contact With Officials	Rule 3.5
DR 7-111 Confidential Information	None
CANON 8	
DR 8-101 Action as a Public Official	None
DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers	Rule 8.2(a)
CANON 9	
DR 9-101 Avoiding Even the Appearance of Impropriety	
DR 9-101(A)	Rule 1.12
DR 9-101(B)	Rules 1.11 & 1.12
DR 9-101(C)	Rule 8.4(e)
DR 9-102 Preserving Identity of Funds and Property of a Client	Rule 1.15
Definitions	Rule 1.0

OHIO ETHICAL CONSIDERATIONS ADDRESSED IN OHIO RULES OF PROFESSIONAL CONDUCT

EC 2-18 Agreement with Client with Respect to Fees	Rules 1.5(b) & (c)
EC 2-19 Contingent Fee Arrangements	Rule 1.5(d)(1)
EC 2-25 – 2-32 Acceptance and Retention of Employment	Rule 6.2
EC 4-1 Confidences and Secrets	Rule 1.18
EC 4-2 Confidences and Secrets	Rule 5.3
EC 5-19 Organizational Clients	Rule 1.13
EC 5-21 Arbitrator or Mediator	Rules 1.12 & 2.4
EC 7-4 Construction of Law; Frivolous Conduct	Rule 1.2(d)
EC 7-7 Decision-Making Authority	Rule 1.2(a)
EC 7-8 Informing Client of Relevant Considerations; Withdrawal from Employment	Rules 1.2(a), 1.4(a) & (b), and 2.1
EC 7-10 Zealous Advocacy	Rule 1.2(a)
EC 7-11 Varying Responsibilities Dependent Upon Client	Rule 1.14
EC 7-12 Incompetent Client	Rule 1.14
EC 7-13 Responsibility of Prosecutor	Rule 3.8
EC 7-24 Expression by Attorney of Personal Opinion in Court	Rule 3.4
EC 7-25 Adherence to Procedural Rules	Rules 3.1 & 3.4
EC 7-26 False Testimony	Rule 3.4
EC 7-27 Suppression of Evidence	Rule 3.4
EC 7-28 Fees to Witnesses	Rule 3.4
EC 9-2 Promoting Public Confidence in Legal Profession	Rules 1.4(a) & (b)

2021 IRB LEXIS 480

Administrative, Procedural, and Miscellaneous

US Internal Revenue Service

November 18, 2021

Rev. Proc. 2021-48

Reporter
2021 IRB LEXIS 480 *; Rev. Proc. 2021-48

Revenue Procedure 2021-48

Applicable Sections

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability. (Also Part I, § 61.)

[*1]

Core Terms

forgiveness, taxpayer, Loans, small business, tax-exempt, eligible, COVID Tax Relief Act, expenses, taxable year, entities, gross receipts, eligible recipient, partnership, purposes, costs, income resulting, gross income, tax return, reduction, accrued, deduct

Text

SECTION 1. PURPOSE

This revenue procedure provides that taxpayers may treat amounts that are excluded from gross income (tax-exempt income) in connection with the forgiveness of Paycheck Protection Program (PPP) Loans as received or accrued: (1) as eligible expenses are paid or incurred, (2) when an application for PPP Loan forgiveness is filed, or (3) when PPP Loan forgiveness is granted. To the extent tax-exempt income resulting from the forgiveness of a PPP Loan is treated as gross receipts under a particular Federal tax provision, including but not limited to §§ 448 (c) and 6033 of the Internal Revenue Code (Code), this revenue procedure applies for purposes of determining the timing and, to the extent relevant, reporting of such gross receipts.

SECTION 2. BACKGROUND

.01 Overview.

(1) The PPP is a loan program administered by the U.S. Small Business Administration (SBA) and the Administrator of the SBA (Administrator) as part of the SBA's "7 (a) Loan Program" under § 7 (a) of the Small Business Act (15 U.S.C. § 636 (a)). 1 Congress established the PPP to assist small businesses nationwide adversely impacted by the COVID-19 pandemic in paying payroll costs and other eligible expenses. 2 Under the PPP, the Administrator may guarantee the full principal amount of a "covered loan," as defined **[*2]** in § 7 (a) (36) (A) (ii) of the Small Business Act, which for purposes of the PPP is a loan made under the PPP to an "eligible recipient," as defined in § 7 (a) (36) (A) (iv) of the Small Business Act, during the period beginning on February 15, 2020, and ending on May 31, 2021 (PPP First Draw Loan). 3 Under § 7 (a) (37) of the Small Business Act, the Administrator may guarantee under the same terms, conditions, and processes as a PPP First Draw Loan

the full principal amount of a subsequent loan made under the PPP to an "eligible entity," as defined in § 7 (a) (37) (A) (iv) of the Small Business Act, that has used or will use the full amount of a PPP First Draw Loan on or before the expected date on which the subsequent loan is disbursed to the eligible entity (PPP Second Draw Loan). 4 Section 1109 (b) of the CARES Act allows the Department of the Treasury (Treasury Department), the Farm Credit Administration, and other Federal financial regulatory agencies to authorize bank and nonbank lenders, including insured credit unions, to participate in loans made under the PPP and provide PPP loans under § 1109 (Section 1109 Loans). 5 Under § 1109 (d) (2) (D) of the CARES Act, regulations establishing the terms and conditions of Section 1109 Loans must provide for forgiveness of Section 1109 Loans under terms and conditions that, to the **[*3]** maximum extent practicable, are consistent with the terms and conditions for loan forgiveness of PPP First Draw Loans under § 1106 of the CARES Act.

(2) A taxpayer that receives a PPP First Draw Loan, a PPP Second Draw Loan, and/or a Section 1109 Loan, each a "PPP Loan" and collectively "PPP Loans," may be eligible to receive forgiveness of the principal amount of the PPP Loan up to an amount (loan forgiveness amount) equal to the costs incurred and payments made during the "covered period," as defined in § 7A (a) (4) of the Small Business Act, for the following "eligible expenses": (1) payroll costs, (2) interest on a covered mortgage obligation, (3) any covered rent obligation payment, (4) any covered utility payment, (5) covered operations expenditures, (6) covered property damage costs, (7) covered supplier costs, and (8) covered worker protection expenditures. 6 However, a taxpayer's loan forgiveness amount may be reduced under "PPP loan forgiveness reduction rules" if the taxpayer experiences reductions in full-time equivalent employees or employee salary and wages during the covered period and the taxpayer does not qualify for any of the statutory or regulatory exemptions from the PPP loan forgiveness reduction **[*4]** rules. 7

.02 Forgiveness of PPP Loans.

(1) Section 276 (a) (1) of the COVID Tax Relief Act amended § 7A (i) of the Small Business Act to provide guidance on the Federal income tax consequences of the forgiveness of PPP First Draw Loans. Section 276 (b) of the COVID Tax Relief Act provides substantially similar guidance with regard to PPP Second Draw Loans, as do §§ 278 (a) (1) and (2) with regard to Section 1109 Loans. Specifically, § 7A (i) of the Small Business Act and §§ 276 (b) and 278 (a) of the COVID Tax Relief Act provide that, for purposes of the Code, no amount is included in the gross income of an eligible recipient or an eligible entity, as appropriate, by reason of the forgiveness of a PPP Loan, and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income.

(2) Revenue Procedure 2021-20, 2021-19 I.R.B. 1150 (May 10, 2021), provides a safe harbor that allows certain taxpayers that, under prior guidance issued by the Treasury Department and the Internal Revenue Service, did not deduct certain otherwise deductible PPP-related expenses on a tax return that was filed prior to the enactment of the COVID Tax Relief Act to deduct such expenses in the next taxable year (that is, the taxable year following the taxable year in which such expenses were paid or incurred). **[*5]**

(3) For eligible recipients and eligible entities, as appropriate, that are partnerships or S corporations, § 7A (i) of the Small Business Act and §§ 276 (b) and 278 (a) (3) of the COVID Tax Relief Act provide that any amount excluded from gross income under § 7A (i) of the Small Business Act or § 276 (b) or § 278 (a) of the COVID Tax Relief Act, as applicable, is treated as tax-exempt income for purposes of §§ 705 and 1366 of the Code. Section 7A (i) of the Small Business Act and §§ 276 (b) and 278 (a) of the COVID Tax Relief Act further provide that, except as provided by the Secretary of the Treasury or her delegate, any

increase in the adjusted basis of a partner's interest in a partnership under § 705 of the Code with respect to amounts treated as tax-exempt income under § 7A (i) of the Small Business Act, § 276 (b) of the COVID Tax Relief Act, or § 278 (a) of the COVID Tax Relief Act, as applicable, equals the partner's distributive share of deductions resulting from costs giving rise to the forgiveness of the PPP Loans. Revenue Procedure 2021-49, 2021-49 I.R.B. _____, released November 18, 2021, provides guidance for partners and their partnerships regarding allocations under § 704 (b) of the Code of amounts excluded from gross income under § 7A (i) of the Small Business Act and § 276 (b) or 278 (a) of the COVID Tax Relief Act, as applicable, allocations under § 704 (b) of the Code of deductions resulting from expenditures attributable **[*6]** to the use of certain PPP Loan proceeds, and corresponding adjustments to partners' bases in their partnership interests under § 705 of the Code. Revenue Procedure 2021-49 also provides guidance under § 1502 of the Code and § 1.1502-32 of the Income Tax Regulations regarding the corresponding basis adjustments for stock of subsidiary members of consolidated groups as a result of tax-exempt income resulting from forgiveness of PPP Loans. To allow their partners or shareholders to make proper basis adjustments under §§ 705, 1367, and 1502 of the Code, as applicable, entities that are partnerships, S corporations, or subsidiary members of consolidated groups, must determine when tax-exempt income from the forgiveness of a PPP Loan is received or accrued.

(4) Certain eligible recipients and entities may need to determine when tax-exempt income resulting from the forgiveness of a PPP Loan is received or accrued to apply Federal tax provisions for which the amount of gross receipts is relevant. For example, certain eligible recipients and entities may need to determine when such tax-exempt income is included in gross receipts under § 448 (c) or 6033 of the Code. However, Revenue Procedure 2021-33, 2021-34 I.R.B. 327 (August 23, 2021) provides a safe harbor that permits eligible recipients and entities to exclude the amount of forgiveness of a PPP Loan from gross receipts solely for purposes of determining **[*7]** eligibility to claim the employee retention credit under § 2301 of the CARES Act, as amended by §§ 206 and 207 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the CAA, and extended by § 9651 of the American Rescue Plan Act of 2021, Public Law 117-2, 135 Stat. 4 (March 11, 2021). That safe harbor is not mandatory, and it does not allow eligible recipients and entities to exclude the amount of forgiveness of a PPP Loan from gross receipts under § 448 (c) or 6033 of the Code for any other Federal tax purpose.

(5) The Administrator has provided guidance regarding the process for taxpayers to receive forgiveness of PPP First Draw Loans and PPP Second Draw Loans. See Business Loan Program Temporary Changes; Paycheck Protection Program - Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 F.R. 8283 (Feb. 5, 2021) (Loan Forgiveness Requirements); Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 F.R. 3692 (Jan. 14, 2021); Business Loan Program Temporary Changes; Paycheck Protection Program - COVID Revenue Reduction Score, Direct Borrower Forgiveness Process, and Appeals Deferment, 86 F.R. 40921 (July 28, 2021). To receive forgiveness of PPP First Draw Loans and PPP Second Draw Loans, the taxpayer must, among other things, complete and submit a "PPP Loan Forgiveness Application." The amount of information and documentation, if any, that the taxpayer must provide to seek forgiveness and whether the taxpayer's loan forgiveness amount is subject to a reduction depends **[*8]** on the facts and circumstances. The forgiveness approval process undertaken by lenders also depends on the facts and circumstances and the type of PPP Loan Forgiveness Application submitted by the taxpayer. Loan Forgiveness Requirements at 8295-96.

SECTION 3. TIMING OF TAX-EXEMPT

INCOME

.01 Overview. Subject to section 3.03 of this revenue procedure, a taxpayer that received a PPP Loan may treat tax-exempt income resulting from the partial or complete forgiveness of such PPP Loan as received or accrued:

(1) As, and to the extent that, the taxpayer pays or incurs eligible expenses as described in section 2.01 (2). Under this section 3.01 (1), a taxpayer that has elected to use the safe harbor provided under Revenue Procedure 2021-20 will be treated as paying or incurring the eligible expenses during the taxpayer's immediately subsequent taxable year following the taxpayer's 2020 taxable year in which the expenses were actually paid or incurred, as described in Revenue Procedure 2021-20;

(2) When the taxpayer files an application for forgiveness of the PPP Loan; or

(3) When the PPP Loan forgiveness is granted.

.02 Amended returns. Taxpayers may report tax-exempt income pursuant to section 3.01 on a timely filed original or amended Federal income tax return, information return or administrative adjustment request (AAR) under § 6227 of the Code. See also Revenue Procedure 2021-50, 2021-49 I.R.B. _____, released November 18, 2021, **[*9]** allowing an eligible partnership to file an amended Form 1065, *U.S. Return of Partnership Income*, as an alternative to filing an AAR, and furnish a corresponding amended Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits*, etc., to each of its partners. Partners and shareholders that receive amended Forms K-1 as provided in this section 3.02 must file amended Federal income tax returns, information returns or AARs, as applicable, consistent with the Forms K-1 received.

.03 When PPP Loan is not fully forgiven. Unless otherwise provided in the 2021 filing year form instructions, if the taxpayer receives forgiveness for an amount of the PPP Loan that is less than the amount that the taxpayer previously treated as tax-exempt income, the taxpayer must make appropriate adjustments on an amended Federal income tax return, information return or AAR, as applicable, for the taxable year (s) in which the taxpayer treated tax-exempt income from the forgiveness of such PPP Loan as received or accrued. Partners and shareholders that receive amended Forms K-1 as provided in this section 3.03 must file amended Federal income tax returns, information returns or AARs, as applicable, consistent with the **[*10]** Forms K-1 received.

.04 Reporting consistent with this revenue procedure. The IRS will publish form instructions for the 2021 filing season that will detail how taxpayers can report consistently with sections 3.01 through 3.03 of this revenue procedure. However, taxpayers do not need to wait until the instructions are published to apply this revenue procedure.

.05 Gross receipts application. To the extent tax-exempt income resulting from the partial or complete forgiveness of a PPP Loan is treated as gross receipts under a particular Federal tax provision, including but not limited to §§ 448 (c) and 6033 of the Code, section 3 of this revenue procedure applies for purposes of determining the timing and, to the extent relevant, reporting of such gross receipts.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for any taxable year in which a taxpayer paid or incurred eligible expenses, as described in section 2.01 (2) of this revenue procedure, any taxable year in which the taxpayer applied for forgiveness of a PPP Loan, or any taxable year in which the taxpayer's PPP Loan forgiveness is granted.

SECTION 5. PAPERWORK REDUCTION ACT

Any collection of information associated with this notice has been submitted to the Office of Management and Budget for review under OMB control numbers 1545-0123 (for business filers),1545-074 **[*11]** (for individual filers) and

1545-0047 (for exempt organizations) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507 (d)). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

SECTION 6. DRAFTING INFORMATION

The principal authors of this revenue procedure are Morgan Lawrence and Charles Gorham of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, please contact Morgan Lawrence at (202) 317-7011 (not a toll-free call).

Attachment

Other Footnotes

1 See §§ 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281, 286-94, 297-301 (Mar. 27, 2020), as amended by §§ 2 and 3 of the Paycheck Protection Program Flexibility Act of 2020, Public Law 116-142, 134 Stat. 641 (June 5, 2020); the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) enacted as Title III of Division N of the Consolidated Appropriations Act, 2021 (CAA), Public Law 116-220, 134 Stat. 1182 (Dec. 27, 2020); § 276 of the COVID-related Tax Relief Act of 2020 (COVID Tax Relief Act), enacted as Subtitle B of Title II of Division N of the CAA; and § 2 of the PPP Extension Act of 2021, Public Law 117-6, 135 Stat. 250 (Mar. 30, 2021). Section 304 (b) (1) (A) of the Economic Aid Act redesignated § 1106 of the CARES Act (15 U.S.C. § 9005) as § 7A and transferred redesignated § 7A to be inserted to appear after § 7 of the Small Business Act (15 U.S.C. § 636).

2 See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811 (Apr. 15, 2020).

3 See § 7 (a) (2) of the Small Business Act and § 2 of the PPP Extension Act of 2021.

4 See § 7 (a) (37) of the Small Business Act (as added by § 311 (a) of the Economic Aid Act).

5 134 Stat., at 304-306.

6 See § 7A (a) of the Small Business Act (as amended by § 304 (b) (2) of the Economic Aid Act).

7 See § 7A (d) of the Small Business Act (as amended by § 304 (b) (2) of the Economic Aid Act) and Business Loan Program Temporary Changes; Paycheck Protection Program - Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 F.R. 8290 (Feb. 5, 2021).

Load Date: 2021-11-23

2021 IRB LEXIS 478

US Internal Revenue Service

November 18, 2021

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Revenue Procedure 2021-49

[*1]

Core Terms

partnership, tax exemption, gross income, eligible, Loans, entity, expenditure, purposes, deductions, forgiveness, Taxpayer, amounts, capitalized, Restaurant, Emergency, distributive share, taxable year, consolidated, receives, shareholder's, Supplemental, expenses, Venue, economic interest, hypothetical, conditions, covered entity, no deduction, no tax, allocated

Text

SECTION 1. PURPOSE

.01 This revenue procedure provides guidance for partnerships and consolidated groups regarding amounts excluded from gross income (tax exempt income) and deductions relating to the Paycheck Protection Program (PPP) and certain other COVID-19 relief programs. More specifically:

(1) This revenue procedure provides guidance for partners and their partnerships regarding:

(a) allocations under § 704(b) of the Internal Revenue Code (Code) of tax exempt income arising from the forgiveness of PPP Loans, the receipt of certain grant proceeds, or the subsidized payment of certain principal, interest and fees;

(b) allocations under § 704(b) of the Code of deductions resulting from expenditures attributable to the use of forgiven PPP Loans or certain grant proceeds, or subsidized payments of certain interest and fees; and

(c) the corresponding adjustments to be made with respect to the partners' bases in their partnership interests under § 705 of the Code.

(2) This revenue procedure also provides guidance under § 1502 of the Code and § 1.1502-32 of the Income Tax Regulations regarding the corresponding basis adjustments for stock of subsidiary members of consolidated groups as a result of tax exempt income arising from certain forgiven PPP Loans, grant proceeds, or subsidized payment of certain principal, interest and fees.

.02 For **[*2]** guidance on the timing of tax exempt income arising from forgiven PPP Loans, see Rev. Proc. 2021-48, 2021-49 I.R.B. ___, released on November 18, 2021.

SECTION 2. BACKGROUND

.01 CARES Act.

(1) Overview. The PPP is a loan program administered by the U.S. Small Business Administration (SBA) and the Administrator of the SBA (Administrator) as part of the SBA's "7(a) Loan Program" under § 7(a) of the Small Business Act (15 U.S.C. § 636(a)). [1] Congress established

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[1] See §§ 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281, 286-94, 297-301 (Mar. 27, 2020), as amended by §§ 2 and 3 of the Paycheck Protection Program Flexibility Act of 2020, Public

the PPP to assist small businesses nationwide adversely affected by the COVID-19 emergency in paying payroll costs and other eligible expenses.[2] Under the PPP, the Administrator may guarantee the full principal amount of a "covered loan," as defined in § 7(a)(36)(A)(ii) of the Small Business Act, which for purposes of the PPP is a loan made under the PPP to an "eligible recipient," as defined in § 7(a)(36)(A)(iv) of the Small Business Act, during the period beginning on February 15, 2020, and ending on May 31, 2021 (PPP First Draw Loan).[3] A PPP First Draw Loan may be forgiven under § 7A of the Small Business Act.

(2) Authorization of lenders to participate in PPP. Section 1109(b) of the CARES Act allows the Department of the Treasury (Treasury Department), the Farm Credit Administration, and other Federal financial regulatory agencies to authorize bank and nonbank lenders, including **[*3]** insured credit unions, to participate in loans made under the PPP and provide PPP loans under § 1109 (Section 1109 Loans).[4] Under § 1109(d)(2)(D) of the CARES Act, regulations establishing the terms and conditions of Section 1109 Loans must provide for forgiveness of Section 1109 Loans under terms and conditions that, to the maximum extent practicable, are consistent with the terms and conditions for loan forgiveness of PPP First Draw Loans under § 1106 of the CARES Act.

(3) Emergency EIDL Grants. Section 1110(e) of the CARES Act allows an eligible entity that applied for an Economic Injury Disaster Loan (EIDL) under § 7(b)(2) of the Small Business Act (15 U.S.C. § 636(b)(2)) in response to COVID-19 to request that the Administrator provide an advance that is not more than $10,000 (an Emergency EIDL Grant). An applicant is not required to repay any amount of an Emergency EIDL Grant, even if the applicant is subsequently denied an EIDL under § 7(b)(2) of the Small Business Act or a PPP loan under § 7(a) of the Small Business Act. See § 1110(e)(5) of the CARES Act.

(4) Principal and interest payments of covered loans. Section 1112(c) of the CARES Act requires the Administrator to pay the principal, interest, and any associated fees with respect to covered loans in regular servicing status made before the date of enactment of the CARES Act, **[*4]** whether or not on deferment, and covered loans made within six months after the enactment of the CARES Act. Covered loans under this provision include loans:

(a) guaranteed by the SBA under the 7(a) Loan Program (including Community Advantage Loans but excluding PPP First Draw Loans) or under the 504 Loan Program established under title V of the Small Business Investment Act of 1958 (15 U.S.C. § 695 et seq.), and

(b) SBA microloan products made by an intermediary to certain small businesses using loans or grants received under § 7(m) of the Small Business Act (15 U.S.C. § 636(m)).

.02 Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

(1) PPP Second Draw Loans. Section 311 of the Economic Aid Act amended § 7(a) of the Small Business Act to authorize Paycheck Protection Program Second Draw Loans (PPP Second Draw Loans) as covered loans under the same terms, conditions, and processes as PPP First Draw Loans. See § 7(a)(37)(B) of the Small Business Act (as

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Law 116-142, 134 Stat. 641 (June 5, 2020); the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) enacted as Title III of Division N of the Consolidated Appropriations Act, 2021 (CAA), Public Law 116-260, 134 Stat. 1182 (Dec. 27, 2020); § 276 of the COVID-related Tax Relief Act of 2020 (COVID Tax Relief Act), enacted as Subtitle B of Title II of Division N of the CAA; and the PPP Extension Act of 2021, Public Law 117-6, 135 Stat. 250 (Mar. 30, 2021). Section 304(b)(1)(A) of the Economic Aid Act redesignated § 1106 of the CARES Act (15 U.S.C. § 9005) as § 7A and transferred redesignated § 7A to be inserted to appear after § 7 of the Small Business Act (15 U.S.C. § 636).

[2] See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811 (Apr. 15, 2020).

[3] See § 7(a)(2) of the Small Business Act and § 2 of the PPP Extension Act of 2021.

[4] 134 Stat., at 304-306.

added by § 311(a) of the Economic Aid Act). Congress authorized the PPP Second Draw Loans to further assist those small businesses nationwide that continue to be adversely affected by the COVID-19 emergency. Similar to a PPP First Draw Loan, the Administrator is permitted to guarantee the full principal amount of a PPP Second Draw Loan made under the PPP to an "eligible **[*5]** entity," as defined in § 7(a)(37)(A)(iv) of the Small Business Act, that has used or will use the full amount of a PPP First Draw Loan on or before the expected date on which the subsequent loan is disbursed to the eligible entity, and a PPP Second Draw Loan may be forgiven under § 7(a)(37)(J) of the Small Business Act (as added by § 311(a) of the Economic Aid Act). An individual or entity that receives a PPP First Draw Loan, a PPP Second Draw Loan, and/or a Section 1109Section 1109 Loan, each a "PPP Loan" and collectively "PPP Loans," may be eligible to receive forgiveness of the principal amount of the PPP Loan up to an amount (loan forgiveness amount) equal to the costs incurred and payments made during the "covered period," as defined in § 7A(a)(4) of the Small Business Act, for the following "eligible expenses": (1) payroll costs, (2) interest on a covered mortgage obligation, (3) any covered rent obligation payment, (4) any covered utility payment, (5) covered operations expenditures, (6) covered property damage costs, (7) covered supplier costs, and (8) covered worker protection expenditures.[5] However, an individual or entity's loan forgiveness amount may be reduced under "PPP loan forgiveness reduction rules" if the individual or entity experiences **[*6]** reductions in full-time equivalent employees or employee salary and wages during the covered period and the individual or entity does not qualify for any of the statutory or regulatory exemptions from the PPP loan forgiveness reduction rules. [6]

(2) Shuttered Venue Operator Grants. Section 324(b) of the Economic Aid Act authorizes the SBA to make initial and supplemental grants to certain "eligible persons or entities," which include live venue operators and promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theater operators, and talent representatives (Shuttered Venue Operator Grants). See § 324(a) of the Economic Aid Act (defining the term "eligible person or entity").

(3) Extension of Emergency EIDL Grants program and Targeted EIDL Advances. Section 324(b) of the Economic Aid Act authorizes the SBA to make initial and supplemental grants to certain "eligible persons or entities," which include live venue operators and promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theater operators, and talent representatives (Shuttered Venue Operator Grants). See Section 331 of the Economic Aid Act extends the Emergency EIDL Grant program to allow covered entities, as defined under paragraph (a)(2) of that section, to request to receive a total of $10,000 under § 1110(e) of the CARES Act, without regard to whether the covered entity's EIDL under § 7(b)(2) of the Small Business Act is, or was, approved or accepted and without regard to whether the covered entity received a PPP Loan (Targeted **[*7]** EIDL Advances). The covered entity is not required to repay any amount of the Emergency EIDL Grant, including the portion (if any) that comprises a Targeted EIDL Advance. See § 1110(e) of the CARES Act; § 331(b)(2)(A) of the Economic Aid Act.

.03 COVID Tax Relief Act.

(1) Forgiveness of PPP Loans.

(a) Overview. Section 276(a) of the COVID Tax Relief Act amended § 7A(i) of the Small Business Act (as redesignated, transferred, and inserted by §

[5] See § 7A(a) of the Small Business Act (as amended by § 304(b)(2) of the Economic Aid Act).

[6] See § 7A(d) of the Small Business Act (as amended by § 304(b)(2) of the Economic Aid Act) and Business Loan Program Temporary Changes; Paycheck Protection Program – Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 F.R. 8290 (Feb. 5, 2021).

304(b)(1)(A) of the Economic Aid Act) to provide guidance regarding the Federal income tax treatment of the forgiveness of PPP First Draw Loans. Section 276(b) of the COVID Tax Relief Act provides substantially similar guidance with regard to PPP Second Draw Loans, as do § 278(a)(1) and (2) of the COVID Tax Relief Act with regard to Section 1109 Loans.

(b) Federal income tax treatment. Specifically, § 7A(i) of the Small Business Act and §§ 276(b) and 278(a)(1) and (2) of the COVID Tax Relief Act, as applicable, provide that, generally for purposes of the Code, no amount is included in the gross income of an eligible recipient or an eligible entity, as appropriate, by reason of the forgiveness of a PPP Loan and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income. Those sections also provide that, for eligible recipients **[*8]** and eligible entities, as appropriate, that are partnerships or S corporations, any amount excluded from gross income under § 7A(i) of the Small Business Act or § 276(b) or § 278(a)(3) of the COVID Tax Relief Act, as applicable, is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code. Section 7A(i) of the Small Business Act and §§ 276(b) and 278(a)(3) of the COVID Tax Relief Act further provide that, except as provided by the Secretary of the Treasury or her delegate (Secretary), any increase in the adjusted basis of a partner's interest in a partnership under § 705 of the Code with respect to amounts treated as tax exempt income under § 7A(i) of the Small Business Act, § 276(b) of the COVID Tax Relief Act, or § 278(a) of the COVID Tax Relief Act, as applicable, equals the partner's distributive share of deductions resulting from costs giving rise to the forgiveness of the PPP Loans.

(2) Emergency EIDL Grants and Targeted EIDL Advances. Section 278(b)(1) and (2) of the COVID Tax Relief Act provide that any Emergency EIDL Grant or Targeted EIDL Advance is not included in the gross income of the person that receives such advance or funding, and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income. Section 278(b)(3) of the COVID Tax Relief Act **[*9]** provides that, in the case of a partnership or an S corporation that receives such advance or funding, any amount excluded from gross income under § 278(b)(1) of the COVID Tax Relief Act is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code and that the Secretary is to prescribe rules for determining a partner's distributive share of any such advance or funding for purposes of § 705 of the Code.

(3) Subsidy for certain loan payments. Section 278(c)(1) and (2) of the COVID Tax Relief Act provide that any payment described in § 1112(c) of the CARES Act is not included in the gross income of the person on whose behalf such payment is made, and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income. Section 278(c)(3)(A) of the COVID Tax Relief Act provides that, in the case of a partnership or S corporation on whose behalf a payment described in § 1112(c) of the CARES Act is made, any amount excluded from gross income under § 278(c)(1) of the COVID Tax Relief Act is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code. Section 278(c)(3)(B) of the COVID Tax Relief Act provides that, except as provided by the Secretary, any increase in the adjusted basis of a partner's interest in a partnership under § 705 of the Code with respect to any such payment **[*10]** equals the sum of the partner's distributive share of deductions resulting from interest and fees described in § 1112(c) of the CARES Act and the partner's share, as determined under § 752 of the Code, of principal described in § 1112(c) of the CARES Act.

(4) Shuttered Venue Operator Grants. Section 278(d)(1) and (2) of the COVID Tax Relief Act provide that any Shuttered Venue Operator Grant is not included in the gross income of the person that receives such grant, and no deduction is denied, no tax attribute is reduced, and no basis increase is

denied, by reason of such exclusion from gross income. Section 278(d)(3) of the COVID Tax Relief Act provides that, in the case of a partnership or an S corporation that receives a Shuttered Venue Operator Grant, any amount excluded from gross income under § 278(d)(1) of the COVID Tax Relief Act is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code, and the Secretary is to prescribe rules for determining a partner's distributive share of any such grant for purposes of § 705 of the Code.

.04 American Rescue Plan.

(1) Supplemental Targeted EIDL Advances.

(a) Overview. Section 5002(b)(2)(B) of the ARP requires the Administrator to make additional Targeted EIDL Advances to covered entities that (1) have suffered an economic loss of greater than 50 percent and (2) employ not more than 10 employees **[*11]** (Supplemental Targeted EIDL Advances). The terms "covered entity" and "economic loss" have the meanings given the terms in § 331(a) of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. See § 5002(a)(2) of the ARP. The amount of a Supplemental Targeted EIDL Advance equals $5,000, and is provided to a covered entity in addition to any Emergency EIDL Grant or Targeted EIDL Advance that the covered entity may have received.

(b) Federal income tax treatment. Section 9672(1) and (2) of the ARP provide that any Supplemental Targeted EIDL Advance is not included in the gross income of the person that receives such advance, and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income. Section 9672(3) of the ARP provides that, in the case of a partnership or an S corporation that receives a Supplemental Targeted EIDL Advance, any amount excluded from gross income under § 9672(1) of the ARP is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code, and the Secretary is to prescribe rules for determining a partner's distributive share of any such amount for purposes of § 705 of the Code.

(2) Restaurant Revitalization Grants.

(a) Overview. Section 5003(c) of the ARP requires the Administrator to **[*12]** make grants (Restaurant Revitalization Grants) of up to $10 million in the aggregate ($5 million in the aggregate per location) to eligible entities (including restaurants, food stands and food trucks, bars, and other similar establishments, but not including, among other prohibited recipients, publicly traded companies or chains of 20 or more locations) and affiliated businesses to cover pandemic-related revenue losses. See § 5003(a)(2), (4), and (7) of the ARP (defining "affiliated business," "eligible entity," and "pandemic-related revenue loss," respectively). The amount of any Restaurant Revitalization Grant is limited to the eligible entity's pandemic-related revenue loss, as determined pursuant to § 5003(a)(7) of the ARP and any guidance issued by the SBA, which is reduced by any amounts received through a PPP First Draw Loan or a PPP Second Draw Loan in 2020 or 2021. See § 5003(c)(4)(B)(i) and (a)(7) of the ARP. In addition, any amount of a Restaurant Revitalization Grant made to an eligible entity based on estimated receipts that is greater than the actual gross receipts of the eligible entity in 2020 must be returned to the Treasury Department. See § 5003(c)(4)(B)(ii) of the ARP.

(b) Return of Funds to the Treasury Department. If an eligible entity **[*13]** that receives a Restaurant Revitalization Grant fails to use all grant funds or permanently ceases operations on or before the last day of the covered period, the eligible entity must return to the Treasury Department any funds that the eligible entity did not use for allowable expenses. See § 5003(c)(6) of the ARP. Section 5003(c)(5) of the ARP describes "allowable expenses" as including, among other expenses, payroll costs, payments of principal or interest on any mortgage obligation, rent payments, utilities, maintenance expenses, supplies, operational

expenses, paid sick leave, and any other expenses that the Administrator determines to be essential to maintaining the eligible entity. See § 5003(c)(5) of the ARP (enumerating permitted uses of funds made available through a Restaurant Revitalization Grant). The covered period began on February 15, 2020, and ends on December 31, 2021, or a date to be determined by the Administrator that is not later than two years after the date of enactment of § 5003 of the ARP. See § 5003(a)(3) of the ARP.

(c) Federal income tax treatment. Section 9673(1) and (2) of the ARP provide that any Restaurant Revitalization Grant received from the Administrator is not included in the gross income of the person that receives such **[*14]** grant, and no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income. Section 9673(3) of the ARP provides that, in the case of a partnership or an S corporation that receives a Restaurant Revitalization Grant, except as otherwise provided by the Secretary, any amount excluded from gross income under § 9673(1) of the ARP is treated as tax exempt income for purposes of §§ 705 and 1366 of the Code, and the Secretary is to prescribe rules for determining a partner's distributive share of any such amount for purposes of § 705 of the Code.

.05 Relevant Provisions under Subchapter K of the Code

(1) Partner's distributive share. Section 704(b) of the Code provides that a partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) is determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances), if (1) the partnership agreement does not provide as to the partner's distributive share of income, gain, loss, deduction, or credit (or item thereof), or (2) the allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect. In order for an allocation to have economic effect, it must **[*15]** be consistent with the underlying economic arrangement of the partners. This means in the event that there is an economic benefit or economic burden that corresponds to an allocation, the partner to whom the allocation is made must receive such economic benefit or bear such economic burden. See § 1.704-1(b)(2)(ii)(a) of the Income Tax Regulations.

(2) Determination of basis of partner's interest. Section 705(a)(1) of the Code provides that the adjusted basis of a partner's interest in a partnership is increased by the sum of the partner's distributive share for the taxable year and prior taxable years of (A) taxable income of the partnership as determined under § 703(a) of the Code, (B) income of the partnership exempt from tax under Title 26, and (C) the excess of the deductions for depletion over the basis of the property subject to depletion. Under § 705(a)(2) and (3) of the Code, a partner's adjusted basis in a partnership interest is decreased (but not below zero) by distributions by the partnership as provided in § 733 of the Code and by the sum of the partner's distributive share for the taxable year and prior taxable years of (A) losses of the partnership and (B) expenditures of the partnership not deductible in computing its taxable income and not properly chargeable to capital account; **[*16]** and decreased (but not below zero) by the amount of the partner's deduction for depletion for any partnership oil and gas property to the extent such deduction does not exceed the proportionate share of the adjusted basis of such property allocated to such partner under § 613A(c)(7)(D) of the Code.

.06 Relevant Provisions under Subchapter S of the Code

(1) Determination of S corporation shareholder's Federal income tax liability. Section 1366(a)(1) of the Code provides, in part, that, in determining the Federal income tax of an S corporation shareholder under chapter 1 of the Code for the shareholder's taxable year in which the taxable year of the S corporation ends (or for the final taxable year of a shareholder who dies, or of a trust or estate which terminates, before the end of the S corporation's taxable year), there is taken into account the

shareholder's pro rata share of the corporation's--

(a) items of income (including tax exempt income), loss, deduction (including expenses related to tax exempt income, whether deductible or non-deductible), or credit the separate treatment of which could affect the liability for tax of any shareholder; and

(b) nonseparately computed income or loss.

(2) Positive basis adjustments to stock of S corporation shareholders. Section 1367(a)(1) of the Code provides, in part, that the basis **[*17]** of each shareholder's stock in an S corporation is increased for any period by the sum of the items of income described in § 1366(a)(1)(A) of the Code determined with respect to that shareholder for such period. Consequently, amounts excluded from gross income under § 7A(i) of the Small Business Act, § 276(b) of the COVID Tax Relief Act, and § 278(a) through (d) of the COVID Tax Relief Act are taken into account in accordance with each S corporation shareholder's pro rata share under § 1366(a)(1)(A), and accordingly increase the basis of the shareholder's stock in the S corporation under § 1367(a)(1).

.07 Relevant Provisions in the Consolidated Return Regulations

(1) Tax exempt income. Section 1.1502-32(b)(2) provides for adjustments to the basis in the stock of a member of a consolidated group (as defined in § 1.1502-1(h)) that is a subsidiary of one or more members (S), including positive adjustments for tax exempt income. See § 1.1502-32(b)(2)(ii). S's tax exempt income is defined as its income and gain which is taken into account but permanently excluded from its gross income under applicable law and which increases, directly or indirectly, the basis of its assets (or an equivalent amount). Section 1.1502-32(b)(3)(ii)(A).

(2) COD income. Section 1.1502-32(b)(3)(ii)(C)(1) provides that excluded discharge-of-indebtedness income (that is, excluded COD income) is treated as tax exempt income only to the extent the discharge is applied to reduce tax **[*18]** attributes attributable to any member of the group under § 108 or § 1017 of the Code, or § 1.1502-28 (implementing § 108 in a consolidated group). As described in section 2.03 of this revenue procedure, § 7A(i) of the Small Business Act, and §§ 276(b) and 278(a)(1) and (2) of the COVID Tax Relief Act, as applicable, provide that no amount is included in the gross income of a borrower by reason of forgiveness of a PPP Loan, and that no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income.

SECTION 3. SCOPE

This revenue procedure applies to a taxpayer that is described in section 3.01, 3.02, 3.03, 3.04, or 3.05 of this revenue procedure (Covered Taxpayer).

.01 A partnership or a member of a consolidated group that--

(1) Received a PPP Loan; and

(2) Received partial or complete forgiveness of the PPP Loan such that, in accordance with § 7A(i) of the Small Business Act, or §§ 276(b) or 278(a)(1) of the COVID Tax Relief Act, as applicable, the forgiveness amount is not included in the gross income of the eligible recipient, entity, or borrower.

.02 A partnership for which the SBA made payments with respect to a covered loan under § 1112(c) of the CARES Act.

.03 A partnership that received an Emergency EIDL Grant, a Targeted EIDL Advance, or a Shuttered Venue Operator Grant. **[*19]**

.04 A partnership that received a Supplemental Targeted EIDL Advance.

.05 A partnership that received a Restaurant Revitalization Grant.

SECTION 4. ALLOCATION OF CERTAIN PARTNERSHIP ITEMS AND PARTNERSHIP INTEREST BASIS ADJUSTMENTS

.01 Treatment for Covered Taxpayers that are partnerships. If a Covered Taxpayer that is a partnership satisfies all of the applicable requirements provided in section 4.02 of this revenue procedure, and complies with all information reporting requirements described in section 6 of this revenue procedure, the Internal Revenue Service (IRS) will treat the Covered Taxpayer's allocation of amounts treated as tax exempt income and allocation of deductions described in section 4.02(1), (2), (3), or (4) of this revenue procedure (as the case may be) as determined in accordance with § 704(b) of the Code. Under § 705(a) of the Code, a partner's basis in its interest is increased by the partner's distributive share of tax exempt income and is decreased by the partner's distributive share of deductions described in section 4.02(1), (2), (3), or (4) of this revenue procedure.

.02 Requirements for Covered Taxpayers that are partnerships.

(1) Requirements for the allocation of deductions and amounts treated as tax exempt income arising in connection with the forgiveness of a PPP Loan. A Covered Taxpayer that is a partnership satisfies the requirements of this section 4.02(1) if all of the **[*20]** following conditions are met:

(a) The allocation of deductions resulting from expenditures giving rise to the forgiveness of a PPP Loan is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership.

(b) The allocation of amounts treated as tax exempt income under § 7A(i) of the Small Business Act, § 276(b) of the COVID Tax Relief Act, or § 278(a) of the COVID Tax Relief Act, as applicable, is made in accordance with the allocation of the deductions described in section 4.02(1)(a) of this revenue procedure.

(c) If any expenditure giving rise to the forgiveness of a PPP Loan is required to be capitalized under the Code (capitalized expenditure), the allocation of amounts treated as tax exempt income under § 7A(i) of the Small Business Act, § 276(b) of the COVID Tax Relief Act, or § 278(a) of the COVID Tax Relief Act, as applicable, is made in accordance with the allocation of the deemed loss, as provided in this section 4.02(1)(c), with respect to the capitalized expenditure's basis. Solely for purposes of this revenue procedure, the deemed loss with respect to the capitalized expenditure's basis is treated as a loss allowable as a deduction and is equal to the amount of loss that would be recognized if the property to which the capitalized **[*21]** expenditure relates were treated as disposed of in a fully taxable transaction for no consideration (hypothetical transaction) and, with respect to each partner, the allocation of the deemed loss associated with the capitalized expenditure's basis is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership. The hypothetical transaction and resulting deemed loss are solely for purposes of determining the manner in which tax exempt income described in this section 4.02(1)(c) is allocated to the partnership's partners.

(2) Requirements for the allocation of deductions and amounts treated as tax exempt income arising in connection with payments made by the SBA on behalf of the taxpayer with respect to a covered loan under § 1112(c) of the CARES Act. A Covered Taxpayer that is a partnership satisfies the requirements of this section 4.02(2) if all of the following conditions are met:

(a) The allocation of deductions resulting from payments of interest and fees described in § 1112(c) of the CARES Act is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership.

(b) The allocation of amounts treated as tax exempt income under § 278(c) of the COVID Tax Relief Act attributable to interest **[*22]** and fees described in § 1112(c) of the CARES Act is made in accordance with the allocation of the deductions described in section 4.02(2)(a) of this revenue

procedure.

(c) The allocation of amounts treated as tax exempt income under § 278(c) of the COVID Tax Relief Act attributable to payments of principal described in § 1112(c) of the CARES Act is made in accordance with each partner's share of the liability under § 752 of the Code and the regulations thereunder.

(d) If any expenditure related to the payment of interest and fees described in § 1112(c) of the CARES Act is required to be treated as a capitalized expenditure, the allocation of amounts treated as tax exempt income under § 278(c) of the COVID Tax Relief Act is made in accordance with the allocation of the deemed loss, as described in section 4.02(1)(c) of this revenue procedure, with respect to the capitalized expenditure's basis. Upon the hypothetical transaction, the allocation of the deemed loss is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership. The hypothetical transaction and resulting deemed loss are solely for purposes of determining the manner in which tax exempt income described in this section 4.02(2)(d) is allocated to the partnership's partners.

(3) Requirements for the **[*23]** allocation of deductions and amounts treated as tax exempt income arising in connection with the taxpayer receiving an Emergency EIDL Grant, Targeted EIDL Advance, or a Shuttered Venue Operator Grant. A Covered Taxpayer that is a partnership satisfies the requirements of this section 4.02(3) if all of the following conditions are met:

(a) The allocation of deductions resulting from the expenditure of proceeds of an Emergency EIDL Grant, a Targeted EIDL Advance, or a Shuttered Venue Operator Grant is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership.

(b) The allocation of amounts treated as tax exempt income under § 278(b) and (d) of the COVID Tax Relief Act is made in accordance with the allocation of the deductions described in section 4.02(3)(a) of this revenue procedure.

(c) If any expenditure paid with the proceeds from an Emergency EIDL Grant, a Targeted EIDL Advance, or a Shuttered Venue Operator Grant is required to be treated as a capitalized expenditure, the allocation of amounts treated as tax exempt income under § 278(b) and (d) of the COVID Tax Relief Act is made in accordance with the allocation of the deemed loss, as described in section 4.02(1)(c) of this revenue procedure, with respect to the capitalized **[*24]** expenditure's basis. Upon the hypothetical transaction, the allocation of the deemed loss is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership. The hypothetical transaction and resulting deemed loss are solely for purposes of determining the manner in which tax exempt income described in this section 4.02(3)(c) is allocated to the partnership's partners.

(4) Requirements for the allocation of deductions and amounts treated as tax exempt income arising in connection with the taxpayer receiving a Supplemental Targeted EIDL Advance or a Restaurant Revitalization Grant. A Covered Taxpayer that is a partnership satisfies the requirements of this section 4.02(4) if all of the following conditions are met:

(a) The allocation of deductions resulting from the expenditure of proceeds of a Supplemental Targeted EIDL Advance or a Restaurant Revitalization Grant is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership.

(b) The allocation of amounts treated as tax exempt income under §§ 9672 and 9673 of the ARP is made in accordance with the allocation of the deductions described in section 4.02(4)(a) of this revenue procedure.

(c) If any expenditure paid with the proceeds **[*25]** from a Supplemental Targeted EIDL Advance or a Restaurant Revitalization Grant is required to be

treated as a capitalized expenditure, the allocation of amounts treated as tax exempt income under §§ 9672 and 9673 of the ARP is made in accordance with the allocation of the deemed loss, as described in section 4.02(1)(c) of this revenue procedure, with respect to the capitalized expenditure's basis. Upon the hypothetical transaction, the allocation of the deemed loss is determined under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership. The hypothetical transaction and resulting deemed loss are solely for purposes of determining the manner in which tax exempt income described in this section 4.02(4)(c) is allocated to the partnership's partners.

.03 Amended Returns. If a taxpayer has filed an original or amended Federal income tax return or information return, as applicable, for a taxable year ending after March 27, 2020, the taxpayer may file an amended return or an administrative adjustment request under § 6227 of the Code, as applicable, that reflects application of this revenue procedure. See Rev. Proc. 2021-50, 2021-49 I.R.B.___, released November 18, 2021, allowing eligible partnerships to file amended partnership returns under this revenue procedure **[*26]** if the requirements of section 3 of Rev. Proc. 2021-50 are met.

SECTION 5. STOCK BASIS ADJUSTMENTS REGARDING COVERED TAXPAYERS THAT ARE MEMBERS OF CONSOLIDATED GROUPS

With regard to a Covered Taxpayer that is a member of a consolidated group, the IRS will treat any amount excluded from gross income under § 7A(i) of the Small Business Act, § 276(b) of the COVID Tax Relief Act, or § 278(a)(1) of the COVID Tax Relief Act, as applicable, as tax exempt income for purposes of § 1.1502-32(b)(2)(ii). A Covered Taxpayer that is a member of a consolidated group may rely on the IRS treatment provided by this section 5 only if the consolidated group attaches a signed statement to its consolidated tax return indicating that all Covered Taxpayers in the consolidated group are relying on this section 5 and reporting consistently.

SECTION 6. INFORMATION REPORTING BY PARTNERSHIPS THAT ARE COVERED TAXPAYERS

A Covered Taxpayer that is a partnership must report to the IRS all partnership items described in section 4 of this revenue procedure that the Commissioner of Internal Revenue or the Commissioner's delegate may require in forms, instructions, or other guidance.

SECTION 7. EFFECTIVE DATE

A taxpayer may apply this revenue procedure for any taxable year ending after March 27, 2020.

SECTION 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Katherine A. Waibler and Michael R. Gould of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, **[*27]** contact Katherine A. Waibler at (202) 317-5056, and, regarding § 1.1502-32, Robert H. Liquerman at (202) 317-3181.

Load Date: 2021-11-22

2021 IRB LEXIS 481

Administrative, Procedural, and Miscellaneous

US Internal Revenue Service

November 18, 2021

Rev. Proc. 2021-50

Reporter
2021 IRB LEXIS 481 *; Rev. Proc. 2021-50

Revenue Procedure 2021-50

Applicable Sections

26 CFR 601.601. Rules and regulations. (Also Part I, §§ 6031, 6222, 6227.)

[*1]

Core Terms

partnership, amended return, taxable year, furnishing, eligible, partnership audit, corresponding, centralized, forgiveness, partner, ending

Text

SECTION 1. PURPOSE

This revenue procedure allows eligible partnerships to file amended partnership returns for taxable years ending after March 27, 2020 using a Form 1065, *U.S. Return of Partnership Income* (Form 1065), with the "Amended Return" box checked, and issue an amended Schedule K-1, *Partner's Share of Income, Deductions, Credits, etc.* (Schedule K-1), to each of its partners. An eligible partnership may file an amended return under Rev. Proc. 2021-48, 2021-49 I.R.B._____, or Rev. Proc. 2021-49, 2021-49 I.R.B. _____, if the requirements of section 3 of this revenue procedure are met. In order to take advantage of the option to amend provided in this revenue procedure, amended partnership returns must be filed, and corresponding Schedules K-1 must be furnished, on or before December 31, 2021. 1

SECTION 2. BACKGROUND

.01 Bipartisan Budget Act of 2015.

(1) Section 1101 (a) of the Bipartisan Budget Act of 2015 (BBA), P.L. 114-74, Title XI (November 2, 2015), replaced subchapter C of chapter 63 of subtitle F of the Internal Revenue Code (Code) effective for partnership taxable years beginning after December 31, 2017. Prior to the enactment of the BBA, subchapter C of chapter 63 contained the unified partnership audit and litigation rules enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), P.L. 97-248 (September 3, 1982), **[*2]** that were commonly referred to as the TEFRA partnership procedures. Section 1101 (c) of the BBA replaced the TEFRA partnership procedures with a centralized partnership audit regime that, in general, determines, assesses, and collects tax at the partnership level. The centralized partnership audit procedures enacted by the BBA are found at §§ 6221 through 6241 of the Code. The centralized partnership audit procedures apply to all partnerships, unless the partnership makes a valid election under § 6221 (b) not to have those

procedures apply. Partnerships subject to the centralized partnership audit regime are referred to as BBA partnerships.

(2) Section 6031 (a) of the Code requires every partnership to file a return for each taxable year stating the items of its gross income and the deductions allowable by subtitle A of the Code and such other information as required by forms and regulations, including information about the partners in the partnership. For a partnership, the return required by § 6031 (a) is Form 1065, which includes Schedules K-1. Each Schedule K-1 reports a partner's name, taxpayer identification number, and distributive share of partnership-related items and other information related to the partner's interest in the **[*3]** partnership. Section 6031 (b) requires that a partnership required to file a return under § 6031 (a) furnish a copy of the Schedule K-1 to each partner that includes such information as may be required to be shown by regulations. In general, § 6031 (b) also prohibits BBA partnerships from amending the information required to be furnished to their partners after the due date of the return, unless specifically provided by the Secretary of the Treasury or her delegate. This revenue procedure exercises that authority to allow a BBA partnership to file an amended partnership return and furnish amended Schedules K-1 under the circumstances described in this revenue procedure.

(3) Section 6222 (a) of the Code requires partners in a BBA partnership to treat partnership-related items, as defined in § 6241 and the corresponding regulations, consistently on the partner's return with how the BBA partnership treated the items on its return. This consistency requirement generally applies to all partners. Treatment with the partnership return generally requires that a partner in a BBA partnership file a return consistent with the information reported to the partner on the partner's Schedule K-1.

.02 PPP Loan Forgiveness Treatment.

(1) Rev. Proc. 2021-49, released on November 18, 2021, **[*4]** provides guidance for partners and partnerships regarding:

(a) allocations under § 704 (b) of the Code of amounts excluded from gross income (tax-exempt income), as described in sections 2.03 and 2.04 of Rev. Proc. 2021-49, arising from the forgiveness of Payroll Protection Program (PPP) Loans, as described in section 2.02 of Rev. Proc. 2021-49, certain grant proceeds, or the subsidized payment of certain principal, interest, and fees;

(b) allocations under § 704 (b) of the Code of deductions resulting from expenditures attributable to the use of forgiven PPP Loans, certain grant proceeds, or the subsidized payments of certain interest and fees described in sections 2.03 and 2.04 of Rev. Proc. 2021-49; and

(c) the corresponding adjustments to be made with respect to the partners' bases in their partnership interests under § 705 of the Code.

(2) Rev. Proc. 2021-48, released on November 18, 2021, provides that taxpayers may treat tax-exempt income resulting from the forgiveness of PPP Loans, as described in section 2.01 of Rev. Proc. 2021-48, as received or accrued: (1) as, and to the extent that, the taxpayer pays or incurs eligible expenses described in section 2.01 (2) of Rev. Proc. 2021-48, (2) when the taxpayer files an application for forgiveness of the PPP Loan, or (3) when the PPP Loan forgiveness is granted.

.03 Amended Returns.

(1) This revenue procedure explains how a BBA partnership that wishes to take advantage of **[*5]** Rev. Proc. 2021-48 or Rev. Proc. 2021-49 may do so without filing an administrative adjustment request (AAR) under § 6227 of the Code, which is the process prescribed for a partnership to make partnership adjustments to a partnership return after it is filed.

(2) This revenue procedure allows BBA partnerships the option to file an amended return instead of an AAR, though it does not prevent a partnership from filing an AAR to obtain the

benefits of Rev. Proc. 2021-48, Rev. Proc. 2021-49, or any other tax benefits to which the partnership is entitled. A BBA partnership that files an amended return pursuant to this revenue procedure is still subject to the centralized partnership audit procedures enacted by the BBA.

SECTION 3. AMENDED RETURN OPTION PROVIDED TO ELIGIBLE BBA PARTNERSHIPS FOR TAXABLE YEARS ENDING AFTER MARCH 27, 2020

.01 Scope. The filing and furnishing option provided by section 3.02 of this revenue procedure applies to BBA partnerships described in section 3.03 of this revenue procedure for the taxable years described in section 3.04 of this revenue procedure.

.02 Option to file amended return. BBA partnerships that filed a Form 1065 and furnished all required Schedules K-1 for taxable years ending after March 27, 2020 and did so prior to the issuance of this revenue procedure may file amended partnership returns and furnish corresponding amended Schedules K-1 on or before December 31, 2021. The amended returns **[*6]** must take into account tax changes under Rev. Proc. 2021-48 or Rev. Proc. 2021-49, but eligible BBA partnerships under section 3.03 of this revenue procedure may make any additional changes on their amended returns.

.03 Eligible BBA partnerships.

(1) The filing and furnishing option provided in section 3.02 of this revenue procedure is available only to BBA partnerships that filed Forms 1065 and furnished Schedules K-1 for the partnership taxable years ending after March 27, 2020 and prior to the issuance of Rev. Proc. 2021-48 or Rev. Proc. 2021-49. Additionally, to be eligible for the filing and furnishing option in section 3.02 of this revenue procedure, BBA partnerships must:

(a) Be within the scope of section 3 of Rev. Proc. 2021-49 and meet the requirements of section 4.02 (1), 4.02 (2), 4.02 (3), or 4.02 (4) of Rev. Proc. 2021-49 by filing an amended Form 1065 in accordance with procedures in section 6 of Rev. Proc. 2021-49, or

(b) Treat tax-exempt income resulting from the forgiveness of a PPP Loan, at a time described in section 3.01 (1), (2) or (3) of Rev. Proc. 2021-48 by filing an amended Form 1065 in accordance with procedures in section 3.02 of Rev. Proc. 2021-48, as applicable.

(2) For purposes of § 6222, the amended return replaces any prior return (including any AAR filed by the partnership) for the taxable year for purposes of determining the partnership's treatment of partnership-related items. See section 4.03 of this revenue procedure for a special rule regarding partnerships **[*7]** who have previously filed AARs for an affected taxable year.

.04 Eligible taxable years. The filing and furnishing option provided in this revenue procedure applies to any partnership taxable year ending after March 27, 2020 and prior to the issuance of Rev. Proc. 2021-48 and Rev. Proc. 2021-49.

SECTION 4. PROCEDURE

.01 Filing requirements. To take advantage of the option to file an amended return provided by section 3 of this revenue procedure, a BBA partnership must file a Form 1065 (with the "Amended Return" box checked) and furnish corresponding amended Schedules K-1 to its partners. The BBA partnership must clearly indicate the application of this revenue procedure on the amended return and write "FILED PURSUANT TO REV PROC 2021-50" at the top of the amended return and attach a statement with each amended Schedule K-1 furnished to its partners with the same notation. The BBA partnership may file electronically or by mail but filing electronically may allow for faster processing of the amended return. The BBA partnership filing an amended return pursuant to this revenue procedure should not include any forms that are normally only filed with an AAR, such as Form 8985, *Pass-Through Statement-*

*Transmittal/Partnership Adjustment Tracking Report (Required Under Sections 6226 and **[*8]** 6227)* or Form 8986, *Partner's Share of Adjustment (s) to Partnership-Related Item (s) (Required Under Sections 6226 and 6227)*.

.02 Special rule for BBA partnerships whose returns are under examination. If a BBA partnership is currently under examination for a taxable year ending after March 27, 2020, and wishes to take advantage of the option to file an amended return provided by section 3 of this revenue procedure, the partnership may only do so if the partnership sends notice in writing to the revenue agent coordinating the partnership's examination that the partnership seeks to use the amended return option described in this revenue procedure prior to or contemporaneously with filing the amended return as described in section 4.01 of this revenue procedure. The partnership must also provide the revenue agent with a copy of the amended return and amended Schedules K-1 upon filing.

.03 Special rule for BBA partnerships who have previously filed an AAR. If a BBA partnership has previously filed an AAR and wishes to file an amended return pursuant to this revenue procedure for the same taxable year, the partnership should use the items as adjusted in the AAR, where applicable, in lieu of any reporting from the originally filed **[*9]** partnership return.

.04 Special rule for a pass-through partner that is a BBA partnership. If a pass-through partner (as defined in § 301.6241-1 (a) (5) of the Procedure and Administration Regulations) that is also a BBA partnership receives an amended Schedule K-1 issued pursuant to this revenue procedure, the pass-through partner may file an amended return in lieu of filing an AAR, but only with respect to the items included on the K-1 it received, using the procedures described in section 4.01 of this revenue procedure.

(1) The time limit to file an amended return, as discussed in sections 3.02 and 5 of this revenue procedure, is not applicable to pass-through partners within the scope of this section 4.04 of this revenue procedure.

(2) This section 4.04 also applies to BBA partnerships that received an amended Schedule K-1 under any other previously issued revenue procedure allowing BBA partnerships to issue amended Schedules K-1.

SECTION 5. EFFECTIVE DATE

An eligible BBA partnership may apply this revenue procedure for eligible taxable years by filing amended Forms 1065, and furnishing corresponding amended Schedules K-1, on or before December 31, 2021.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Nikki Bossert of the Office of the Associate Chief Counsel (Procedure and **[*10]** Administration). For further information, please contact 202-317-5185 (not a toll-free call).

Load Date: 2021-11-23

THE SUPREME COURT *of* OHIO

COMMISSION ON PROFESSIONALISM

PROFESSIONAL IDEALS

FOR OHIO LAWYERS AND JUDGES

On the Cover:

The *Words of Justice* grace the North Reflecting Pool at the Thomas J. Moyer Ohio Judicial Center. Carved from granite, the words – *Compassion*, *Equity*, *Honesty*, *Honor*, *Integrity*, *Justice*, *Peace*, *Reason*, *Truth*, and *Wisdom* – represent the foundational ideals of the judicial branch and are a reminder of the fundamental principles of justice.

THE SUPREME COURT *of* OHIO

PROFESSIONAL IDEALS
for Ohio Lawyers and Judges

OCTOBER 2021

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INTRODUCTION

The following pages contain A Lawyer's Creed, A Lawyer's Aspirational Ideals and A Judicial Creed, which were adopted by the Supreme Court of Ohio upon recommendation by the Supreme Court Commission on Professionalism. These statements encapsulate the ideals of professionalism for lawyers and judges.

Included in the professionalism ideals for lawyers and judges are integrity, the achievement and maintenance of competence, a commitment to a life of service, and the quest for justice for all. Professionalism requires lawyers and judges to remain mindful that their primary obligations are to the institutions of law and the betterment of society, rather than to the interests of their clients or themselves.

Also included in these materials is the Supreme Court Statement Regarding the Provision of pro bono Legal Services by Ohio Lawyers, which speaks to a lawyer's obligations to ensure equal access to justice and to serve the public good.

Finally, these contents feature Professionalism DOs & DON'Ts, which provide guidelines for professional behavior in various contexts of legal practice Attorneys and judges who adhere to and promote the best practices depicted in the Professionalism DOs & DON'Ts will elevate the level of professionalism in the practice of law.

FROM THE

STATEMENT ON PROFESSIONALISM

. . . As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed and A Lawyer's Aspirational Ideals, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.

ISSUED BY THE SUPREME COURT OF OHIO
FEBRUARY. 3, 1997

A LAWYER'S CREED

TO MY CLIENTS, I offer loyalty, confidentiality, competence, diligence and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.

TO THE OPPOSING PARTIES AND THEIR COUNSEL, I offer fairness, integrity and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

TO THE COURTS AND OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM, I offer respect, candor and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

TO MY COLLEAGUES in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me.

TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

TO THE PUBLIC AND OUR SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

A LAWYER'S ASPIRATIONAL IDEALS

AS TO CLIENTS, I SHALL ASPIRE:

a) To expeditious and economical achievement of all client objectives.

b) To fully informed client decision-making. I should:

1) Counsel clients about all forms of dispute resolution
2) Counsel clients about the value of cooperation as a means toward the productive resolution of disputes
3) Maintain the sympathetic detachment that permits objective and independent advice to clients
4) Communicate promptly and clearly with clients, and
5) Reach clear agreements with clients concerning the nature of the representation.

c) To fair and equitable fee agreements. I should:

1) Discuss alternative methods of charging fees with all clients
2) Offer fee arrangements that reflect the true value of the services rendered
3) Reach agreements respecting fees with clients as early in the relationship as possible
4) Determine the amount of fees by consideration of many factors and not just time spent, and
5) Provide written agreements as to all fee arrangements.

d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.

e) To achieve and maintain a high level of competence in my field or fields of practice.

AS TO OPPOSING PARTIES AND THEIR COUNSEL, I SHALL ASPIRE:

a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should:

1) Notify opposing counsel in a timely fashion of any canceled appearance
2) Grant reasonable requests for extensions or scheduling changes, and
3) Consult with opposing counsel in the scheduling of appearances, meetings and depositions.

b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. I should:

1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response
2) Be courteous and civil in all communications
3) Respond promptly to all requests by opposing counsel
4) Avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations

5) Prepare documents that accurately reflect the agreement of all parties, and
6) Clearly identify all changes made in documents submitted by opposing counsel for review.

AS TO THE COURTS AND OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM, I SHALL ASPIRE:

a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient and humane system of justice. I should:
   1) Avoid nonessential litigation and nonessential pleading in litigation
   2) Explore the possibilities of settlement of all litigated matters
   3) Seek noncoerced agreement between the parties on procedural and discovery matters
   4) Avoid all delays not dictated by competent representation of a client
   5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual, and
   6) Advise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.

b) To model for others the respect due to our courts. I should:
   1) Act with complete honesty
   2) Know court rules and procedures
   3) Give appropriate deference to court rulings
   4) Avoid undue familiarity with members of the judiciary
   5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary
   6) Show respect by attire and demeanor
   7) Assist the judiciary in determining the applicable law, and
   8) Give recognition to the judiciary's obligations of informed and impartial decision-making.

AS TO MY COLLEAGUES IN THE PRACTICE OF LAW, I SHALL ASPIRE:

a) To recognize and develop a professional interdependence for the benefit of our clients and the legal system

b) To defend you against unjust criticism, and

c) To offer you assistance with your personal and professional needs.

AS TO OUR PROFESSION, I SHALL ASPIRE:

a) To improve the practice of law. I should:
   1) Assist in continuing legal education efforts
   2) Assist in organized bar activities

3) Assist law schools in the education of our future lawyers, and
4) Assist the judiciary in achieving objectives of A Lawyer's Creed and these aspirational ideals.

b) To promote the understanding of and an appreciation for our profession by the public. I should:

1) Use appropriate opportunities, publicly and privately, to comment upon the roles of lawyers in society and government, as well as in our system of justice, and
2) Conduct myself always with an awareness that my actions and demeanor reflect upon our profession.

c) To devote some of my time and skills to community, governmental and other activities that promote the common good.

AS TO THE PUBLIC AND OUR SYSTEM OF JUSTICE, I SHALL ASPIRE:

a) To consider the effect of my conduct on the image of our system of justice, including the effect of advertising methods.

b) To help provide the pro bono representation that is necessary to make our system of justice available to all.

c) To support organizations that provide pro bono representation to indigent clients.

d) To promote equality for all persons.

e) To improve our laws and legal system, by for example:

1) Serving as a public official
2) Assisting in the education of the public concerning our laws and the legal system
3) Commenting publicly upon our laws
4) Using other appropriate methods of effecting positive change in our laws and the legal system.

STATEMENT REGARDING THE PROVISION OF PRO BONO LEGAL SERVICES BY OHIO LAWYERS

Each day, Ohioans require legal assistance to secure basic needs such as housing, education, employment, health care, and personal and family safety. Many persons of limited means are unable to afford such assistance, and legal aid programs must concentrate limited resources on those matters where the needs are most critical. The result is that many Ohioans who are facing significant legal problems do not have access to affordable legal services. These persons are forced to confront landlord-tenant issues, have questions involving employment rights, or seek protection against domestic violence without the assistance of a legal advocate.

In 1997, this Court issued a *Statement on Professionalism* that recognizes each lawyer's obligation to engage in activities that promote the common good, including the provision of and support for pro bono representation to indigent clients. In 2007, in the *Preamble to the Ohio Rules of Professional Conduct*, the Court reemphasized the importance of this obligation by stating:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for those who because of economic or social barriers cannot afford or secure legal counsel.

Lawyers, law firms, bar associations, and legal services organizations, such as the Ohio Legal Assistance Foundation, have done and continue to do much to address unmet civil legal needs through the organization of, support for, and participation in pro bono legal services programs. Although these programs have increased both in number and scope in recent years, there remains an urgent need for more pro bono services.

This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities. There are pro bono programs available throughout Ohio that are sponsored by bar associations, legal aid programs, churches and civic associations. Many programs offer a variety of free legal services, while others concentrate on specific legal needs. Lawyers also may choose to participate in programs that focus on the needs of specific individuals such as senior citizens, the disabled, families of military personnel or immigrants.

The website, www.ohiolegalaid.org/pro-bono, contains a complete, searchable listing of pro bono programs and opportunities in Ohio. A lawyer may fulfill this professional commitment by providing legal counsel to charitable organizations that may not be able to afford to pay for legal services or by making a financial contribution to an organization that provides legal services to persons of limited means.

The Court recognizes that many Ohio lawyers honor their professional commitment by regularly providing pro bono legal services or financial support to pro bono programs. Moreover, the Court encourages lawyers to respond to this call by seeking to engage in new or additional pro bono opportunities. To document the efforts and commitment of the legal profession to ensure equal access to justice, the Court, in conjunction with the Ohio Legal Assistance Foundation, will develop a means by which Ohio lawyers may report voluntarily and anonymously their pro bono activities and financial support for legal aid programs.
The information regarding pro bono efforts will not only underscore the commitment of the legal profession to serving the public good but also will serve as a constant reminder to the bar of the importance of pro bono service.

ISSUED BY THE SUPREME COURT OF OHIO
SEPTEMBER 20, 2007

Visit ohiolegalhelp.org for more information.

FROM THE

STATEMENT ON PROFESSIONALISM

. . .In recognition of the unique standards of professionalism required of a judge or a lawyer acting in a judicial capacity, the Court issues A Judicial Creed upon the recommendation of the Supreme Court Commission on Professionalism. It is the Court's goal by adopting this creed to remind every judge and every lawyer acting in a judicial capacity of the high standards expected of each by the public whom they serve.

ISSUED BY THE SUPREME COURT OF OHIO
JULY 9, 2001

A JUDICIAL CREED

For the purpose of publicly stating my beliefs, convictions and aspirations as a member of the judiciary or as a lawyer acting in a judicial capacity in the state of Ohio:

I RE-AFFIRM my oath of office and acknowledge my obligations under the Canons of Judicial Ethics.

I RECOGNIZE my role as a guardian of our system of jurisprudence dedicated to equal justice under law for all persons.

I BELIEVE that my role requires scholarship, diligence, personal integrity and a dedication to the attainment of justice.

I KNOW that I must not only be fair but also give the appearance of being fair.

I RECOGNIZE that the dignity of my office requires the highest level of judicial demeanor.

I WILL treat all persons, including litigants, lawyers, witnesses, jurors, judicial colleagues and court staff with dignity and courtesy and insist that others do likewise.

I WILL strive to conduct my judicial responsibilities and obligations in a timely manner and will be respectful of others' time and schedules.

I WILL aspire every day to make the court I serve a model of justice and truth.

PROFESSIONALISM DOs AND DON'Ts

JUDICIAL PROFESSIONALISM

As the guardians of our legal system, judges are expected to establish and maintain the highest level of professionalism. The way in which judges manage their dockets, interact with counsel, and preside over their courtrooms sets a standard of professionalism for the attorneys who appear before them. Just as significantly, the words and actions of judges also shape the public's perception of the justice system. Being a judge requires diligence, personal integrity, and a dedication to the attainment of justice. With these principles in mind, the Supreme Court of Ohio Commission on Professionalism prepared this list of "DOs and DON'Ts" to guide judges in carrying out their responsibilities. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's judges. The commission encourages all judges to employ these practices in their daily routines, and in so doing, make lawyers and litigants feel welcome in their courtrooms and assured that disputes will be resolved in an efficient, timely, and just manner.

JUDICIAL PROFESSIONALISM

DO | IN PRETRIAL MATTERS

- DO provide litigants, in advance of an initial pretrial hearing or case management conference, notice of specific procedures that you wish counsel to follow that may differ from those followed in other courtrooms (e.g., regarding voir dire, jury instructions, note taking by or questions from jurors, etc.).
- DO use a case management order with all pertinent deadlines for each case, including specific dates for the completion of fact and expert discovery and the filing of certain motions.
- DO be accessible to parties to resolve discovery disputes, either by telephone conference or court hearing.
- DO remember that counsels' awareness of your accessibility may have the effect of decreasing a need for your actual involvement or the likelihood of counsel filing motions to compel discovery.
- DO conduct final pretrial conferences yourself to the extent possible. If a conflict in your schedule arises, allow parties the opportunity to reschedule before delegating the responsibility to a staff attorney. Remember that the presence of the judge at the final pretrial conference often helps facilitate a settlement.

DO | IN SCHEDULING

- DO freely grant a motion to extend case deadlines if the extension will not adversely affect any date previously set or will not otherwise prejudice a party.
- DO be aware of attorneys' professional and personal schedules (including vacation time) before setting a court date or denying a timely motion for continuance.
- DO perform a proper triage in managing scheduling conflicts between cases.
- DO weigh the consequences, cost, and additional expenditure of time and resources that are likely to result from cancelling one proceeding and moving forward on another.
- DO tell attorneys that if they want to put something on the record, they will be permitted to do so, subject to the court's determination as to the appropriate time, place, and manner.
- DO treat parties, litigants, and others with respect and dignity and create an environment where all persons are treated fairly and believe that they have been fully heard.
- DO instruct the members of your staff to treat all court visitors with the same respect that they themselves would expect.
- DO be patient and temperate, especially under trying circumstances.

JUDICIAL PROFESSIONALISM

DO | IN CONDUCTING HEARINGS & TRIALS

- DO enforce standards in your courtroom consistent with Professionalism DOs and DON'Ts: Professionalism in the Courtroom and encourage attorneys to follow the other publications of the Supreme Court of Ohio Commission on Professionalism.
- DO take the bench promptly and begin hearings at the scheduled time. Alert parties of any delay or conflict with as much advance notice as possible.
- DO consider making reasonable accommodations for self-represented litigants, such as summarizing the nature of the proceedings and the presentation and admission of evidence, using commonly understood words, instead of legal jargon, briefly explaining the reasoning for rulings, and, where appropriate, referring them to available resources that may assist them.
- DO address all participants formally and consistently in court by using an appropriate title, such as Ms., Mr., Mrs., Counsel, Dr., Rev., etc.
- DO be aware of your mood and take necessary breaks to decompress so that you can render the next decision refreshed.
- DO make decisions after the conclusion of a bench trial in such a manner as will make the litigants feel that their arguments were fully considered.
- DO deliver the decision or sentence in a formal, dignified, and neutral tone.

DO | IN RULING ON MOTIONS

- DO prepare for motion hearings by reading all relevant memoranda of law in advance of the hearing.
- DO listen to and consider each party's position, and provide all parties with adequate opportunities to respond, before ruling.
- DO issue timely rulings once motions become ripe, remembering the collateral expense incurred, as well as the frustration attorneys and parties experience, when rulings are not made in a timely manner.
- DO what you believe to be the right thing and trust that, if it turns out that your ruling was wrong, the error will, in all likelihood, be corrected on review.

JUDICIAL PROFESSIONALISM

DO | IN OTHER ACTIVITIES

- DO bring to a lawyer's attention any instance of the lawyer exhibiting a lack of civility or professionalism.
- DO encourage lawyers to engage in pro bono service.
- DO consider providing law students the opportunity to intern or extern in your court, as well as participating in mentoring programs that guide new lawyers in their transition into practice.
- DO accept criticism, justified or unjustified, even though you may not, or should not, respond.
- DO remember that the public or private functions you attend may affect confidence in the judiciary.
- DO consider teaching at bar association and judicial association CLE functions, mock trials, the Law and Leadership Institute, classroom visits, and other educational activities.
- DO bear in mind that dialogue between the bench and bar promotes a strong legal community and a more effective judicial system and so participate actively in the activities and committees of your state and local bar associations, judicial conferences, and judicial associations.

JUDICIAL PROFESSIONALISM

DON'T

- DON'T hold attorneys or litigants accountable for events beyond their control.
- DON'T chastise, correct, or question attorneys in a demeaning manner, especially in front of their clients or the jury.
- DON'T take an overly familiar tone with any lawyer, litigant, or witness while in court and on the record. Recognize how your interactions may be perceived by adverse counsel, by parties, by jurors, or by spectators.
- DON'T threaten or disclose how you are leaning on a dispositive motion as a means of forcing a settlement.
- DON'T use the contempt power lightly.
- DON'T conduct a hearing, sentence a defendant, or render an important decision in a state of anger or depression.
- DON'T demean or mock a defendant at a criminal sentencing hearing or in any written opinion.
- DON'T permit profanity and expressions of vengeance from attorneys, victims, or witnesses to invade a formal sentencing proceeding.
- DON'T hesitate to ask for post-hearing briefs or proposed findings of fact or conclusions of law if you believe that these post-hearing submittals will be helpful or appropriate.
- DON'T be worried about whether you will be appealed or what a reviewing court may say.
- DON'T disparage any attorney or fellow judge in your private conversations.
- DON'T attend an event if your attendance could cause a reasonable person to question your later impartiality in a pending case.

PROFESSIONALISM DOs AND DON'Ts

WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

Under "A Lawyer's Creed" issued by the Supreme Court of Ohio in February 1997, Ohio lawyers pledge to offer fairness, integrity, and civility to opposing parties and their counsel. The Supreme Court of Ohio Commission on Professionalism prepared this list of "DOs and DON'Ts" to illustrate some of the ways lawyers can fulfill this pledge in their everyday communication with opposing counsel and other lawyers. In creating this list, it is not the commission's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. By following these practices, lawyers will elevate the level of professionalism in their day-to-day interactions with other lawyers.

WORKING WITH OPPOSING COUNSEL & OTHER LAWYERS

DO

- DO maintain a courteous and cooperative working relationship with opposing counsel and other lawyers.
- DO avoid motions about minor issues that should be worked out informally.
- DO wait 24 hours before deciding to respond to an intemperate, untrue, or exasperating communication from another attorney.
- DO discuss discovery disputes with opposing counsel in person, by phone, or by email before sending a formal letter that stakes out your position.
- DO consult in advance with other attorneys to avoid scheduling conflicts.
- DO cooperate with other attorneys when you have obtained permission of the court to extend deadlines imposed by a court order.
- DO extend professional courtesies regarding procedural formalities and scheduling when your client will not suffer prejudice, DO be fair-minded with respect to requests for stipulations, and DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- DO respond in a timely fashion to communications from opposing counsel and other attorneys.
- DO keep your word.
- DO identify the changes you made from previous drafts when exchanging document drafts.
- DO promptly notify other counsel (and, where appropriate, the court or other persons who are affected) when hearings, depositions, meetings, or conferences must be cancelled or postponed.
- DO conclude a matter with a handshake or an exchange of courteous messages.
- DO require that persons under your supervision conduct themselves with courtesy and civility and that they adhere to these precepts when dealing with other attorneys and their staffs.

DON'T

- DON'T respond in kind when confronted with unprofessional behavior by another attorney.
- DON'T serve papers at a time or in a manner intended to inconvenience or take advantage of opposing counsel, such as late on a Friday afternoon, on the day preceding a holiday, or when you know counsel is absent or ill.
- DON'T be belligerent, insulting, or demeaning in your communications with other attorneys or their staff.
- DON'T use discovery as a means of harassment.
- DON'T publicly disparage another attorney, either during or after a case concludes.

PROFESSIONALISM DOs AND DON'Ts

LEGAL WRITING

A substantial part of the practice of most lawyers is conducted through the written word. Lawyers communicate with other attorneys, courts, and clients through writing. Writings introduce judges to the facts of a case, state the applicable law, and argue for a desired action or resolution to a legal dispute. The most effective legal writing is well-researched, clearly organized, logically sound, and professional in tone and appearance.

The Supreme Court of Ohio Commission on Professionalism has prepared this list of "DOs and DON'Ts" to guide lawyers in their professional writing. These points relate to many facets of attorney writing. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers. The list provides general categories of "DOs and DON'Ts" containing specific recommendations on form and content for specific types of writing.

LEGAL WRITING

DO

DO MAINTAIN PROPER FOCUS

- DO keep your purpose in mind while writing.
- DO tailor your writing to your primary audience, but be aware that others may read what you have written.

DO PROVIDE A CONSISTENT, COHERENT ARGUMENT

- DO research the applicable law thoroughly.
- DO investigate the facts diligently.
- DO plan and organize your writing.
- DO make sure that any legal theory you present is consistent with applicable law.
- DO use persuasive authority.
- DO state clearly what you are requesting in motions and briefs.

DO PRESENT AN HONEST, ACCURATE POSITION

- DO include all relevant facts.
- DO cite the record accurately.
- DO disclose relevant authority, including adverse controlling authority.
- DO update all cited authorities and exclude any reversed or overruled case.

DO ADOPT A CLEAR & PERSUASIVE STYLE

- DO put material facts in context.
- DO write in a professional and dignified manner.
- DO put citations at the end of a sentence.
- DO use pinpoint citations when they would be helpful.

DO PROVIDE APPROPRIATE SIGNPOSTS

- DO consider using headings and summaries.
- DO use transitions between sections that guide the reader from one argument to the next, especially in longer pieces of writing.

DO USE PRECISE ENGLISH GRAMMAR & CITATION FORM

- DO proofread for spelling and grammar.
- DO edit and redraft.
- DO cite cases and authorities accurately.
- DO use Ohio citation form (See Supreme Court of Ohio Writing Manual[1]).
- DO adhere to the applicable court's technical requirements and rules for submitting documents, such as, for example, any restrictions on fonts, margins, and document length.

LEGAL WRITING

DON'T

DON'T MAKE YOUR READER'S JOB MORE DIFFICULT

- Don't use jargon or confusing acronyms.
- Don't use boilerplate without tailoring to your specific argument or case.
- Don't use string citations, unless parenthetical explanations follow.
- Don't use lengthy quotations. Break up quoted language as necessary to simplify points.
- Don't put important information in footnotes.
- Don't overuse nominalizations, i.e., noun forms of verbs (e.g., "indication" instead of "indicate").
- Don't overuse the passive voice.

DON'T MAKE INAPPROPRIATE COMMENTS

- Don't make ad hominem attacks.
- Don't use hyperbole and sarcasm.
- Don't use overly emotional arguments. Rely on logic and reason.

DON'T MISCHARACTERIZE YOUR POSITION

- Don't misrepresent.
- Don't misquote.
- Don't rely on non-record facts.
- Don't plagiarize.
- Don't lie.

PROFESSIONALISM DOs AND DON'Ts

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

The integrity of our criminal justice system depends, in large part, upon the professionalism of the lawyers who prosecute criminal matters on behalf of the state and the defense attorneys who defend the accused. In a criminal matter, the rights of the victim, the protection of the public, and the liberty of the defendant are at stake. Considering the importance of these interests, perhaps nowhere in the practice of law is it more important for attorneys to act with professionalism and to serve our system of justice honorably. The Supreme Court of Ohio Commission on Professionalism, with the assistance of members of the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, prepared this list of "DOs and DON'Ts" to guide attorneys who practice criminal law. In creating this list, the commission does not intend to regulate or provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR PROSECUTORS

- DO remember your job is not to "win," but to help administer justice.
- DO go forward with a case only if you have a good-faith belief in the guilt of the defendant.
- DO remember that the power of the state is not personal to an individual prosecutor and that you should always use prosecutorial power judiciously, with personal humility.
- DO remain in control of your case and remember that you – not the police, not the investigator, and not the victim – are the person in charge, that your client is the government, and that your ultimate goal is the furtherance of justice.
- DO periodically and regularly review your case from the point of view of the defense. This practice will help you provide exculpatory evidence in a timely fashion.
- DO be realistic about the strengths and weaknesses of your case as it evolves and circumstances change. Be willing to adjust your position as justice requires.
- DO take any doubts about the sufficiency of the evidence supporting the government's case to your supervisor, and document the fact that you took that step.
- DO provide discovery in a timely manner. Have discovery materials ready within a reasonable period of time after request, and promptly inform defense counsel of delays.
- DO respond to communications from the victim and his or her family. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.

DON'T | FOR PROSECUTORS

- DON'T forget that your role is the obtainment of justice, which does not always mean a conviction.
- DON'T pursue a charge if the evidence is not there.
- DON'T be rude to defense counsel, who is simply advocating for his or her client.
- DON'T be vindictive or punitive to defendants who are exercising their rights. The mere filing of a motion to suppress, a request for search warrant affidavits, a discovery demand, or the exercise of a defendant's right to trial does not justify adding additional and unnecessary charges or recommending a harsher sentence.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR DEFENSE ATTORNEYS

- DO advocate for your client, listen to your client, and treat your client with respect.
- DO advocate creatively, but reasonably. Remember that your credibility will affect this client and all of your clients, present and future.
- DO determine the type of fee agreement that is best for your client, i.e., hourly or flat fee. Do enter into a written fee agreement with your client as early as feasible.
- DO explain to your client, as early as feasible, your dual role as an adviser and as defender.
- DO respond to communications from the defendant's family, as long as the information sought is not protected by the attorney-client privilege. Be attentive to their concerns and be mindful that they may not be familiar with court procedures or proceedings.
- DO meet with your client regularly throughout the representation.
- DO contact the prosecutor with questions or concerns about discovery before filing a motion to compel or a motion for a continuance.
- DO promptly file a notice of appearance when taking over a case as retained counsel from appointed counsel, so that appointed counsel can file a motion to withdraw, and ask appointed counsel to provide you with all pleadings and all discovery materials and other case information he or she obtained.
- DO prepare accordingly when appearing in a court in which you haven't appeared before. Check the court's website, or with the court staff, and, if necessary, the judge, in order to familiarize yourself with local rules and the general practices of that court.

DON'T | FOR DEFENSE ATTORNEYS

- DON'T suggest to your client that you can get a certain result or make promises to your client that you may not be able to keep.
- DON'T represent that you have not received discovery materials from the prosecutor when such materials have been made available to you, or represent that you have not received a particular document when you have not asked the prosecutor for it.
- DON'T file motions that are frivolous, or file certain motions only because you believe that such motions are usually filed, or file last-minute motions with respect to matters about which you have long been aware.
- DON'T demean your client in conversations with the prosecutor and/or the judge.
- DON'T enter a plea agreement on your client's behalf without first investigating all areas of potential defense.
- DON'T ask for more time than is needed when requesting a continuance.
- DON'T request last-minute continuances as a trial tactic, especially in cases where witnesses have to travel.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DO | FOR PROSECUTORS & DEFENSE ATTORNEYS

- DO review and consistently follow the Supreme Court of Ohio's *Professionalism Dos* and *Don'ts* concerning *Professionalism in the Courtroom and Working with Opposing Counsel and Other Attorneys*.
- DO be respectful of the time and resources of opposing counsel. Where discrepancies in resources exist, be reasonable.
- DO prepare clients, witnesses, family, and friends for the courtroom by explaining the rules and procedures of court to them.
- DO use third parties when possible to interview witnesses. If you must personally interview a witness, especially a witness who is likely to be called to testify for the opposing side, have a third person present during the interview to avoid the possibility of your having to testify at trial as to what the interviewee actually said.
- DO know and follow the rules of evidence and rules of procedure.
- DO treat opposing counsel with the utmost professionalism, even if you disagree.

Prosecutors & defense attorneys are officers of the court and responsible for the administration of justice. Keeping this in mind, they must proceed at all times with the diligence, integrity, and courtesy such an important endeavor requires.

CONDUCT OF PROSECUTORS & DEFENSE ATTORNEYS

DON'T | FOR PROSECUTORS & DEFENSE ATTORNEYS

- DON'T make statements to the court or the media concerning the strength of your case prior to evaluating discovery materials.
- DON'T disparage or personally attack opposing counsel. Don't claim a prosecutor is "persecuting" your client. Don't treat a defense attorney as if he or she committed the alleged crime. Don't consider opposing counsel an enemy when opposing counsel is simply doing his or her respective job.
- DON'T improperly suggest a judge or opposing counsel has a political agenda or bias. Think carefully about how such statements may affect a client, a victim, or the public's perception of the quality of justice.
- DON'T refer to your own personal, political, or religious beliefs during a criminal proceeding.
- DON'T misrepresent your status by telling a witness that you "work with the court so you have to talk to me," allow your investigator to make such a representation, or discourage a witness from talking to opposing counsel.
- DON'T have ex parte communications with the judge about substantive issues or the merits of a case.
- DON'T use inappropriate body language to try to persuade a jury. Examples include: fist pumping after a favorable ruling from the judge, rolling eyes during a defendant's or witness's testimony, uttering audible sighs, putting your head down on a table, nodding your head in agreement, or shaking your head in disagreement during court proceedings.
- DON'T feign ignorance of rules of courts, rulings made by the judge, or of evidence that was disclosed to you. For example, during a trial or hearing, don't refer to evidence that has been excluded in limine or make comments about, or allude in questions to, evidence already held to be inadmissible.
- DON'T hide evidence or fail to disclose witnesses. Don't wait until the morning of trial to disclose witnesses or evidence.
- DON'T make unfair or derogatory references to opposing counsel during opening and closing statements. Trials are about facts and the arguments that fit them. Avoid any arguments or characterizations of opposing counsel's case that are not based on the evidence.
- DON'T allow clients, witnesses, victims, or their family or friends, to act inappropriately in the courtroom or near the courtroom.
- DON'T emulate bad behavior portrayed by lawyers in television shows or movies.

PROFESSIONALISM DOs AND DON'Ts

DEPOSITIONS

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "DOs and DON'Ts." The commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the commission's intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition follow the do's and dont's on the following pages.

DEPOSITIONS

DO

- DO review the local rules of the jurisdiction where you are practicing before you begin.
- DO cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, do cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- DO arrive on time.
- DO be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- DO turn off all electronic devices for receiving calls and messages while the deposition is in progress.
- DO attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- DO treat other counsel and the deponent with courtesy and civility.
- DO go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- DO recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, do make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, do provide a copy to the deponent.
- DO inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DEPOSITIONS

DON'T

- DON'T attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- DON'T coach the deponent during the deposition when he or she is being questioned by the other side.
- DON'T make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- DON'T make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- DON'T instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- DON'T take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- DON'T overtly or covertly provide answers to questions asked of the witness.
- DON'T demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- DON'T engage in conduct that would be inappropriate in the presence of a judge.

PROFESSIONALISM DOs AND DON'Ts

PROFESSIONALISM IN THE COURTROOM

To be truly professional when appearing in court, a lawyer must act in a proper manner. Such conduct goes beyond complying with the specific rules of procedure and of evidence promulgated by the Supreme Court of Ohio and with local rules issued by trial courts and individual judges. Proper conduct in the courtroom also includes adhering to common principles of civility and respect when dealing with the judge, court staff, and opposing counsel. The Supreme Court of Ohio Commission on Professionalism has prepared this list of "DOs and DON'Ts," to illustrate a number of principles so that lawyers appearing in Ohio courts will fully understand what is expected of them. In creating this list, the commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

By following the principles of civility and respect, lawyers will enhance their professionalism, as well as the dignity of courtroom proceedings.

PROFESSIONALISM IN THE COURTROOM

DO

- DO be prepared for your participation in any court conference or proceeding.
- DO wear appropriate courtroom attire when appearing in court. If you are a male attorney, always wear a tie.
- DO advise your clients on how to dress appropriately for any scheduled court appearance.
- DO be on time for all court conferences and proceedings. (The best practice is to arrive at least five minutes in advance of the scheduled time.)
- If you are going to be late, do call the courtroom so those who are waiting are properly informed.
- DO turn your cell phone and all other electronic devices off or to silent mode before entering a courtroom.
- DO be courteous when addressing the judge and opposing counsel, both in the courtroom and in chambers.
- DO begin any argument on the record before the judge or jury, by saying, "May it please the court."
- DO stand whenever you address the judge in the courtroom.
- DO show all exhibits to opposing counsel before showing the exhibit to a witness.
- DO ask the judge's permission before approaching a witness during trial or before publishing an exhibit to the jury during an examination.
- DO speak clearly and enunciate when addressing the judge or a witness.
- DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- DO respect the private nature of a sidebar conference; avoid making statements or arguments at a level that may be overheard by the jury.
- DO inform the judge in advance of any delays in the scheduling of witnesses.
- DO treat court personnel with the same respect you would show the judge.
- DO be accurate when setting forth pertinent facts and pertinent rules of law.
- DO answer questions from the judge directly and forthrightly.
- DO bring to the judge's attention any possible ethics issues as soon as you become aware of them.
- DO verify immediately the availability of necessary participants and witnesses after a date for a hearing or trial has been set, so you can promptly notify the judge of any problems.
- During final argument, do be circumspect when summarizing testimony that contains profane words.

PROFESSIONALISM IN THE COURTROOM

DON'T

- DON'T make ad hominen attacks on opposing counsel or be sarcastic in either your oral arguments or written briefs.
- DON'T shout when making an objection in a court proceeding.
- DON'T make any speaking objections in a jury case except for an explanatory single word or two (e.g., "hearsay," "leading," "no foundation"). DO request a side bar conference if you must expound on your objections.
- DON'T interrupt opposing counsel or the judge, no matter how strongly you disagree with what is being said.
- DON'T argue with the judge aor react negatively after the judge has ruled on an objection or other matter.
- DON'T tell the judge that he or she has committed a reversible error.
- DON'T tell the judge that another judge has ruled a different way without providing a copy of the other judge's written opinion.
- DON'T display anger in the courtroom.
- DON'T make facial objections during testimony or during arguments by opposing counsel.
- DON'T bring a beverage to the trial table unless it is in a non-descript glass or cup and only if you determined that the judge does not object to a beverage on the trial table.
- DON'T lean or sit on the trial table, jury box, or any other furniture in the courtroom.
- DON'T move freely around the courtroom once a proceeding is underway without obtaining permission from the judge.
- DON'T celebrate or denounce a verdict as it is delivered, and also advise clients and interested spectators not to do so. DO behave civilly with opposing counsel when leaving the courtroom.

PROFESSIONALISM DOs AND DON'Ts

VIDEOCONFERENCING

Although Zoom and other videoconferencing platforms existed before the COVID-19 pandemic, it was not until COVID-19 safety protocols became ubiquitous in courts and law offices that these platforms became everyday parts of most legal practitioners' lives. Because of its many benefits, it appears that videoconferencing is here to stay.

As in other areas, the legal profession's adjustment to videoconferencing was not without occasional missteps. One mistake that gained national attention, was a Texas lawyer who could not remove his cat filter during a hearing.

If a lawyer uses videoconferencing improperly, or without fully understanding the technology of the chosen platform, the lawyer can potentially violate the Ohio Rules of Professional Conduct, damage their reputation, or their employer's reputation, and create claims against the lawyer and/or the employer.

For these reasons, the Commission on Professionalism is publishing the following guidelines, a set of videoconferencing "Dos and Don'ts." The Commission believes that if lawyers follow these guidelines, they will enjoy all of the benefits of videoconferencing without running afoul of professional pitfalls.

It is not the Commission's intention to regulate or suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. By adhering to these guidelines, lawyers will be acting as professionals.

VIDEOCONFERENCING

DO

- DO ensure that your internet connection is sufficient to allow you to connect to the videoconferencing platform and maintain a stable connection. Consider using a cable and a hardwired-internet connection instead of relying on a wireless-internet connection.
- DO familiarize yourself with the functionalities of the videoconferencing platform. Learn keyboard shortcuts, if any.
- DO connect early to ensure everything is working properly.
- DO a test run before the first time you use a videoconferencing platform for a meeting, court proceeding, client meeting, etc., to minimize the potential for technical difficulties at the time of your conference.
- DO have all materials you need, plan to refer to, or mark as exhibits ready and available.
- DO ensure all materials and exhibits that will be referenced during the videoconference are shared with participants before the conference. For a videoconference deposition, send exhibits to the participants, including the court reporter, at least a day before the deposition.
- DO change your videoconferencing platform's default settings so that you enter conferences with your microphone muted and your camera turned off. Consider adding your headshot to your profile, if possible, so your picture appears if you lose your video feed.
- DO remember to mute your microphone when others are speaking.
- DO treat all participants with courtesy and civility.
- DO mute your microphone, and remind your client to mute their microphone when you take breaks in a deposition or other meeting requiring client consultation. You and your client should physically move to another room, rather than using a virtual breakout room within the videoconferencing platform, before having any conversations during breaks.
- DO consider your audience when choosing attire. Dress as you would if you were having the meeting or proceeding in person. Avoid clothing with stripes or other patterns that cause a strobing effect on camera.
- DO consider using a laptop or desktop computer, rather than a cellphone or tablet, to ensure high-quality video and sound.
- DO position your device so your head and shoulders are visible, you are centered in the frame with some space above your head, and the camera is as close as possible to level with your eyes.
- DO make eye contact with the camera, not the images of the other participants.
- DO be conscious of your body language during a videoconference. Consider standing when addressing a court, tribunal, or witness, if you can do so without causing undue delay or distraction.

VIDEOCONFERENCING

DO, CONTINUED...

- DO notify others in your office that you will be unavailable during the videoconference to avoid interruptions and distractions. Consider putting a sign on the door informing others in the building that a videoconference is underway.
- DO choose a professional background.
- DO set up in a well-lit area. Avoid using a window as your background and having lights directly behind you. Consider positioning a ring light or similar device in front of you to provide better illumination.
- DO be mindful of confidentiality rules. Ensure that no client information is unintentionally visible during your videoconference session.
- DO ensure that your display name on the videoconferencing platform is appropriate and properly identifies you. Avoid using generic names (such as "Participant 1") or your email address. Include both your first and last name if you are before a tribunal or in a meeting with participants who do not know you.
- DO familiarize yourself with any tribunal rules or orders related to appearing before that tribunal through videoconferencing platforms.

VIDEOCONFERENCING

DON'T

- DON'T be late. Punctuality matters and is a show of respect to your fellow attendees and tribunal.
- DON'T choose a location that is uncomfortable or public.
- DON'T forget that any other attendee could be watching you at any time.
- DON'T keep other tabs open on your web browser, use an offensive or inappropriate device wallpaper, or allow your device to give pop-up notifications, if you are sharing your screen.
- DON'T make rude or degrading comments to any participant.
- DON'T wear clothing that matches, or is similar to, the color of your video background.
- DON'T forget to wear appropriate attire on your lower half. Although it is generally not visible, if you must stand or walk away for any reason, other participants can see your entire outfit.
- DON'T be less prepared than you would be for an in-person meeting or appearance before a tribunal.
- DON'T multitask. Your fellow attendees can tell.
- DON'T forget to check your setup – including the functioning of your audio and video, your background, the lighting, the appearance of your attire, and the documents on your desk – before joining the session.
- DON'T be interrupted by avoidable distractions. Before your session, turn off the ringer or alert tone (including any vibration feature) of your desk phone, cellphone, smart watch, and other devices, close programs (such as your email program) that send frequent alerts, and disable any visual-notification feature on your device.
- DON'T presume your audience is always with you. Periodically check to ensure that you and any critical participants (such as the judge) are still connected and streaming to the videoconference, and see if other participants have questions or comments.
- DON'T say something not meant for all participants until you ensure your microphone is muted. Don't leave your camera on if you need to attend to something other than the videoconference during the session, or there is a visible distraction in the room with you.
- DON'T forget to unmute when you are ready to speak or turn your camera on when you rejoin the session.
- DON'T interrupt or speak over other participants.

THE SUPREME COURT OF OHIO COMMISSION ON PROFESSIONALISM

The Supreme Court of Ohio created the Commission on Professionalism in September 1992. As stated in Gov.Bar R. XV, the commission's purpose is to promote professionalism among attorneys admitted to the practice of law in Ohio. The commission aspires to advance the highest standards of integrity and honor among members of the profession.

The 15-member commission includes five judges and two lay members appointed by the Supreme Court, six attorneys appointed by the Ohio Metropolitan Bar Association Consortium and Ohio State Bar Association, and two law school administrators or faculty. The duties of the commission include:

- Monitoring and coordinating professionalism efforts and activities in Ohio courts, bar associations and law schools, and in jurisdictions outside Ohio
- Promoting and sponsoring state and local activities that emphasize and enhance professionalism
- Developing educational materials and other information for use by judicial organizations, bar associations, law schools and other entities
- Assisting in the development of law school orientation programs and curricula, new lawyer training and continuing education programs
- Making recommendations to the Supreme Court, judicial organizations, bar associations, law schools and other entities on methods for enhancing professionalism
- Overseeing and administering a mentoring program for attorneys newly admitted to the practice of law in Ohio.

CURRENT AND PAST CHAIRS
OF THE COMMISSION ON PROFESSIONALISM

Emily C. Samlow, Esq., 2021

Denise Platfoot Lacey, Esq., 2020

Douglas R. Dennis Esq., 2019

Judge Richard L. Collins Jr., 2018

Mark Petrucci Esq., 2017

Judge Jeffrey Hooper, 2016

Mary Cibella Esq., 2015

Michael L. Robinson Esq., 2014

Marvin L. Karp Esq., 2013

Judge Michael P. Donnelly, 2012

Lee E. Belardo Esq., 2011

Professor Stephen R. Lazarus, 2009-2010

Monica A. Sansalone Esq., 2007-2008

Judge David Sunderman, 2005-2006

Barbara G. Watts, 2003-2004

Judge C. Ashley Pike, 2001-2002

John Stith, 1999-2000

Richard Ison, 1997-1998

Kathy Northern, 1995-1996

Richard Ison, 1992-1994

FOR MORE INFORMATION ABOUT ATTORNEY PROFESSIONALISM OR THE COMMISSION ON PROFESSIONALISM, CONTACT:

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THE SUPREME COURT *of* OHIO

PUBLISHED BY
The Supreme Court of Ohio
Commission on Professionalism

KMK | Law

Ohio Rewrites the Law on Limited Liability Companies

1.11.2021

Related Practices

Business Representation & Transactions

On January 8, 2021, Ohio Governor Mike DeWine signed Senate Bill 276 into law effecting a restatement of the Ohio Limited Liability Company Act as Chapter 1706 of the Ohio Revised Code. The Act is the result of years of work by the Ohio State Bar Association's Corporation Law Committee. The original Ohio Limited Liability Act was enacted in 1994. Since that time the utility and prominence of the limited liability company as a business entity has developed significantly. Although changes have been made over the years to the Ohio LLC Act in an effort to improve clarity and to keep it current, Ohio is one of the few states whose original limited liability company act has not seen a comprehensive revision.

The new Ohio LLC Act is intended to be one of the most modern limited liability company acts in the country. The new LLC Act is based on the Revised Prototype Limited Liability Company Act published by the American Bar Association's Committee of LLCs, Partnerships and Unincorporated Entities (the "Prototype Act"), modified to take into consideration certain familiar aspects of the current Ohio LLC Act. Some of the highlights of the new LLC Act include the following:

Retaining Ohio Terminology. Most modern limited liability company acts, including the Prototype Act, use the terminology certificate of formation, limited liability company agreement, limited liability company interests, registered office and registered agent. Chapter 1706 retains the terminology used in the Ohio LLC Act to reduce confusion by businesses and practitioners familiar with the current terminology, considering that many existing limited liability companies may continue with their current operating agreement and other organizational documents in effect.

Series Limited Liability Companies. Chapter 1706 now permits Ohio series limited liability companies. The series limited liability companies establish, by way of its operating agreement, one or more designated series of assets and liabilities with which certain subjects of members might be associated. The series provisions are based on those provided in the Prototype Act. Series provisions are primarily contained at Section 1706.76, et. seq.

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Elimination of Manager-Managed and Member-Managed Dichotomy and Statutory Default Authority. Consistent with the Prototype Act, SB 276 eliminates the member-managed and manager-managed bifurcation of management structures and the statutorily conferred actual and apparent authority of members and managers in those paradigms. This structure also departs from the strictly bifurcated organization contemplated by the current Ohio LLC Act. This approach is more consistent with the flexibility legal practitioners and the public have applied to structuring the governance and operation of limited liability companies which structures include managers, officers, boards of directors, managing members, etc.

Fiduciary Duties or Standards of Conduct. Consistent with the current Ohio LLC Act and certain other Ohio business entity statutes, Sections 1706.31 and 1706.311 provides for statutory default fiduciary duties for members and managers. This is a significant departure from the Prototype Act which does not provide for statutory default fiduciary duties, relying on the premise that common law provides an adequate basis for applying the obligations associated with members and agents of a limited liability company.

Consolidation of Provisions on Limited Liability Company Agreement Override. Consistent with the current Ohio LLC Act (Section 1705.081), Chapter 1706 places in one section (Section 1706.08) the various provisions that are not permitted to be modified by the operating agreement. This centralization allows for the elimination of the phrase "unless otherwise provided in the limited liability company agreement" or similar phrases throughout the Revised Ohio LLC Act and the ambiguity that results in the absence of express override language. Therefore, all provisions within Chapter 1706 are "default" provisions that may be modified by the operating agreement unless modifications are prohibited under Section 1706.08.

Practitioners and business owners will have nearly a year to adjust to the new regime as Chapter 1706 will apply to all limited liabilities companies effective January 1, 2022.

The Ohio State Bar Association Corporation Law Committee has indicated its intention to provide educational materials regarding the new statute, including form operating agreements to aid practitioners in their adaption to the new statute.

For more information please contact Mike Moeddel or a member of KMK's Business Representation & Transactions Group.

porterwright

Media

JULY 22, 2021
LAW ALERT

Changes to the Ohio LLC Act and series LLCs for real estate purposes

RELATED SERVICES

- Real Estate

The introduction of series limited liability companies (LLCs) into the provisions governing LLCs under the Ohio Revised Code will be very important for Ohio companies operating for real estate purposes. While other changes are also important to consider, series LLCs will provide a new flexible vehicle for Ohio companies that hold and invest in real property assets.

Chapter 1705, the current chapter of the Ohio Revised Code (ORC) governing limited liabilities companies will be repealed, effective Jan. 1, 2022, to make way for the Ohio Revised Limited Liability Company Act (Ohio LLC Act) adopted earlier this year under Chapter 1706 of the ORC. The new chapter will modernize Ohio's LLC law similar to many other states and is based largely on the Prototype LLC Act developed by the LLCs, Partnerships and Unincorporated Entities Committee of the American Bar Association Section of Business Law. The new chapter preserves many concepts of the current chapter to prevent existing LLCs from needing to make significant changes in response to the new chapter going into effect, but introduces many new concepts. One notable change, the addition of "series LLCs," could affect how existing and new LLCs may wish to be organized, especially those formed primarily for real estate purposes.

In Ohio, the holding company structure is a common vehicle used by businesses whose primary purpose is centered around real estate. In this structure, one parent LLC is composed of different members – usually one management entity used to manage the business - and a collection of separate subsidiary LLCs each used to hold different properties in the names of those LLCs. The parent LLC's operating agreement can then be used to administer profits, liabilities and other obligations of the business regarding the operation of those properties. Similar to how a conventional LLC can be used to protect individual person-members from personal liability, by holding properties in this structure the parent LLC can operate a single business while protecting each of its properties as individual assets in the event one of its subsidiary LLCs faces legal liability. For example, if a lawsuit arises against one subsidiary LLC, typically the challenger can only look to the assets of that LLC and not any of the other properties of the parent LLC held in the names of its other subsidiaries. This structure can effectively shield different assets while allowing the business to operate as one entity. It was born out of the creative efforts of legal

professionals responding to early LLC statutes and therefore can be cumbersome to organize since it was not originally contemplated by LLC laws.

ORC Sections 1706.76 – 1706.7613 of the new chapter authorize the formation of "series LLCs" and govern their operation. A series LLC is a form of LLC that can establish one or more "series" of assets organized under only one parent LLC, with each series (and its assets) being shielded from the liability of other series and the company generally. This form of LLC was originally implemented by other states when modernizing those states' LLC laws.

To take advantage of this structure under Ohio's new chapter, a company's operating agreement must expressly contemplate this series structure and must provide for each series to have:

1. Separate rights, powers or duties with respect to specified property or obligations of the LLC or profits and losses associated with such specified property or obligations; and/or
2. A separate purpose or investment objective.

Additionally, at least one member of the company must be associated with each series. Under this structure, the debts, liabilities and obligations of a specific series are enforceable only against the assets of that series and are not enforceable against the assets of the company generally or any other series under that company. Similarly and conversely, none of the debts, liabilities or obligations of the company generally or any other series are enforceable against the assets of that specific series. To maintain these protections for the company and each series, the company must continuously meet the following conditions:

1. The records maintained for each series must account for the assets of that series separately from the other assets of the company or any other series
2. The company's operating agreement must expressly provide for limited liability between its separate series
3. The company's articles of organization must contain a statement that the company may have one or more series of assets subject to these limitations

In the real estate context, series LLCs can be very useful. Unlike the holding company structure (which requires multiple LLCs), the series LLC structure under the new chapter requires only one series LLC. The series LLC can create separate series to hold each property asset and will protect those assets against liability through the use of this series structure, rather than holding each property in a separate subsidiary LLC. Similar to the purpose of the holding company structure, if a lawsuit arises in connection with one of the properties held in a specific series, the company and its other properties would not be at risk by virtue of that lawsuit.

So what about an existing business using a holding company structure to manage its properties? The new chapter will still permit these existing structures (for example, a "member" may still be an entity and a member will not liable for a debt, obligation or liability of the company) and there is plenty of existing case law governing this effect. However, if an existing business using the holding company structure wants to take advantage of the series LLC structure under the new chapter, one solution would be to merge each of the subsidiary LLCs into the parent LLC, and revise the operating agreement for purposes of a series LLC in accordance with the new chapter. ORC 1706.71 provides for the conditions that must be met in order to effect a merger and ORC 1706.713(3) expressly

provides that property owned by each subsidiary company would vest in the surviving parent LLC without reservation or impairment.

Apart from the addition of series LLCs, the new chapter includes at least two other changes that are notable for businesses formed for real estate purpose: Changes to management structure and authority and provisions applying to foreign LLCs.

The current chapter permits LLCs to be organized as member-managed or manager-managed. Conversely, the new chapter takes a new approach by instead providing that a person's ability to bind the LLC can be authorized by:

1. The operating agreement;
2. The decisions of members in accordance with the operating agreement;
3. A statement of authority filed with the Ohio Secretary of State; or
4. The default rules otherwise provided under the new chapter.

This effectively removes the member-managed and manager-managed distinction and provides more flexibility for an LLC to manage its business. For example, a company could use its operating agreement to establish a mechanism for a board to make decisions, rather than referring to members or managers specifically. In the real property context, this will be provide more flexibility for any company to duly authorize dealings with real property.

The new chapter also provides new provisions governing how foreign LLCs will be treated in Ohio. Notably, in order for a foreign LLC to "transact business" in Ohio, it must register with the secretary of state. However, ORC 1706.512 provides a list of what does not constitute "transacting business" in Ohio, which specifically includes merely owning real property. Effectively, these statutes clarify that a foreign LLC will not face statutory liability for failure to register in Ohio if it merely owns real property in the state. This can be important for companies organized in foreign jurisdictions and owning real property in Ohio, as well as domestic owners who organized their companies elsewhere (like Delaware or a neighboring state).

The introduction of series LLCs into the ORC may be the most significant addition for LLCs operating for real property businesses in Ohio. Other changes are also important to consider in this context, but the new chapter will at least be a great step in the direction of modernizing Ohio's limited liability company law.

For more information, contact any member of Porter Wright's Real Estate practice group.

Tucker Ellis LLP

CLIENT ADVISORY

NEW LAW OFFERS ADDITIONAL FLEXIBILITY IN STRUCTURING LLC MANAGEMENT

AUGUST 2021

A new Ohio LLC statute will bring flexibility in structuring the management of a limited liability company formed in Ohio. Current Ohio law contemplates that an LLC will be managed either directly by its owners, known as "members," or by designated persons called "managers." Until 2016, the Ohio LLC statute did not even officially contemplate the concept of "officers" as an option. Even today it does not expressly contemplate governance by a collective group like a board of directors.

No longer just "member-managed" or "manager-managed." Drafters of LLC operating agreements have long provided for boards of managers and officers answerable to that board when it suited the management structure desired by the members, but this structure relied heavily on the idea that such a contract among the members would be honored even if not directly contemplated by the statute. Beginning January 1, 2022, the new Ohio Revised Limited Liability Company Act will move away from the concept that an LLC is either "member-managed" or "manager-managed." Although the new Act still uses the term "manager," it will now be defined as "any person designated by the limited liability company or its members with the authority to manage all or part of the activities or affairs of the limited liability company on behalf of the limited liability company, which person has agreed to serve in such capacity, *whether such person is designated as a manager, director, officer, or otherwise*."

This Client Advisory is part of a series highlighting different features of the Ohio LLC Act that goes into effect on January 1, 2022. For other content regarding the Act, click here.

Existing authority to bind. Existing Ohio law provides that in an LLC without managers, each member, acting alone, can bind the LLC in a matter "apparently carrying on in the usual way the business of the company" unless the other person knows that the member does not have the necessary authority. Similarly, under existing law in an LLC with managers, each manager, acting separately, can bind the LLC in apparently carrying on in the usual way the business of the company unless the other party knows that the manager does not have actual authority. Thus an LLC under today's law is at risk that a member or manager who oversteps his or her bounds could commit the LLC to a third party who is ignorant of the lack of actual authority of the member or manager.

New reliance on actual authority. The new statute replaces those standards with the simple concept that no person has the power to bind the LLC except to the extent the person is authorized to act as the agent of the LLC under the operating agreement or such authorization is provided to the person by the members in a manner that does not violate the operating agreement. For actions in the ordinary course of activities of the LLC, approval by a majority of members is sufficient, but for actions not in the ordinary course of activities of the LLC, the approval must be unanimous. In other words, only actual authority granted as provided by, or pursuant to, the governing document or by express vote of the members results in binding effect. That actual authority could be provided directly by the operating agreement; by delineating certain actions a person is authorized to take, indirectly, such as by stating that a person has authority to the extent conferred by a board of directors; or by an action of the members as described above.

The new importance of actual authority means that a person entering into an agreement with an Ohio LLC may want to look more closely into governing documents to be assured that the person signing for the LLC has the actual authority to do so.

In our experience, most operating agreements today have express provisions that lay out the authority structure of the company. If, however, an LLC has relied on the existing statutory provisions to set the authority of members or managers to bind the company, that concept will

need to be revisited, because, when the new law goes into effect, there may no longer be any effective structure for decisions to bind the company.

The new law also, for the first time in Ohio, authorizes an LLC to establish separate series that may hold separate assets and limit their liability to the activities of the specific series. Each series can have a separate management structure. For more about series LLCs, see our Client Advisory here.

Also for the first time, the new statute provides the option for an LLC to file a "statement of authority" with the Ohio Secretary of State. A statement of authority may address authority for the LLC as a whole or for a series separately. An effective statement of authority is conclusive in favor of a person that gives value in reliance on the statement, unless the person has knowledge to the contrary. The statement of authority is mostly likely useful for situations where a third party is seeking clear authority in a public record, as opposed to having to get assurances that do not appear on the public record. One example would be real estate conveyancing.

Finally, it is worth mentioning that, like the prior statute, the new Act provides for certain actions that cannot be taken or authorized by any person without consent of all of the members of the LLC, such as amending the operating agreement or filing for bankruptcy. However, the "default" nature of the new Act suggests that this requirement may be varied by an agreement among the members to give such authority to fewer than all of the members or even to another person, such as a manager.

Key takeaways. The management structure of an LLC can be a touchy subject, so if your operating agreement has provisions that work well to the general satisfaction of all involved, there is probably no good reason to make any changes based on the new law. If, however, the current management structure is awkward, confusing, or poorly worded – either because ideas were forced to fit into the more restrictive concepts of the existing Ohio law or because the structure has become outdated for the business – now is the ideal time to revisit it in view of the flexibility of the new Act. Closely related and also worthy of consideration are the types of duties owed by members and managers to the LLC and to the other members. For a discussion of that subject, click here. Finally, going forward, a party dealing with an LLC may want to take a closer look for actual authority before entering into an agreement.

ADDITIONAL INFORMATION

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FEATURE **BUSINESS & BANKING**

OPPORTUNITIES AND PITFALLS UNDER OHIO'S NEW LLC ACT

BY LUDGY A. LAROCHELLE & GLENN E. MORRICAL

On January 1, 2022, the new Ohio Revised Limited Liability Act in O.R.C. Chapter 1706 (the "New Act") will go into effect and govern all LLCs formed or registered to do business in Ohio. The new Act is a complete replacement of existing Ohio LLC law under O.R.C. Chapter 1705 and constitutes the default rules for governing Ohio LLCs; however, the new Act emphasizes the principles of "freedom of contract" in providing business owners and investors the ability to override the majority of the default rules under the new Act through the company's operating agreement.

Consequently, the new Act provides a litany of opportunities to business owners and investors to specifically tailor their relationships and management structures. In order to help their clients take advantage of these opportunities, practitioners must become keenly aware of the default rules under the new Act and avoid any unintentional consequences or "pitfalls" with respect to the application of the law to their clients' businesses. Practitioners should begin to review their existing clients' operating agreements to ensure that their terms align with the business owners' expectations while navigating the requirements under the new Act.

MANAGEMENT STRUCTURES AND AUTHORITY

Opportunity – The new Act eliminates the distinction between the member-managed and manager-managed structures under the existing LLC Act and the inherent apparent authority of the members and/or managers to bind the LLC derived from these management structures. Instead, the new Act provides an LLC the flexibility to institute any governing structure and bestow actual authority to certain persons or entities to bind the LLC as defined in the operating agreement, as provided by the consent of the members, or as set forth in a statement of authority filed with the Ohio Secretary of State (a concept borrowed from partnership law but new to Ohio LLCs).

Pitfall – If the management structure is not properly addressed in the operating agreement, then the default rules with respect to management and authority under the new Act will apply. Under the default rules, the activities and affairs of the LLC or series are subject to the oversight of its members. Outside of a few exceptions that require unanimous consent under the default rules (e.g. the ability to amend the operating agreement or undertake any activity that is outside the ordinary course of the company's activities), matters in the ordinary course of the company's activities are to be decided by the majority of the members (or, with respect to a series, the members of that particular series) on a per capita basis. This is in stark contrast to the existing LLC Act, where the management authority of the members (when the operating agreement is silent) is based on the proportion of each member's contribution of capital to the company, as adjusted to reflect additional contributions or withdrawals by such member. Additionally, the default rules under the new Act require that all members share equally in any distributions made by the company (except that when winding up the LLC, each member is first entitled to receive a return of its unreturned contributions before receiving an equal share

of distributions from any surplus remaining in the Company). Understandably, many business owners and investors who make substantial contributions to a company will want to avoid scenarios where the management authority of the company is decided by the headcount of the members and operational distributions are shared equally by the members, thereby making the size of a member's contribution inconsequential with respect to control over the company and the distribution of funds.

FIDUCIARY DUTIES

Opportunity – The new Act permits the elimination of all fiduciary duties of the members, managers, or other parties, including the duty of loyalty and the duty of care. The ability to eliminate fiduciary duties may be beneficial to those companies that typically engage passive investors, such as real estate holding companies or investment funds. Owners in these types of entities, who often participate in more than one holding or investment company, usually desire to avoid any duty to present business opportunities to the Company or a duty to refrain from competing with the Company.

Both the existing and new Acts preclude the elimination of the implied covenant of good faith and fair dealing, which is not a fiduciary duty per se, but shares similar traits. Practitioners should consider drafting operating agreement provisions in a manner intended to clarify what will or will not be considered breaches of this covenant.

Pitfall – Under the new Act, the default rules for fiduciary duties of the members and managers are subject to whether the company has managers. If a company has managers, the members do not owe any fiduciary duties to the company or to the other members, but they must exercise their rights consistent with the implied covenant of good faith and fair dealing. Managers owe a duty of loyalty and care. If the company does not have managers, members owe the duties of care and loyalty to the company and the other members. Application of the fiduciary default rules may be viewed as an "opportunity" or a "pitfall" depending on the member's position of control in the LLC. Controlling members typically want to limit their fiduciary obligations to the company and other members in order reduce their exposure for business decisions made on behalf of the LLC, while minority investors generally want to expand the fiduciary obligations to ensure the controlling members act on behalf of the minority investors' interest.

SERIES

Opportunity – The new Act allows for Ohio limited liability companies to be formed or reorganized into series LLCs. A series LLC is a limited liability company that contains one or more separate series. Each series may establish, in its own separate name, its own members, purpose, management, assets, duties, powers, and rights distinct from other series in the company and from the LLC itself. Additionally, each series in a series LLC has the power to sue or be sued, enter into contracts, and, with respect to the assets of the series, convey assets or otherwise encumber such assets by granting liens or security interests on those assets. The biggest benefit of establishing a series is that it affords a high level of protection for assets held by an individual series from the liabilities of other series and the master LLC. Generally, the assets of an individual series are shielded from claims arising from the other series or the LLC itself. Conversely, the other series and the LLC are protected from claims against an individual series. In order for a series to be afforded these protections, the articles of organization and operating agreement of the series LLC must contain specific language regarding the establishment and separateness of each series, and the series LLC must keep and maintain consistently clear and separate records for each series.

Pitfall – Given that the series LLC is still a relatively new but growing concept (currently allowed in approximately one-third of the states), there remains a level of uncertainty regarding whether the benefits of a series will be upheld in jurisdictions outside of Ohio or in certain legal proceedings. For example, there is an inherent risk that the liability shield for the assets of a series may not be recognized in states that do not recognize series limited liability structures or by bankruptcy courts. Furthermore, there is no clear indication that states will follow federal guidelines, which currently provide that each series is to be treated as a separate entity for income tax purposes. This uncertainty adds further complexity as to how series LLCs are required to deal with payroll and state income taxes.

BARRING CREDITOR CLAIMS

Opportunity – The new Act provides a dissolving company the opportunity to bar certain creditor claims following the windup of its operations. The opportunity to bar certain creditor claims depends on whether the dissolving company provides proper notice to its creditors in accordance with the new Act. Proper notice must include the name of the dissolving company, a description of information needed to file a claim, a mailing address to send a claim, and a deadline to submit a claim. For known creditors, the Company must deliver a notice to the known creditors with a statement that any claims against the Company must be filed within 90 days of the notice date. For unknown creditors, the company must publish a notice on the company's website (if it has one) and provide the notice to the Ohio Secretary of State to be posted on its website. In addition, the notice for unknown creditors must include a statement that any claims must be filed within two years of the notice publication date. Creditors who fail to deliver their claims within the specified deadline will be barred from filing claims against the dissolved company.

Pitfall – The ability to bar certain creditor claims is optional and subject to the dissolving company's following of the notice requirements in the new Act. In order to avoid unintentionally missing the opportunity to bar creditor claims, practitioners may want to advise their clients to include a statement under the dissolution section of their operating agreements that references the creditor notice requirements under the new Act.

CONCLUSION

The discussion above highlights only some of the opportunities and pitfalls under the new Act. The new Act makes changes to Ohio LLC law in many other areas, including those relating to derivative claims, charging orders, and failure to maintain an agent. Practitioners should review the new Act in its entirety to avoid surprises down the road.

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Tucker Ellis LLP

CLIENT ADVISORY

NEW ACT GIVES OHIO LLCS TOOLS TO CUT OFF CLAIMS

OCTOBER 2021

Ohio's current limited liability company statute does not provide any means for an LLC to cut off claims by others after the company dissolves. The statute requires the dissolved LLC to pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations that are known to the company and all claims and obligations that are known to the company but where the claimant or obligee is unknown. Absent an express settlement between the LLC and a creditor or claimant, there could be a cloud hanging over the LLC until any applicable statute of limitations has expired. Beginning January 1, 2022, an Ohio LLC will have statutory tools to allow it to force creditors and claimants to resolve matters within certain timeframes.

This Client Advisory is part of a series highlighting different features of the Ohio LLC Act that goes into effect on January 1, 2022. For other content regarding the Act, click here.

A claimant who is given notice is barred from bringing a claim if the claimant does not deliver the claim to the dissolved company by the deadline. If the dissolved company rejects a claim, the claimant is barred if it does not commence a proceeding to enforce the claim within 90 days after the effective date of the rejection notice. This procedure applies even to claims where the amount of the claim is not yet determined, but it does not apply to a contingent liability that has not matured so that there is no immediate right to bring suit or a claim based on an event occurring after the effective date of dissolution.

Barring of Other Claims. Under the new Act, a dissolved LLC may publish notice of its dissolution and request that persons with claims against the dissolved company present them in accordance with the notice. The notice must be posted on the company's website, if it has one, and must be provided to the Ohio Secretary of State for posting on its website. The notice must describe the information that must be included in a claim, provide a mailing address to which the claim must be sent, and state that a claim against the dissolved company will be barred unless a proceeding to enforce the claim is commenced within two years after the posting of the notice. A claim by any of the following persons will be barred two years after publication of the notice, unless it is barred earlier, such as by expiration of the statute of limitations:

- A claimant who was not given direct notice as described above with respect to known claims;
- A claimant whose claim was timely sent to the dissolved company but not acted on by it; and
- A claimant whose claim is contingent at the effective date of the dissolution of the company or is based on an event occurring after the effective date of the company's dissolution.

Determination by a Court. If a dissolved LLC has posted the notice on its website (if it has one) and provided it to the Ohio Secretary of State, then it has the right to file an application with the appropriate court for a determination of the amount and form of security to be provided for payment of claims that are contingent, claims that have not been made known to the dissolved company, and claims that are based on an event occurring after the effective date of the dissolution of the LLC but that, based on the facts known to the LLC, are reasonably estimated to arise after the effective date of the dissolution. If the court sets the terms and amount of security for a claim and the company provides that security, then that claim is satisfied and cannot be enforced against the company or a person owning a membership interest to whom assets have been distributed by the company after the effective date of the dissolution.

Previously Dissolved LLCs. The new Act, when it becomes operative, will apply not only to newly formed LLCs but also to ones that existed before the new Act. The procedures described above are not limited to LLCs formed after a certain date or dissolved after a certain date. It appears then that an LLC that was previously dissolved without the ability to use these new procedures could use them after January 1, 2022 with the same effect as for new LLCs. The way in which the Ohio Secretary of State provides for the required website posting may affect whether this possibility is available. The desirability of using one or all of these procedures will depend on the confidence the dissolved LLC has that it has already satisfied possible claims.

Drafting Issues and Key Takeaways. The procedures described above are available as a matter of law under the new Act to LLCs formed either before or after the new law goes into effect and do not require that the LLC address them in its operating agreement. It would be prudent, however, for members of any existing LLC to review their operating agreement and make sure that it does not contain any language that could be interpreted to mean that the LLC will not follow procedures like those described above. The new procedures are optional, so members who will not control how such matters are handled after dissolution may want to request that the operating agreement be amended to require that the new procedures be followed.

Additional Information

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Health and Well-Being: Navigation During COVID / Post-COVID: Resources for Help

- The Ohio Lawyers Assistance Program, Inc.

  www.ohiolap.org

  OLAP's Facebook Page: @ohiolawyersassistanceprogram
- National Suicide Prevention Hotline: (800) 273-8255
- Crisis Text Line- 4HOPE to 714-714
- Call 911
- Go you your closest ER

Krueger v. Experian Info. Sols., Inc.

United States Court of Appeals for the Sixth Circuit

September 13, 2021, Filed

File Name: 21a0428n.06

No. 20-2060

Reporter
2021 U.S. App. LEXIS 27699 *; 2021 FED App. 0428N (6th Cir.); 2021 WL 4145565

MARK R. KRUEGER, Plaintiff-Appellant, v. EXPERIAN INFORMATION SOLUTIONS, INC.; TRANS UNION LLC, Defendants, CENLAR FSB, Defendant-Appellee.

Prior History: [*1] ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Counsel: For MARK R. KRUEGER, Plaintiff - Appellant: Tarek N. Chami, Law Office, Dearborn, MI; David A. Chami, Price Law Group, Scottsdale, AZ.

For CENLAR FSB, Defendant - Appellee: Steven A. Jacobs, Schneiderman & Sherman, Farmington Hills, MI.

Judges: Before: GIBBONS, KETHLEDGE, and MURPHY, Circuit Judges.

Opinion by: KETHLEDGE

Opinion

KETHLEDGE, Circuit Judge. For more than a year, the servicer for Mark Krueger's mortgage loan, Cenlar FSB, continued to tell credit-reporting agencies that the loan was past due—even though Cenlar knew that the loan had been discharged in bankruptcy. Krueger's credit score hovered in the low 500s as a result. After unsuccessfully seeking for months to have Cenlar correct its reports, Krueger brought this suit under the Fair Credit Reporting Act, alleging that Cenlar had negligently and willfully breached its duties under the Act. The district court granted summary judgment to Cenlar, holding that Krueger lacked standing to assert his negligence claim and that he lacked evidence that Cenlar violated the Act willfully. We respectfully disagree and reverse.

I.

Given that the district court granted summary judgment **[*2]** to Cenlar, we construe the factual record in the light most favorable to Krueger. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009).

Krueger filed for bankruptcy under Chapter 13 and eventually made all the payments required under his plan. In January 2018, the bankruptcy court entered an order discharging his remaining debts, including a mortgage loan on a property at 9405 Pardee Road. The servicer for the mortgage on that property was Cenlar.

After the discharge, Krueger looked forward to

replacing his older, beat-up car with a new one. A month after the discharge, however, an online credit-monitoring app told Krueger that one of his accounts was past due. Krueger pulled his credit reports from Experian, Equifax, and TransUnion. Those reports said that Krueger owed $29,453 on the Cenlar loan, that $10,875 of the loan was past due, and that his credit score was 515—much lower than Krueger had expected, even with his recent bankruptcy.

Given that credit score, Krueger abandoned his plan to buy a new car and instead disputed his credit report. The credit-reporting agencies forwarded Krueger's disputes to Cenlar. At the time, Cenlar already knew that the bankruptcy court had discharged the mortgage loan; indeed Cenlar was in the process **[*3]** of stripping the lien from Krueger's property. In response to the dispute, Cenlar's credit analysts likewise noted that the bankruptcy court had discharged the debt—meaning, as Cenlar's representative admitted later, that Krueger "did not owe" anything on the loan and that his account was not past due. Yet when Cenlar purportedly sought to correct the mistaken report, it said the account had "no status"—which, according to Cenlar, meant that the account's status had not changed from the month before. Cenlar also said that the account balance had increased to $31,783 and that the amount past due had increased to $11,191.

When Krueger next checked his reports, Experian and TransUnion still said that the Cenlar loan was past due. Over the following months, Krueger continued to dispute his credit reports, and Cenlar continued to say the same thing—that the account had "no status" and a past-due balance. In February 2019, more than a year after the discharge, Cenlar was still reporting that the loan was past due—now by $12,294.

Krueger sued Cenlar that month, alleging that it had willfully and negligently violated its statutory duties as a "furnisher" of credit information. *See* 15 U.S.C. §§ 1681s-2, 1681n, 1681o. Cenlar **[*4]** and Krueger cross-moved for summary judgment on those claims. The district court held that a reasonable jury could not find that Cenlar had violated the Act willfully and that Krueger lacked standing to bring a claim that Cenlar had violated the Act negligently. The court therefore granted summary judgment to Cenlar. This appeal followed.

II.

We review the district court's grant of summary judgment de novo. *See Fortney & Weygandt, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 310 (6th Cir. 2010). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A.

Krueger challenges the district court's conclusion that he lacked standing. A plaintiff has standing if he suffered an injury in fact, fairly traceable to the defendant's alleged misconduct, which the relief he seeks would likely redress. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Here, Krueger seeks damages under the Fair Credit Reporting Act, which gives him a cause of action against a furnisher of credit information (like Cenlar) who willfully or negligently violated its procedural duties under the Act. *See* 15 U.S.C. §§ 1681n, 1681o. But not every violation of the Act causes an injury in fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016). Instead, a plaintiff has standing to seek damages only if he can show that the defendant's **[*5]** alleged procedural violation—here, Cenlar's inaccurate reports about the mortgage loan's status—caused him to suffer a concrete harm. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211, 210 L. Ed. 2d 568 (2021).

Krueger argues that Cenlar's inaccurate reports inflicted a concrete harm because his low credit score caused him to abandon his plans to buy a new

car. When the bankruptcy court discharged his debts, Krueger had been driving an older car for years, using his available funds to pay off his debts. A loan would have allowed him to replace his old car, with the added benefit of giving him a chance to rebuild his credit. But when Krueger saw his dismal credit score he chose not to apply for a loan, since a lower credit score meant that lenders would charge him a higher interest rate. The harm that resulted from Krueger's forbearance was "not abstract." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). To the contrary, for about 18 months after Krueger's debts were discharged, instead of driving a new Ford F-150, he drove a Ford Fusion that was not "always in the best of shape." And the record here supports a finding that this harm was real, rather than fictive: once the credit-reporting agencies removed the Cenlar account from Krueger's report, his credit score **[*6]** increased by almost 100 points and he promptly obtained a car loan to buy a new F-150.

Cenlar does argue that, since Krueger himself chose not to apply for a car loan, he cannot trace this harm to Cenlar's conduct—as opposed to the bankruptcy or to himself. But a plaintiff's role in his injury destroys traceability only when the injury is "so completely due to the plaintiff's own fault as to break the causal chain." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) (alterations adopted). Here, when Cenlar reported that the loan was past due, Krueger's resulting credit score was only 515. That Krueger chose not to obtain a loan with higher interest than he could have obtained absent Cenlar's error does not make him at "fault" for the harm of driving his old car. Krueger has standing to assert his claims here.

B.

Krueger argues that his evidence would allow a reasonable jury to find that Cenlar had willfully and negligently violated the Act. To prevail on those claims, Krueger must show three things. First, Krueger must make "a threshold showing" that Cenlar provided false or "materially misleading" information to the credit-reporting agencies. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 629-30 (6th Cir. 2018). Krueger plainly made that showing: long after his mortgage loan was discharged, Cenlar continued **[*7]** to report it as past due. Cenlar responds that its report was not materially misleading because Cenlar also said that the account had "no status" and because Experian's credit report elsewhere noted Krueger's bankruptcy. The relevant inquiry, however, is whether Cenlar's information was misleading, not whether Experian's report as a whole was. *See id.* And Cenlar's failure to indicate that the debt had been discharged could mislead a person to believe that Krueger remained liable for the loan. Indeed, Krueger presented evidence that the credit reporting agencies actually construed Cenlar's responses that way: when the agencies removed the Cenlar account from his report, his credit score increased by 100 points. Thus, a reasonable jury could find that Cenlar furnished false or materially misleading credit information about Krueger.

Second, a reasonable jury must be able to find that Cenlar breached its duties under the Act. *See* 15 U.S.C. §§ 1681n(a), 1681o(a); *Pittman*, 901 F.3d at 628. As relevant here, the Act required Cenlar reasonably to investigate Krueger's dispute and to correct any inaccurate or incomplete information that Cenlar had furnished. *See* 15 U.S.C. § 1681s-2(b)(1)(A), (E); *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 616, 618 (6th Cir. 2012). The record would allow a jury to find that Cenlar breached that duty. Krueger **[*8]** repeatedly told Cenlar that his loan had been discharged in bankruptcy and that, as a result, he did not owe anything on the loan. Cenlar's credit analysts also saw that the loan had been discharged. And Cenlar's representative admitted in his deposition that the discharge meant that Krueger owed nothing on the loan. Yet Cenlar continued to report that Krueger owed a balance on the loan and that the loan was past due. From that evidence a jury could plainly find that Cenlar botched its investigation and failed to correct its mistaken reporting.

The same evidence supports the third element of

Krueger's claims, namely that Cenlar acted negligently or willfully. *See* 15 U.S.C. §§ 1681n(a), 1681o(a). Again, Cenlar knew that Krueger's loan had been discharged but for more than a year told the credit-reporting agencies that the loan was past due. A jury could therefore find that Cenlar was either incompetent or willful in its failure to correct its reports sooner. Cenlar contends that its actions were not willful because it had implemented policies that guided its analysts in the resolution of credit disputes. But the mere existence of those policies hardly disproves as a matter of law that Cenlar acted willfully. *See* ***[*9]*** *Boggio*, 696 F.3d at 619. Cenlar was not entitled to summary judgment on Krueger's claims.

* * *

The district court's judgment is reversed, and Krueger's case is remanded for further proceedings consistent with this opinion.

Russell v. Educ. Comm'n for Foreign Med. Graduates

United States Court of Appeals for the Third Circuit

February 11, 2021, Argued; September 24, 2021, Filed

No. 20-2128

Reporter
15 F.4th 259 *; 2021 U.S. App. LEXIS 28960 **

MONIQUE RUSSELL; JASMINE RIGGINS; ELSA M. POWELL; and DESIRE EVANS, v. EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES, Appellant

Prior History: **[**1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (District Court No. 2:18-cv-05629). District Judge: Honorable Joshua D. Wolson.

Russell v. Educ. Comm'n for Foreign Med. Graduates, 2020 U.S. Dist. LEXIS 49393, 2020 WL 1330699 (E.D. Pa., Mar. 23, 2020)

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Judges: Before: RESTREPO, BIBAS, and **[**2]** PORTER, Circuit Judge.

Opinion by: RESTREPO

Opinion

[*261] OPINION OF THE COURT

RESTREPO, *Circuit Judge*.

This case presents the question whether the District Court abused its discretion when it certified an "issue class" pursuant **[*262]** to Rule 23(c)(4) of the Federal Rules of Civil Procedure. We hold that it did. According to Rule 23(c)(4), "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." For "an action" to be "brought or maintained as a class action," the party seeking class status must satisfy Rule 23 and all its requirements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Further, in *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011), we enumerated a "non-exclusive list of factors" relevant to assessing whether the certification of an issue class under Rule 23(c)(4) is "appropriate." *Id.* at 272 (quoting *Chiang v. Veneman*, 385 F.3d 256, 267, 46 V.I. 679

(3d Cir. 2004)). So when a party seeks to certify "particular issues" for class treatment, the district court must ask three questions. *First*, does the proposed issue class satisfy Rule 23(a)'s requirements? *Second*, does the proposed issue class fit within one of Rule 23(b)'s categories? *Third*, if it does, is it "appropriate" to certify this as an issue class? Fed. R. Civ. P. 23(c)(4). Here, lacking clear guidance, the District Court failed to determine whether the issues identified for class treatment fit within one of Rule 23(b)'s categories and then failed to explicitly consider a few of the *Gates* factors. **[**3]** Accordingly, for the reasons that follow, we will vacate the District Court's issue-class certification and remand for further proceedings.

I. FACTUAL BACKGROUND

A. The Educational Commission for Foreign Medical Graduates

Graduates of foreign medical schools who wish to be accepted to a United States medical-residency program must have graduated from a recognized foreign institution, demonstrated English-language proficiency, and passed the first two steps of the United States Medical Licensing Examination. Defendant-Appellant Educational Commission for Foreign Medical Graduates ("the Commission") is a Philadelphia-based nonprofit that certifies that such graduates have satisfied those requirements. The Commission carries out this function in two ways. First, it administers the English-language and medical examinations the foreign medical school graduates must pass. Second, the Commission verifies, using primary sources, that the applicant received a medical degree from a qualifying institution.

As the central certification agency for graduates of foreign medical schools, the Commission also investigates what it calls "irregular behavior." According to internal policies, the Commission **[**4]** may investigate "all actions or attempted actions on the part of applicants . . . that would or could subvert the examination, certification or other processes, programs, or services of [the Commission]." J.A. 254. The Commission's investigation of such behavior proceeds as follows. When the Commission receives an allegation that an applicant committed irregular behavior, it reviews the allegation and determines whether sufficient evidence supports the charge. If sufficient evidence supports the charge, the Commission notifies the applicant of the allegation and invites him to submit a written explanation or present any other relevant information. The applicant may also request a hearing and hire legal counsel. After the applicant is heard, the Commission then determines whether, by a preponderance of the evidence, the applicant engaged in the irregular behavior that was charged. The Commission may take various disciplinary actions, up to and including permanent revocation of a certification. The charged individual has a right of appeal, but petitions to reconsider decisions are granted "only in extraordinary **[*263]** cases." *Id.* And whatever the case, if the Commission "determines that an **[**5]** individual engaged in irregular behavior, a permanent annotation to that effect will be included in the individual's [Commission] record." *Id.*

B. A Foreign Doctor Named Charles Igberase

In early 1992, a man named Oluwafemi Charles Igberase applied to the Commission for certification. He eventually passed the medical-licensing and English-language examinations and was issued the Commission's certification. But no residency program accepted him. So, in March 1994, Igberase submitted a second application for certification to the Commission. In that application, however, Igberase rearranged his name ("Igberase Oluwafemi Charles" instead of "Oluwafemi Charles Igberase"); used a different date of birth (April 17, 1961 instead of April 17, 1962); and responded "No" to the question of whether he had

ever previously submitted an application to the Commission. Igberase passed each required examination and was certified by the Commission for a second time. But in June 1995, the Commission learned that Igberase had obtained two of its certifications under different names and dates of birth, and had lied on his second application about not seeking certification previously. So it invalidated Igberase's **[**6]** second certification and revoked the first, and informed the United States Medical Licensing Examination Committee of his deception. J.A. 237.

In 1996, Igberase applied to the Commission for certification for yet a third time. In this application, Igberase ditched his first two names and invented another one: "John Nosa Akoda." J.A. 263. As he had twice before, Igberase (as Akoda) eventually passed the medical-licensing and English-language examinations and received the Commission's certification. After receiving the certification as "Akoda," Igberase applied for and was admitted to a residency program in New Jersey. But in August 2000, the residency program learned that the social security number Akoda used in his application belonged to Igberase. The residency program informed the Commission of the inconsistency, provisionally suspended the doctor it knew as Akoda, and, after an internal investigation, in November 2000, dismissed him.

Once it learned of Akoda's possible misuse of Igberase's social security number, the Commission launched its own investigation. Based on the information it had received from the residency program, the Commission sent Akoda a "charge letter." In it, the **[**7]** Commission told Akoda that it had "received information alleging that you may have engaged in irregular behavior," specifically that he had twice before applied for certification using the name "Igberase." J.A. 284. The Commission told Akoda that the allegations "require[] an explanation," and granted him fifteen days to submit a written response. J.A. 285.

A week later, as Akoda, Igberase responded. He denied the allegations, telling the Commission that "[t]he identification numbers listed in your letter apparently belong to my cousin Dr. Igberase Oluwafemi Charles, who left the country to practice, I believe, in South Africa." J.A. 287. Akoda admitted using Igberase's social security number but insisted that they were "two different persons who attended two different Colleges of Medicine." *Id.* He reiterated that he had "only taken the examination once in my name, John NOSA Akoda," and offered to provide the Commission with his passport if it requested it. J.A. 287.

The Commission official overseeing Akoda's case apparently did not buy the explanation. In a December 2000 memorandum **[*264]** intentionally not made part of Akoda's official file, the official wrote that he and others believed Igberase **[**8]** and Akoda were one in the same. J.A. 293. But the official concluded that he did not have enough evidence to recommend Akoda's case to the Commission's credentialling committee. So Akoda's credential remained active.

In October 2006, Igberase, again as "Akoda," applied to a residency program at Howard University Medical Center. As part of his application, he submitted to the Commission three letters of recommendation. But the Commission was suspicious of Akoda, so one of its officials attempted to verify the authenticity of these three letters of reference. The official sent each reference the recommendation letter submitted by Akoda and asked each whether the letter was authentic. The record does not reflect whether the official received a response from any of the references.

Despite the official's reservations, Igberase (as Akoda) was admitted to Howard's residency program. He successfully completed the program in 2011. After completing the program, he applied for and received a Maryland medical license using fake identification documents. That same year, he became a member of the medical staff at Prince George's Hospital Center and began seeing patients there.

In June 2016, law enforcement **[**9]** officials executed search warrants at Igberase's residence, medical office, and vehicle. They found fraudulent or altered immigration documents, medical diplomas, medical transcripts, letters of recommendation, and birth certificates. On November 15, 2016, Igberase signed a plea agreement. In it, he pleaded guilty to misuse of a social security account number to fraudulently obtain a Maryland medical license and admitted that "Akoda" was a pseudonym. *Id.*

The Commission subsequently invalidated Akoda's foreign-doctor certification, and the Maryland Board of Physicians revoked his medical license.

C. Patients of Igberase sue the Commission

The named Plaintiffs are Monique Russell, Jasmine Riggins, Elsa Powell, and Desire Evans. Each received medical treatment from the doctor known as "Akoda," who was certified by the Commission in 1997. Igberase performed unplanned emergency cesarean-section surgery on Russell and Riggins and delivered Evans's and Powell's children. These Plaintiffs also seek to represent a class of similarly situated individuals who likewise received medical treatment from "Akoda." But the Plaintiffs (appellees here) did not sue Igberase. Instead, they sued the Commission, **[**10]** and asserted claims of negligent infliction of emotional distress arising out of the Commission's certification of Igberase as "Akoda."

Eventually, the district court certified a class of "All patients examined or treated in any manner by Oluwafemi Charles Igberase (a/ka [sic] Charles J. Akoda) beginning with his enrollment in a postgraduate medical education program at Howard University in 2007." J.A. 63-64. But the district court did not certify the class under any subsection of Rule 23(b). Instead, the court certified the class as an "issue class" pursuant to Rule 23(c)(4). The court certified the class with respect to these issues:

> (1) whether the Commission undertook or otherwise owed a duty to class members.
>
> (2) whether the Commission breached any duty that it owed to class members.
>
> (3) whether the Commission undertook or otherwise owed a duty to hospitals and state medical boards, such that it may be held liable to class members **[*265]** pursuant to the Restatement (Second) of Torts § 324A.
>
> (4) whether the defendant breached any duty that it owed to hospitals and state medical boards.

In short, the particular issues the district court certified for class treatment concern only the duty and breach elements of Plaintiffs' claim. The district court therefore **[**11]** left for individualized proceedings whether each Plaintiff was injured; whether the Commission's breach of the relevant duty (if it had a duty that was breached) actually and proximately caused those injuries; whether those injuries are due a particular amount of damages; and whether the Commission could raise any affirmative defense, including, presumably, whether each Plaintiff's consent to medical treatment by Igberase breaks the causal chain. In the wake of the Rule 23(c)(4) certification, the Commission successfully petitioned for leave to appeal under Rule 23(f). We must decide whether that certification was proper.

II. The Legal Framework of Issue-Class Certification

A. Rule 23 outlines one procedure for pursuing aggregate litigation

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 n.6 (3d Cir. 2009) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). One reason the class action is an exceptional form of litigation is because final judgments in such actions may implicate the

procedural and substantive rights of absent persons.

The Supreme Court recently reiterated the principle that absent persons may not be bound by federal-court judgments unless one of a limited number of historically **[**12]** recognized exceptions is satisfied. *See Taylor v. Sturgell*, 553 U.S. 880, 893, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). A "properly conducted" class action is one such exception. *Id.* at 894-95. A properly conducted class action requires that (1) "[t]he interests of the nonparty and her representative are aligned"; (2) "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty"; and (3) there was "notice of the original suit to the persons alleged to have been represented." *Id.* at 900.

In the class context, "these limitations are implemented by the procedural safeguards in Federal Rule of Civil Procedure 23." *Id.* at 900-01. The procedural safeguards of Rule 23, in turn, are constitutionally mandated and "grounded in due process." *Id.* at 901. Rule 23 thus provides a constitutional safe harbor for litigants to pursue class treatment on behalf of absent persons. But the party seeking to certify a class "bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *see also Reyes v. Netdeposit, LLC*, 802 F.3d 469, 485 (3d Cir. 2015) (discussing and clarifying preponderance of evidence standard in class certification determinations).

The requirements of Rule 23 are these. The party seeking class certification must demonstrate, first, that the requirements of Rule 23(a) are met. **[**13]** *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). To satisfy Rule 23(a), a plaintiff must "prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy **[*266]** of representation." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (internal quotation marks omitted).

Once beyond Rule 23(a)'s four prerequisites, plaintiffs then must seek to certify a class of one of three "types," each with additional requirements. *See* Fed. R. Civ. P. 23(b). For instance, Rule 23(b)(3), a provision at issue here, states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy."[1]

Rule 23(c) provides two additional pathways to a form of class certification. Rule 23(c)(5) permits a district court, "[w]hen appropriate," to "divide[]" a class "into subclasses that are each treated as a class under [Rule 23]." So if a district court detects dissimilarities of interests between the putative class representative and absent class members, it may divide the full class into subclasses to isolate atypical issues or claims, or resolve conflicts of interest that otherwise would preclude full class certification. **[**14]** *See, e.g., In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 432 (3d Cir. 2016); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) ("[A] class divided between holders of present and future claims . . . requires division into homogenous subclasses . . . with separate representation to eliminate conflicting interests of counsel."). And Rule 23(c)(4), the provision center stage here, states that "[w]hen

[1] There are two additional "types" of class actions maintainable under Rule 23(b). Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(2), by contrast, applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

appropriate, an action may be brought or maintained as a class action with respect to particular issues." Pursuant to that provision, we have previously held that a district court may certify for class treatment issues that would, upon their resolution, determine a defendant's course of conduct. *See Chiang v. Veneman*, 385 F.3d 256, 46 V.I. 679 (3d Cir. 2004). In what follows, we examine the scope of issue-class certification under Rule 23(c)(4).

B. Issue-class certification under Rule 23(c)(4) grants district courts broad but well-defined discretion to certify particular issues for class treatment

Let us restate the text of Rule 23(c)(4). It says that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." The Rule, therefore, permits an issue class to be brought or maintained "as a class action." But with that permission comes restrictions. To be a "class action," a party must satisfy Rule 23 and all its requirements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013); *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d 305, 310 (3d Cir. 2008) ("[A] class may not be certified **[**15]** without a finding that each Rule 23 requirement is met."). In other words, "[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification **[*267]** must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). A party seeking to certify "particular issues" for class treatment must show the same. That party must show that those issues "satisfy[] Rule 23(a)'s prerequisites" and that those issues are "maintainable under Rule 23(b)(1), (2), or (3)." *See id.*

But neither Rule 23(c)(4) nor its commentary outlines the "appropriate[ness]" inquiry, or discusses which types of "issues" might be suitable for class treatment and which may not be. At the provision's adoption, the Rules Committee, in its commentary, suggested that the issue-class device may be used to bifurcate the "adjudication of liability to the class" from follow-on proceedings needed to "prove the amounts of [class members'] respective claims." Fed. R. Civ. P. 23(c)(4) advisory committee's note to 1966 amendment. That commentary does not illuminate much. In a typical Rule 23(b)(3) class action, for example, individualized damages determinations often remain after common questions have been decided. *See, e.g., Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 452-60, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-70, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013). Further, Rule 23(c)(4) talks about "issues," not "liability" (or "claims" or "causes of action"), so there **[**16]** is no obvious textual basis to limit issue-class certification to issues that, upon *their* resolution, necessarily establish a defendant's liability as to all claimants.

We explained Rule 23(c)(4)'s "appropriate[ness]" inquiry in *Gates v. Rohm & Haas*, 655 F.3d 255 (3d Cir. 2011). In *Gates*, we considered the appropriateness of issue-class certification for property owners who alleged that a chemical company's pollution decreased their property values. In 2005, Rohm & Haas acquired a chemical-processing plant in Ringwood, Illinois. *Id.* at 258. For the half-century or so prior to Rohm & Haas's acquisition, the Ringwood facility was owned and operated by a company called Morton International. *Id.* During at least some of that time, Morton dumped wastewater produced by its chemical processing into an on-site lagoon. *Id.* The wastewater contained vinylidene chloride, a molecule used in the production of vinyl chloride, which is important in the production of plastics and a known carcinogen. "In 1978, Morton ceased using the on-site lagoon and covered it." *Id.* But environmental testing in the 1970s and 1980s suggested that Morton's dumping of vinylidene chloride was polluting the surrounding environment. In 1973, for example, "tests of a

shallow aquifer under the **[**17]** Ringwood facility showed elevated levels of ammonia and chloride." *Id.* And in 1984, water samples from wells that Morton had installed at Ringwood showed elevated levels of vinylidene chloride and vinyl chloride. *Id.*

In 2006, residents of a nearby residential village filed a class-action complaint alleging, among other things, that Morton's dumping of the vinylidene chloride caused their residential community to become less attractive and their property values to decrease.[2] *Id.* at 259, 271. Before **[*268]** the district court, with respect to their property damage claim, the plaintiffs moved to certify two classes—a Rule 23(b)(3) class of property owners who allegedly suffered loss in property values due to the defendants' contamination and an "issue only" class that would decide defendants' liability but leave damages for individual trials. *Id.* at 272.

The district court declined to certify either class. As to the plaintiffs' proposed Rule 23(b)(3) class, the district court found that common questions did not predominate over individual ones. The court observed "that resolution of [common] questions leaves significant and complex questions unanswered, including questions relating to causation of contamination, extent of contamination, fact of damages, **[**18]** and amount of damages." *Gates v. Rohm and Haas Co.*, 265 F.R.D. 208, 233-34 (E.D. Pa. 2010). The district court likewise rejected plaintiffs' attempt to certify a Rule 23(c)(4) issue class. The court found that an issue class "would not advance the resolution of class members' claims" because, like in the Rule 23(b)(3) context, "the fact of damages and the amount of damages would remain following the class-wide determination of any common issues, and further that causation and extent of contamination would need to be determined at follow-up proceedings." *Gates*, 655 F.3d at 272 (quotation marks omitted). We affirmed.

In affirming the district court's decision not to certify a Rule 23(c)(4) issue class, we adopted a "non-exclusive list of factors [to] guide courts" faced with motions to certify particular issues. *Gates*, 655 F.3d at 273. *Id.* The factors, which number nine, are these:

1. the type of claim(s) and issue(s) in question;
2. the overall complexity of the case;
3. the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives;
4. the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy;
5. the impact partial certification will have on the **[**19]** constitutional and statutory rights of both the class members and the defendant(s);
6. the potential preclusive effect or lack thereof that resolution of the proposed issue class will have;
7. the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues;
8. the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others;
9. and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s).

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[2] The plaintiffs' complaint asserted several claims for relief, including medical monitoring, property damage claims, relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, the Illinois Environmental Protection Act, 415 Ill. Comp. Stat. § 5/1 *et seq.*, and state-law fraudulent misrepresentation and willful and wanton misconduct claims. But they chose to proceed on a class basis only on the medical monitoring and property damage claims and, as noted, solely with regard to vinyl chloride exposure. *Gates*, 655 F.3d at 259.

When assembled, the *Gates* factors construct a functional framework to aid the district courts tasked with resolving issue-class certification questions.[3] But *Gates* did **[*269]** not define which "issues" would be appropriate for class treatment or, more importantly, which would not. Specifically, *Gates* did not answer whether the term "particular issues" in Rule 23(c)(4) could encompass claim elements (like duty or breach, or causation **[**20]** or reliance) and defenses (like consent or intervening cause), or if the "particular issues" that the district court could certify "when appropriate" must be limited to questions that would resolve a defendant's liability.

At several points, *Gates* appears to suggest that the certified "issues" should (perhaps except in exceptional circumstances) be able to resolve a defendant's liability. *See, e.g., id.* at 272 ("[T]he [district] court declined to certify a liability-only class."); *id.* at 273 ("The trial court here did not abuse its discretion by declining to certify a liability-only issue class when it found liability inseverable from other issues that would be left for follow-up proceedings."); *id.* ("Nor did the court err in finding no marked division between damages and liability."); *id.* at 274 ("Plaintiffs have neither defined the scope of the liability-only trial nor proposed what common proof would be presented."); *id.* ("A trial on whether the [issues proposed] is unlikely to substantially aid resolution of the substantial issues on liability and causation.").

Reading "issues" in Rule 23(c)(4) to exclude claim elements is supported by later cases from our Court. In *Gonzalez v. Corning*, 885 F.3d 186 (3d Cir. 2018), for example, the only published **[**21]** opinion from this Court to apply *Gates*, we reiterated that issue-class certification "*might* be appropriate" if "liability is capable of classwide treatment but damages are not[.]" *Id.* at 202-03 (emphasis added). Said another way, issue-class certification *is not* appropriate if class-wide resolution of the "issues" does not resolve liability. *See id.* (noting that declining issue-class certification was appropriate because plaintiffs offered "no theories of *liability* for which classwide treatment is apt") (emphasis added).

But at various other points, *Gates* suggests that claim elements *may* be appropriate for issue-class treatment in certain circumstances. For example, the *Gates* Court "agreed" with the district court's finding that an issue class was not feasible and would not advance the resolution of class members' claims because "both the fact of damages and the amount of damages would remain following the class-wide determination of any common issues, and further that causation and extent of contamination would need to be determined at follow-up proceedings." *Gates*, 655 F.3d at 272 (quoting district court). In other words, for the district court, the fact that claim elements (like causation) would remain after resolution **[**22]** of the class issues was a *reason* for the inappropriateness of certifying an issue class. But neither the district court nor the court of appeals concluded that claim elements remaining after resolution of class issues *barred* issue-class certification.

Viewing *Gates* to permit the certification of issues that do not resolve liability comports with our pre-*Gates* caselaw. In *Chiang v. Veneman*, 385 F.3d 256, 46 V.I. 679 (3d Cir. 2004), we noted "that courts commonly use Rule 23(c)(4) to certify some *elements* of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement." *Id.* at 267 (emphasis added). So **[*270]** there, we affirmed the district court's certification of an issue

[3] The *Gates* factors grew out of our opinion in *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009). In *Hohider*, we provided relevant considerations on when a district court may wish "to carve at the joints to form issue classes." *Gates*, 655 F.3d at 273. As source for the factors, the *Hohider* court cited the American Law Institute's "Proposed Final Draft of the Principles of the Law of Aggregate Litigation." *Hohider*, 574 F.3d at 200-02. By the time *Gates* issued, the ALI had finalized the Principles, and we incorporated many of them as the factors district courts should consider in assessing whether to certify an issue class. *Gates*, 655 F.3d at 273.

class limited to determining the defendant's course of conduct (whether a federal agency placed "thousands of Virgin Islanders, almost all of whom were Black, Hispanic, or female," on a "phony, illegal waiting list" when those individuals sought to apply to a "loan program[] intended to help low income rural families obtain homes and make repairs to existing homes," *id.* at 259-60, 263), but left for subsequent individual adjudication the issue of whether those individuals were eligible for the loans in the first place. *Id.* at 267.

Other courts of appeals have **[**23]** permitted the certification of non-liability issue classes in analogous circumstances. The Seventh Circuit, for example, has affirmed the certification of an issue class where the issues, once resolved, stopped short of establishing a defendant's liability to any claimant. *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) (in employment case, endorsing the use of a Rule 23(c)(4) issue class to determine the disparate impact of a challenged corporate policy, with "separate trials . . . to determine which class members were actually adversely affected . . . and if so what loss each class member sustained"); *cf. Pella Corp. v. Saltzman*, 606 F.3d 391, 393-94 (7th Cir. 2010) (in consumer fraud case, upholding certification of Rule 23(b)(3) class when common issues left components of causation for individualized determination).

Moreover, the text of Rule 23(c)(4) supports the reading that the "issues" a district court may certify for class treatment need not be limited to those that decide a party's liability. The Rule permits an action to be brought or maintained as a class action "with respect to particular issues," not just those that decide liability. We therefore hold that district courts may certify "particular issues" for class treatment even if those issues, once resolved, do not resolve a defendant's liability, provided **[**24]** that such certification substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants.

* * * *

In sum, district courts tasked with resolving motions to certify issue classes must make three determinations. First, does the proposed issue class satisfy Rule 23(a)'s requirements? Second, does the proposed issue class fit within one of Rule 23(b)'s categories? Third, if the proposed issue class does both those things, is it "appropriate" to certify these issues as a class? Fed. R. Civ. P. 23(c)(4). The first two steps will be informed by general class-action doctrine. The third step will be informed by *Gates. See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 201 (3d Cir. 2009). In other words, Rule 23(a) and Rule 23(b) decide if the proposed issues *can* be brought or maintained as class action, while the *Gates* factors determine whether they *should*.

III. DISCUSSION

Guided by Rule 23(c)(4) and *Gates*, in this case, we must determine whether the District Court appropriately certified for class treatment whether the Commission owed a relevant legal duty to the Plaintiffs that it subsequently breached, but left for individual proceedings whether Plaintiffs were injured; **[**25]** whether the Commission's breach of the relevant duty actually and proximately caused those injuries; whether those injuries are due a particular amount of damages; and whether the Commission's affirmative defenses (including, presumably, that each Plaintiff consented to medical **[*271]** treatment by Igberase) can refute Plaintiffs' claim.

We review the District Court's decision to certify the duty and breach issues of Plaintiffs' negligent infliction of emotion distress claim for abuse of discretion. *Gates*, 655 F.3d at 262. A district court abuses its discretion if its "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Id.* (quoting *In re Hydrogen Peroxide*, 552 F.3d 305, 320 (3d Cir. 2009)). Whether the district

court employed the correct legal standard is reviewed *de novo. In re Hydrogen Peroxide*, 471 F.3d at 312 (citing *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 32 (2d Cir. 2006)). Conducting that review, we conclude that the District Court abused its discretion.

A. The District Court erred in certifying this issue class

Two reasons, each independently sufficient, support the conclusion that the District Court misapplied *Gates* when it certified for class treatment the duty and breach elements of Plaintiffs' negligent infliction of emotional distress claim.

First, the District Court did not determine **[**26]** whether the duty and breach elements of Plaintiffs' claim satisfied Rule 23(b)(3). The Court correctly observed that *Gates* does not require Plaintiffs seeking issue-class certification to prove that their cause of action as a whole satisfies Rule 23(b)(3). J.A. 42-43 ("[The Commission]'s argument that the Court should require Plaintiffs to satisfy Rule 23(b)(3)'s predominance requirement before turning to these factors parrots one of the camps that the Third Circuit acknowledged but refused to join in *Gates*. Because the Third Circuit rejected that view, this Court must do the same."); *see also* J.A. 56 ("Having determined that Plaintiffs can satisfy the Rule 23(a) factors, the Court turns to the question of whether to certify an issues class under Rule 23(c)(4)."). But while *Gates* does not require Plaintiffs seeking issue-class certification to prove that their cause of action as a whole satisfies a subsection of Rule 23(b), for reasons we have explained, Rule 23(c)(4) does require that the Plaintiffs demonstrate that the issues they seek to certify satisfy one of Rule 23(b)'s subsections. On remand, the Plaintiffs may be able to make such a showing, but we will leave that inquiry to the District Court to consider in the first instance.[4]

[*272] *Second*, separate and apart from the District **[**27]** Court's failure to determine whether the duty and breach elements of Plaintiffs' claim satisfied any subsection of Rule 23(b), the Court also failed to rigorously consider several *Gates* factors. For example, the Court does not explicitly discuss whether the effect certification of the issue class will have on the effectiveness and fairness of resolution of remaining issues. Many other actors played a role in Igberase's fraud, including the residency programs that admitted and trained him, the state medical boards that licensed him, the hospitals that gave him privileges, the specialty board that certified him, and the law enforcement officers (state and federal) who investigated him. If an issueclass jury finds that the Commission owed Plaintiffs a legal duty that it subsequently breached, the Commission may face undue pressure to settle, even if their breach did not cause Plaintiffs' harm.

Relatedly, the District Court did not rigorously consider what efficiencies would be gained by resolution of the certified issues. To be sure, the District Court briefly discussed the efficiencies of a single trial and broached other options with the parties. J.A. 60-61. But more was needed. To prove

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[4] The Commission also insists that the District Court erred in finding that Plaintiffs' satisfied Rule 23(a)'s typicality and adequacy requirements. Appellant Br. 18-19. It argues the Plaintiffs are atypical and inadequate class representatives because they propose to inflict emotional distress on absent class members currently ignorant of the underlying allegations, and that Plaintiffs' decision to seek relief only for their emotional distress makes them inadequate representatives of absent class members who have suffered physical injuries. Neither argument is persuasive. For one, we find no support for the proposition that absent class members ignorant of their potential legal injury might cause named plaintiffs (who are aware of their injury) to be inadequate or atypical class representatives. For another, if the District Court determines that some cognizable subset of absent class members may also have live legal claims for physical injuries, then it has ample tools at its disposal to manage those divergences, including by creating subclasses pursuant to Rule 23(c)(5) or the notice requirements of Rule 23(c)(4).We have "set a low threshold for typicality." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) (internal quotations omitted). And "[e]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Id.*

their **[**28]** claim that the Commission negligently inflicted emotional distress, Plaintiffs will need to show (as with all causes of action arising under state tort law) duty, breach, cause, and harm. But the District Court certified an issue class with respect to the duty and breach elements only. So even if the District Court finds that the Commission owed a relevant legal duty to the Plaintiffs that it subsequently breached, each Plaintiff, in individual proceedings, will have to prove that they were injured; that the Commission's breach of the relevant duty actually and proximately caused those injuries; that those injuries are due a particular amount of damages; and that the Commission's affirmative defenses (including, presumably, each Plaintiff's consent to medical treatment by Igberase) are not decisive.

The District Court may also wish to consider whether the duty and breach elements of Plaintiffs' negligent infliction of emotional distress claim are suitable for issue-class treatment. Under Pennsylvania law, for example, to determine whether the Commission owed the Plaintiffs a relevant legal duty, the class jury will have to weigh several factors, including the "foreseeability of the **[**29]** harm incurred." *Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166, 1169 (Pa. 2000) (citations omitted). And once beyond the class trial, to determine and measure emotional damages, each individual jury will have to assess the degree of the Commission's negligence as to each Plaintiff. *See Spence v. Bd. of Educ. of the Christina Sch. Dist.*, 806 F.2d 1198, 1202 (3d Cir. 1986) (finding no abuse of discretion where the District Court joined for trial the issues of liability and damages for emotional distress, explaining that "emotional distress damages must be evaluated in light of all the circumstances surrounding the alleged misconduct"). So the issue-class jury, like each individual jury, may need to consider evidence regarding the harm the Commission allegedly caused. And each individual jury, like the issue-class jury, may need to consider evidence regarding the Commission's overall conduct, which likely will include the nature of the legal duty it owed Plaintiffs (if any) and the extent to which it breached that duty. *Gates* disfavors this. *See* 655 F.3d at 273 (holding that "the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)" counsels against certification of those common issues).

Of course, the District Court may very well be correct that "there are efficiencies to be gained by **[**30]** certifying a class on these **[*273]** issues because it will allow for a single trial with a single, preclusive determination about [the Commission]'s conduct, rather than the presentation of the same evidence about [the Commission] again, and again, and again to separate juries." J.A. 60. Duty is an issue of law. Therefore, it must be decided separately from breach, causation, and damages. *See Sharpe v. St. Luke's Hosp.*, 573 Pa. 90, 821 A.2d 1215, 1219 (Pa. 2003). It is true that deciding if the Commission had a duty to investigate requires balancing several factors. *Id.* But none of that requires individual evidence, for each patient shared the same distanced relationship of trust with the Commission. Likewise, breach would require only common evidence: How much investigating did the Commission do? Did it know or should it have known that Igberase was a fraud? Did it take enough steps to investigate him based on warnings received from various parties, including the New Jersey residency program? Should it have followed up in later years once Igberase was admitted to another residency program? No absent class member would have anything special to add in her individual trial. There will be plenty left for individual proceedings, but these major issues could be resolved **[**31]** on a class-wide basis.[5]

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[5] These two reasons are sufficient to support our decision to vacate the District Court's certification for class treatment the duty and breach elements of Plaintiffs' negligent infliction of emotional distress claim. But there may yet be other problems with the issue class, including the possibility that Plaintiffs' legal claim implicates multiple states' laws. Under *Gates*, a district court, tasked with resolving a motion to certify an issue class, must assess the "substantive law underlying the claim(s), including any choice-of-law questions [that law] may present." 655 F.3d at 273. Here, the

B. The Commission's remaining arguments for reversal are unavailing or inapposite

The Commission and its amicus offer two additional bases on which to reverse the District Court. The Commission first argues that "the plain text of Rule 23 and the cases interpreting it" demand that "the party seeking to certify a class must satisfy one of the prongs of Rule 23(b)" and, "[b]ecause the district court failed to find that Named Plaintiffs satisfied Rule 23(b)(3) or any other prong of Rule 23(b), the class certification must be reversed." Appellant's Br. 39; *see also* Brief for U.S. Chamber of Commerce as Amici Curiae Supporting Appellant 5-16.

That is not accurate. A majority of the courts of appeals have concluded that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance infirmities. That view, the so-called "broad view," has been adopted or supported by the Second, Fourth, Sixth, Seventh, and Ninth Circuits.[6] Under the broad **[*274]** view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The broad view permits utilizing Rule 23(c)(4) even where predominance has not been (or cannot be) satisfied for **[**32]** the cause of action as a whole.

The Fifth Circuit, however, in a footnote adopted what is known as "the narrow view," which prohibits issue-class certification if Rule 23(b)(3) predominance has not been satisfied for the cause of action as a whole. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."). But *Castano*'s approach has not been adopted by any other circuit, and subsequent caselaw from the Fifth Circuit suggests that any potency the narrow view once held has dwindled. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (noting that bifurcation might serve "as a remedy

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District Court concluded that the various state laws that may be implicated do not meaningfully differ and that Pennsylvania law would govern anyway. *Russell v. Educational Comm'n for Foreign Med. Graduates*, 2020 U.S. Dist. LEXIS 49393, 2020 WL 1330699, at *4-5 (E.D. Pa. Mar. 23, 2020). That seems like a close question. It may well be true that Pennsylvania has the greatest interest in this case (the Commission's alleged tortious conduct occurred here, after all), but various other states have a substantial interest in the resolution of the claims, too. But because the conflict-of-law question was briefed before the District Court in the context of a motion for class certification, we will leave it to the District Court to determine which state's law applies to each Plaintiff's claim, if the question of which state's law applies becomes relevant in future proceedings.

[6] For discussions of the broad view from these courts of appeals, see, *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (permitting issue certification "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439-45 (4th Cir. 2003) (holding that courts may employ Rule 23(c)(4) to certify a class as to one claim even though all of the plaintiffs' claims, taken together, do not satisfy the predominance requirement); *Martin v. Behr Dayton Thermal Prods.*, 896 F.3d 405 (6th Cir. 2018) (noting that "Rule 23(c)(4) contemplates using issue certification . . . where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution"); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) ("Rule 23(c)(4) provides that 'when appropriate, an action may be brought or maintained as a class action with respect to particular issues.' The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted."), *abrogated on other grounds by Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 559 (7th Cir.), *reh'g and suggestion for reh'g en banc denied*, (7th Cir. Aug. 3, 2016); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) ("A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)[] and proceed with class treatment of these particular issues.").

for the obstacles preventing a finding of predominance" but that the plaintiffs had not made such a proposal to the district court).[7]

The Commission's attempts to avoid the majority view by arguing not so much that full-class Rule 23(b)(3) certification must *precede* Rule 23(c)(4) certification, but that the District **[**33]** Court here failed to consider Rule 23(b)(3) at all. But "certifying a Rule 23(c)(4) class is analytically independent **[*275]** from the predominance inquiry under Rule 23(b)(3)," though predominance concerns may be relevant to both. *See Gonzalez v. Corning*, 885 F.3d 186, 202 (3d Cir. 2018) ("While Plaintiffs are correct to point out that the appropriateness of certifying a Rule 23(c)(4) class is analytically independent from the predominance inquiry under Rule 23(b)(3), a case may present concerns relevant to both.").

Amicus Chamber of Commerce offers yet another reason to reverse the District Court: that the District Court's Rule 23(c)(4) ruling, if adopted, "will permit a flood of abusive class actions, with troubling and far-reaching consequences for businesses, shareholders, employees, customers, and the judicial system." Brief for U.S. Chamber of Commerce as Amici Curiae Supporting Appellant 16-18. The Chamber's concerns seem overblown. Even capacious rules for issue-class certification (which we do not purport to advance in this holding) likely will not encourage "a flood of abusive class actions" because few lawyers will have an incentive to file them. Any lucrative potential payday for class action lawyers arises from securing a damages award, not from obtaining an order on a particular issue. That order, which **[**34]** can be thought of as a type of declaratory judgment, may eventually transform into a judgment awarding damages, but even then it is not clear that the future individualized proceedings would be controlled by the lawyers that won the issue-class order. In any case, even if a lawyer could obtain a quasi-declaratory ruling on a subset of common issues, the transformation of the case from a proposed class action to a set of individualized proceedings would spoil any settlement leverage that the lawyer had. Of course, the lawyer representing the class would prefer a favorable issue-class order to no order at all, but the defendant, once facing just individualized proceedings, could return to the very tactics that may have given it an advantage in the first place. From the defense perspective, such tactics could have the added benefit of deterring other class-action lawyers from attempting similar bifurcated class actions in the future.

* * * *

Because the District Court failed to determine whether the proposed issues satisfied a subsection of Rule 23(b), and because it failed to rigorously analyze several *Gates* factors, we will vacate the District Court's issue-class certification and remand for further **[**35]** proceedings consistent with this opinion.

IV. CONCLUSION

For these reasons, we vacate the District Court's Order certifying for aggregate treatment the duty and breach elements of Plaintiffs' negligent infliction of emotional distress claim, and remand for further proceedings consistent with this opinion.

[7] Further, the Advisory Committee on Civil Rules appears to agree that issues can be certified for class treatment even if predominance cannot be satisfied for the action as a whole. At their April 2015 meeting, the Committee noted that "[a] major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established." *See* Rule 23 Subcommittee Report, in Advisory Committee on Civil Rules 243-99 (Apr. 9-10, 2015). But the Committee went on to note that "recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used *even though full Rule 23(b)(3) certification is not possible* due to the predominance requirement." *Id.* at 280 (emphasis added).

Moser v. Benefytt, Inc.

United States Court of Appeals for the Ninth Circuit

May 13, 2021, Argued and Submitted, Pasadena, California; August 10, 2021, Filed

No. 19-56224

Reporter
8 F.4th 872 *; 2021 U.S. App. LEXIS 23661 **; 110 Fed. R. Serv. 3d (Callaghan) 577; 2021 WL 3504041

KENNETH J. MOSER, individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellee, v. BENEFYTT, INC.; NATIONAL CONGRESS OF EMPLOYERS, INC., a Delaware Corporation, Defendants-Appellants, and UNIFIED LIFE INSURANCE COMPANY, INC., a Texas Corporation; COMPANION LIFE INSURANCE COMPANY, a South Carolina Corporation; DONISI JAX, INC., AKA Nationwide Health Advisors, a Florida Corporation; CHARLES DONISI, an individual; EVAN JAXTHEIMER, an individual; HELPING HAND HEALTH GROUP, INC., a Florida Corporation; ANTHONY MARESCA, an individual; MATTHEW HERMAN, an individual, Defendants.

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. 3:17-cv-01127-WQH-KSC. William Q. Hayes, District Judge, Presiding.

Moser v. Health Ins. Innovations, Inc., 2019 U.S. Dist. LEXIS 132790, 2019 WL 3719889 (S.D. Cal., Aug. 2, 2019)

Disposition: VACATED AND REMANDED.

Summary:

SUMMARY[**]

Class Certification

The panel vacated the district court's order certifying two nationwide classes in an action under the Telephone Consumer Protection Act, and remanded.

Kenneth Moser, a resident of California, sued Benefytt Technologies, Inc., formerly known as Health Insurance Innovations, Inc. ("HII"), alleging that HII was responsible for unwanted sales calls that violated the TCPA. HII was incorporated in Delaware and represented that its principal place of business was Florida. There was no dispute that the district court had specific personal jurisdiction over Moser's own claims against HII. Moser asked the district court to certify two nationwide classes, and HII argued that the district court could not do so because it lacked personal jurisdiction over the claims of non-California plaintiffs under *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017) (Due Process Clause prohibited California state court from exercising specific personal jurisdiction over non-resident plaintiffs' claims in a mass action against a non-resident company). The district court concluded **[**2]** that HII had waived its personal jurisdiction defense by not raising it at the motion to dismiss stage, and the district court certified the classes. The court of appeals granted HII leave to appeal the class certification order under Fed. R. Civ. P. 23(f).

Explaining that its conclusion was consistent with that of the Fifth and Seventh Circuits, and citing *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021), the panel held that it had jurisdiction under Rule 23(f) to

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

review the personal jurisdiction and waiver issues that formed part of the district court's class certification decision.

Agreeing with the Fifth and D.C. Circuits, the panel held that the district court erred in concluding that HII waived its personal jurisdiction objection to class certification by failing to assert the defense at the Rule 12 motion to dismiss stage. The panel held that, at the motion to dismiss stage, lack of personal jurisdiction over unnamed, non-resident putative class members was not an "available" Rule 12(b) defense. The panel therefore vacated the class certification order, leaving it to the district court on remand to address the merits of HII's *Bristol-Myers* objection to class certification.

Dissenting, District Judge Cardone wrote that the majority acted contrary to law in holding that Rule 23(f) conferred **[**3]** appellate jurisdiction over an exercise of personal jurisdiction.

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Judges: Before: Jay S. Bybee and Daniel A. Bress, Circuit Judges, and Kathleen Cardone,[*] District Judge. Opinion by Judge Bress; Dissent by Judge Cardone.

Opinion by: Daniel A. Bress

Opinion

[*874] BRESS, Circuit Judge:

We principally consider whether a defendant waived any objection under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), to the district **[**4]** court's certification of nationwide classes because the defendant did not file a motion to dismiss the claims of non-resident putative class members for lack of personal jurisdiction.

I

Kenneth Moser filed this putative nationwide class action in federal court in California against Benefytt Technologies, Inc., formerly known as Health Insurance Innovations, Inc. ("HII"), alleging that HII was responsible for unwanted sales calls that violated the Telephone Consumer Protection Act of 1991. *See* 47 U.S.C. § 227(b)(1)(A)-(B). Moser is a resident of California. HII is incorporated in Delaware and represents that its principal place of business is Florida. Moser sued other defendants too (including appellant National Congress of Employers, Inc.), but they are not relevant here.

The district court denied HII's motion to dismiss and ruled that HII's motion to strike certain class allegations was premature. HII did not move to dismiss Moser's claims for lack of personal jurisdiction. There is no dispute that the district court had specific personal jurisdiction over Moser's own claims against HII, which "arise out of or relate to" HII's contacts with California. *See*,

[*] The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

e.g., Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021) (citation omitted).

Subsequently, Moser asked the **[**5]** district court to certify two nationwide classes under Federal Rule of Civil Procedure 23. In response, HII argued (among other things) that the district court could not certify classes of that scope because the district court lacked personal jurisdiction over the claims of non-California plaintiffs under *Bristol-Myers*, 137 S. Ct. 1773.

In *Bristol-Myers*, the Supreme Court held that the Fourteenth Amendment's Due Process Clause prohibited a California state court from exercising specific personal jurisdiction over nonresident plaintiffs' claims in a mass action against a non-resident company. *Id.* at 1781. That some plaintiffs were injured in California, the Supreme Court held, "does not allow the State to assert specific jurisdiction over the nonresidents' claims," "even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents." *Id. Bristol-Myers* did not address whether its **[*875]** approach would apply to a class action in federal court. *See id.* at 1789 n.4 (Sotomayor, J., dissenting). But in opposing class certification, HII argued that it did.

The district court did not address HII's *Bristol-Myers* argument on the merits. Instead, it concluded that under Federal Rule of Civil Procedure 12(h)(1), HII had waived its personal jurisdiction defense by not raising it at the motion to dismiss stage, **[**6]** given that the Supreme Court had decided *Bristol-Myers* approximately one month before HII filed its Rule 12 motion. After finding that Rule 23's requirements were otherwise met, the district court certified two nationwide classes. We then granted HII leave to appeal the class certification order. *See* 28 U.S.C. § 1292(e); Fed. R. Civ. P. 23(f).

II

A

Although the parties' sophisticated class action counsel all agree we have jurisdiction over the *Bristol-Myers*-related issues, we have an independent obligation to confirm this. *Snodgrass v. Provident Life & Acc. Ins. Co.*, 147 F.3d 1163, 1165 (9th Cir. 1998). We conclude we have jurisdiction under Rule 23(f) to review the personal jurisdiction and waiver issues that form part of the district court's class certification decision.

Rule 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule." In this case, HII maintained that nationwide classes could not be certified because the district court lacked personal jurisdiction over the claims of non-California class members. The personal jurisdiction and waiver questions thus go directly to the scope of the classes that the district court certified. And they were part of the district court's class certification order, which we granted HII leave to appeal. *See* 16 Charles **[**7]** A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3931.1 (3d ed. Apr. 2021 Update) (explaining that "[a]nything that properly enters the determination whether to certify a class is bound up with the order," which a court of appeals may then review under Rule 23(f)).

We can break this down further and the result is the same. If the district court lacked personal jurisdiction over non-California plaintiffs, that presents obvious reasons why, under the Rule 23 requirements, certification of a *nationwide* class would be improper. For example, if the district court could not even entertain claims from non-California class members and grant them relief, for a nationwide class common questions would not "predominate over any questions affecting only individual members," and Moser's claims would not be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3), (b)(3). The personal jurisdiction and waiver questions are thus not ancillary to class certification, but central to the nationwide classes that the district court certified and, again, part of the very class certification

decision we permitted HII to appeal.

Our conclusion as to the scope of our review is consistent with that of the Fifth **[**8]** and Seventh Circuits, which both reviewed personal jurisdiction questions under *Bristol-Myers* as part of Rule 23(f) appeals. *See Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 248-49 & n.7 (5th Cir. 2020) (reviewing as part of a Rule 23(f) appeal an analogous waiver ruling and noting that the court could have also reviewed whether *Bristol-Myers* applied to class actions in federal court); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443-44 (7th Cir. 2020) (reviewing under Rule 23(f) a district court order **[*876]** striking nationwide class allegations under *Bristol-Myers*).

The Supreme Court's recent decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021), also supports our ability to review the personal jurisdiction issues that are part and parcel of the district court's class certification order. In *BP*, the Supreme Court considered the scope of appealable issues under 28 U.S.C. § 1447(d), which provides that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal." *BP* held that this provision gave the court of appeals jurisdiction to review all the defendant's grounds for removal and not just those made under sections 1442 or 1443. 141 S. Ct. at 1537-40.

BP explained that, like interlocutory appeals under 28 U.S.C. § 1292(b), "'[b]ecause it is the . . . *order* that is appealable,' a court of appeals 'may address any issue fairly included within' it." *Id.* at 1540 (quoting *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) (alterations omitted)). That reasoning tracks **[**9]** our conclusion that when reviewing the class certification "order" under Rule 23(f), we have jurisdiction to review the district court's resolution of the *Bristol-Myers* issue, which formed part of the class certification decision and affected whether nationwide classes could be certified.

The dissent's contrary analysis turns on an apparent misunderstanding of how the personal jurisdiction issues bear on, and form part of, the district court's class certification decision. The dissent notes that "denials of motions to dismiss for lack of personal jurisdiction are not ordinarily reviewable on interlocutory appeal," and then proceeds to assert that we lack jurisdiction to address "the resolution" of HII's supposedly "separate Rule 12 motion," which the dissent alternatively describes as "the district court's personal jurisdiction order under Rule 12(b)(2)."

The problem with the dissent's analysis is that there was no Rule 12 motion to dismiss non-resident class members for lack of personal jurisdiction, nor did the district court resolve such a motion. HII's argument is that under *Bristol-Myers*, the district court could not certify nationwide classes consistent with Rule 23. The dissent says Rule 23(f) "appeals are limited to those issues **[**10]** that bear on the soundness of the class certification decision." (quotations omitted). That test is clearly met here.

Cases such as *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), are thus entirely inapposite. In *Poulos*, the district court denied class certification and we granted the plaintiffs permission to appeal that order under Rule 23(f). *Id.* at 659. The defendants then claimed that under the doctrine of "pendent appellate jurisdiction," we could also review as part of the Rule 23(f) appeal an earlier district court order—issued years before the class certification decision—denying certain defendants' motion to dismiss for lack of personal jurisdiction. *Id.* at 658-59, 671-72. We held that we could not review the denial of the motion to dismiss because it was not "inextricably intertwined" with the later class certification decision. *Id.* at 672. (The Tenth Circuit's decision in *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1098-99 (10th Cir. 2014), also involved the issue of pendent appellate jurisdiction in analogous circumstances.)

Quite plainly, the doctrine of "pendent appellate

jurisdiction" does not come into play here because we are not being asked to review anything "pendent" to the class certification decision, but simply the class certification decision itself. The dissent claims that "the district court's denial of **[*877]** the motion to dismiss did **[**11]** not functionally grant class certification." But again, we are not reviewing the denial of a motion to dismiss or a "functional" grant of class certification. Over HII's *Bristol-Myers* objection, the district court did certify two nationwide classes, which we then permitted HII leave to appeal.

We thus decline the dissent's invitation to create an unprecedented limitation on our jurisdiction under Rule 23(f), which would also create a split with both the Fifth Circuit (*Cruson*) and the Seventh Circuit (*Mussat*). [1] We therefore proceed to the district court's determination that defendants waived any *Bristol-Myers*-based objection to class certification.

B

We hold that the district court erred in concluding that HII waived its personal jurisdiction objection to class certification by failing to assert the defense at the Rule 12 stage. Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss for lack of personal jurisdiction. As relevant here, under Rule 12(h)(1)(A) a party "waives any defense" under Rule 12(b)(2) by "omitting it from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2), in turn, provides that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was *available* to **[**12]** the party but omitted from its earlier motion." (emphasis added).

The question here is whether, at the motion to dismiss stage, it was an "available" Rule 12(b) defense that the district court lacked personal jurisdiction over unnamed, non-resident putative class members. The answer is no. We have explained that "[t]he essence" of Rule 12(g) and 12(h) is that "a party 'who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses [personal jurisdiction, improper venue, insufficient process, or insufficient service] he then has and thus allow the court to do a reasonably complete job.'" *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000), *as amended on denial of reh'g* (Nov. 1, 2000) (quoting Fed. R. Civ. P. 12 advisory committee's note, 1966 Amendment, subdivision (h)). We have also explained that "a class action, when filed, includes only the claims of the named plaintiff." *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001).

Putting these points together shows that HII did not have "available" a Rule 12(b)(2) personal jurisdiction defense to the claims of unnamed putative class members who were not yet parties to the case. To conclude otherwise would be to endorse "the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified* ***[**13]*** ." *Smith v. Bayer Corp.*, 564 U.S. 299, 313, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002) (Scalia, J., dissenting)); *see also* A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 Rev. Litig. 31, 38 (2019) ("No Supreme Court case regards absent class members as parties joined in the action filed by a putative class representative. . . . It necessarily follows that when determining whether there is personal jurisdiction **[*878]** over the defendant with respect to claims asserted by the named plaintiffs in a *putative* class action, the only claims to be assessed by the court are those of the class representatives."); *id.* at 49 ("[A] defendant's failure to seek the dismissal of the claims of absent

[1] Contrary to the dissent's suggestion, the D.C. Circuit in *Molock v. Whole Foods Market Group*, 952 F.3d 293, 445 U.S. App. D.C. 417 (D.C. Cir. 2020), did not reach a different conclusion on the scope of Rule 23(f) appeals. Indeed, *Molock* was not a Rule 23(f) appeal at all. *See id.* at 295 (noting the court had jurisdiction under 28 U.S.C. 1292(b)).

members of a putative class in conformity with the consolidation and forfeiture principles imposed by Rule 12(h) *will not constitute a waiver of the personal jurisdiction defense* for those claims."). HII could not have moved to dismiss on personal jurisdiction grounds the claims of putative class members who were not then before the court, nor was HII required to seek dismissal of hypothetical future plaintiffs.

The Fifth and D.C. Circuits agree. In *Cruson*, the district court likewise concluded that a defendant waived the right to bring a *Bristol-Myers*-based personal **[**14]** jurisdiction challenge to the claims of unnamed non-resident class members because the defendant did not raise this challenge in its motion to dismiss. 954 F.3d at 248. The Fifth Circuit held that this was error. *Id.* at 249-51.

As the Fifth Circuit explained, "[a] defense is not 'available' under Rule 12(g)(2)" if "its legal basis did not then exist" or "if the defense would have been futile." *Id.* at 250 (quotations and alterations omitted). Because putative class members are not before the court at the Rule 12 stage, "at that time, a personal jurisdiction objection respecting merely putative class members was not 'available.'" *Id.* As a result, "[a]lthough *Bristol-Myers* provided new legal support for [the defendant's] objection, the Supreme Court's decision did not make the objection 'available.' Certification did." *Id.* at 251.

The D.C. Circuit reasoned similarly in *Molock v. Whole Foods Market Group*, 952 F.3d 293, 445 U.S. App. D.C. 417 (D.C. Cir. 2020), which also involved a *Bristol-Myers*-based challenge to nonresident class members. In *Molock*, the district court denied a defendant's motion to dismiss non-resident putative class members under *Bristol-Myers* and then certified its order for interlocutory appeal. *Id.* at 295.

The D.C. Circuit did not reach whether *Bristol-Myers* applied to class actions, instead concluding that the defendant's motion **[**15]** to dismiss should have been denied as premature. *Id.* at 296. That was because putative class members "are *always* treated as nonparties" and "become parties to an action—and thus subject to dismissal—only after class certification." *Id.* at 297-98; *see also id.* at 298 ("It is class certification that brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction over their claims."). "Motions to dismiss nonparties for lack of personal jurisdiction," the D.C. Circuit held, "are thus premature." *Id.* And if such a motion was premature, it was not "available" to HII at the motion to dismiss stage.

Moser responds that HII had to raise its personal jurisdiction defense because it had "reasonable notice" of a *Bristol-Myers*-based objection when it moved to dismiss. Essentially, Moser argues that the Federal Rules required HII to raise this defense in its motion to dismiss even if the district court could not address the objection at that time. But we have never held that a defendant must raise such premature objections in a Rule 12 motion. Here, there were no claims the district court could have dismissed on personal jurisdiction grounds when it decided HII's motion **[**16]** to dismiss because Moser was the only plaintiff and there was specific personal jurisdiction over his claims against HII. [2]

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[2] While HII could have moved to strike Moser's class allegations under Rule 12(f) or Rule 23 based on Moser seeking to represent non-California residents, HII did not have to do so (and the district court denied HII's motion to strike as premature anyway).

For its part, the dissent maintains that "a personal jurisdiction challenge like HII's can *only* be raised by motion under Rule 12." (emphasis in original) (quotations and alterations omitted). That is incorrect. As we have explained, and as the dissent seemingly agrees, HII could not have moved to dismiss putative class members at the outset of this case because they were not then parties. By the logic of the dissenting opinion, however, the district court could not even consider in the Rule 23 analysis whether it would lack personal jurisdiction over (by HII's argument) almost everyone in the putative nationwide class. Instead, the district court would be required artificially to ignore that issue, certify a nationwide class (if otherwise proper), and only then receive from HII the inevitable Rule 12 motion to dismiss the claims of nearly every plaintiff in the class just certified. "[P]ersonal jurisdiction entails a court's power over the parties before it." *Molock*, 952 F.3d at 298 (quotations omitted). Nothing in the Federal Rules somehow requires a district court to assert its power over the claims of putative class members in

Because it found the issue waived, the district court did not address the merits of **[*879]** HII's *Bristol-Myers* objection to class certification. Although HII asks us to resolve that issue now, like the Fifth Circuit in *Cruson*, we leave that matter for the district court on remand. *See Cruson*, 954 F.3d at 249 n.7. This case involves allegations that HII was responsible for a network of agents that made unlawful telephone calls to persons across the country. The district court can determine in the first instance whether consideration of the *Bristol-Myers* argument will require additional record development, including as to HII's and its alleged agents' contacts with California. And because the permissible scope of the certified class (and record) may change, we do not reach HII's other arguments on why class certification under Rule 23 was otherwise improper.

* * *

We vacate the class certification order and remand this case to the district court for proceedings consistent with this decision.

VACATED AND REMANDED.

Dissent by: Kathleen Cardone

Dissent

CARDONE, District Judge, dissenting: **[**17]**

For the first time, a panel of this Court holds that Federal Rule of Civil Procedure 23(f) confers appellate jurisdiction over an exercise of personal jurisdiction. Because I believe that holding is contrary to law, I respectfully dissent.

"[D]enials of motions to dismiss for lack of personal jurisdiction are not ordinarily reviewable on interlocutory appeal." *al-Kidd v. Ashcroft*, 580 F.3d 949, 957 (9th Cir. 2009), *rev'd on other grounds*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). As this Court has explained, "federal courts of appeals are courts of limited jurisdiction, and Congress has not seen fit to give this court the general power to review district courts' exercise of personal jurisdiction before a final judgment." *Id.* at 980.

Rule 23(f) is no exception to that rule. Rather, "the only question properly before us [under Rule 23(f) is] whether the district court's [resolution] of the . . . motion for class certification was an abuse of discretion." *See Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014). Thus, "[i]n a Rule 23(f) appeal, an appellate court must limit its review to whether the district court correctly selected and applied Rule 23's criteria." *In re **[*880]** Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 956-57 (9th Cir. 2009) (cleaned up) (quoting *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008)). [1]

Personal jurisdiction over putative class members is not one of those criteria. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 670 (9th Cir. 2004) ("Class certification hinges on the well known

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the face of a class action defendant's personal jurisdiction objection *to class certification*. And nothing in the Federal Rules prevents that objection to a plaintiff's request *for class certification* from being interposed at the Rule 23 stage, as part of Rule 23 proceedings, as HII sought to do here.

[1] *See also Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974))); *Stockwell*, 749 F.3d at 1113 ("As the exception to the final judgment rule created by Rule 23(f) applies *only* to class certification decisions, merits inquiries unrelated to certification exceed our limited Rule 23(f) jurisdiction, as well as the needs of Rule 23(a)-(b)."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 106, 351 U.S. App. D.C. 223 (D.C. Cir. 2002) ("Rule 23(f) interlocutory review is limited to . . . . whether the proposed class satisfies the prerequisites of Rule 23."); 2 McLaughlin on Class Actions § 7:1 (17th ed. Oct. 2020 Update) ("The Advisory Committee Note also clarifies that '[n]o other type of Rule 23 order is covered by this provision,' so that rulings that may affect class proceedings but do not actually grant or deny certification ordinarily cannot be reviewed as part of a Rule 23(f) appeal unless they touch directly upon the suitability of a case for class treatment."); *id.* § 7:1 n.65 (listing cases).

factors from Rule 23—namely, whether there is numerosity, typicality, commonality, adequacy **[**18]** of representation, predominance, and superiority."). Nor does the resolution of that separate Rule 12 motion have any bearing on whether the district court correctly granted a Rule 23 motion for class certification. *See id.* at 672 ("[T]he personal jurisdiction issue and class certification decision involve the application of different standards," and "are only tangentially related."); *see also CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1098-99 (10th Cir. 2014) ("Quite clearly, the question [of personal jurisdiction] is beyond the scope of a traditional Rule 23(f) review . . . ."). In short, the district court's personal jurisdiction order under Rule 12(b)(2) was not "an order granting or denying class-action certification under [Rule 23]." *See* Fed. R. Civ. P. 23(f).

Thus, I would hold that we lack jurisdiction to review that order.

The majority cites no Ninth Circuit authority to support its assertions otherwise. It suggests, for example, "that there was no Rule 12 motion to dismiss non-resident class members for lack of personal jurisdiction, nor did the district court resolve such a motion." But a personal jurisdiction challenge like HII's can *only* be raised "by motion under [Rule 12]." *See* Fed. R. Civ. P. 12(h)(1)(B). As the district court correctly observed, such challenges "are expressly waived unless a defendant timely asserts the defense in a motion to dismiss **[**19]** or in a responsive pleading." (citing, *inter alia*, Fed. R. Civ. P. 12(h)(1)). That is why the district court treated HII's personal jurisdiction objection as a "threshold matter" under Rule 12, rather than analyzing it under Rule 23. And it is likely why HII raised it in the facts section of its opposition to class certification, rather than in its analysis of the "quintessential elements for certifying a class action." But the majority's own analysis is perhaps most telling: if there was no Rule 12 motion, its discussion of availability under Rule 12(g)(2)—which applies only to Rule 12 motions—would be superfluous. *See* Fed. R. Civ. P. 12(g)(2) (providing that "a party that makes a motion under [Rule 12] must not make another *motion under this rule* raising a defense or objection that was available" (emphasis added)). [2]

[*881] The majority argues that HII's personal jurisdiction challenge went "directly to the scope of the classes that the district court certified." But that argument is undermined by its holding that such a challenge was not even "available" until *after* certification. As the majority points out, putative class members "become parties to an action—and thus subject to dismissal—only after class certification." (quoting *Molock v. Whole Foods Market Grp.*, 952 F.3d 293, 298, 445 U.S. App. D.C. 417 (D.C. Cir. 2020)). That is, certification **[**20]** "is 'logically antecedent' to whether the court has authority to exercise personal jurisdiction over [the putative class]." *Molock*, 952 F.3d at 299 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (explaining that certification issues were "logically antecedent to the existence of any Article III issues")). But if class certification thus "precedes the question of personal jurisdiction," *id.*, then HII's personal jurisdiction challenge could not, by definition, affect the scope of the classes certified.

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[2] The majority also attempts to recast HII's Rule 12(b)(2) challenge as a Rule 23 challenge to predominance and typicality. But the parties' "sophisticated class action counsel" never raised that argument, and the district court never considered it. Because it was "not developed in the opening brief or the court below," it is waived. *See Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 n.5 (9th Cir. 2021) (citing *Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762, 766-67 (9th Cir. 2011)); *see also Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) (observing "general rule that an appellate court will not consider sua sponte arguments not presented or urged by the litigants"). And even if it was not waived, the majority cites no cases suggesting personal jurisdiction is relevant to a Rule 23 factor, and I am aware of none. *See Poulos*, 379 F.3d at 672 (explaining that personal jurisdiction and class certification "involve the application of different standards"); *see also Bell v. Brockett*, 922 F.3d 502, 512 n.5 (4th Cir. 2019) (listing typicality and commonality as separate issues from the "possible absence of personal jurisdiction of absent class members").

It does not matter that HII argued otherwise below. *See, e.g.*, *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 822 n.8 (9th Cir. 2019) (refusing to review "grounds in the record" that were not relevant to class certification, even though defendant argued they were); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107, 351 U.S. App. D.C. 223 (D.C. Cir. 2002) ("[Defendant's] effort to recast its Rule 12(b)(6) arguments as a challenge to class certification . . . is to no avail."). To hold differently would allow parties to "turn this focused interlocutory appeal of a class certification [order] into a 'multi-issue interlocutory appeal ticket.'" *Poulos*, 379 F.3d at 669 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)); *see also CGC Holding*, 773 F.3d at 1098 (refusing to review personal jurisdiction order even where parties stipulated to Rule 23(f) jurisdiction because "Rule 23 does not permit a party to shoehorn every decision that went against it into its petition for interlocutory review"); *In re Lorazepam*, 289 F.3d at 107 (refusing to review issue **[**21]** that might "dispose of the class as a whole," but that was "unrelated to the Rule 23 requirements," because "review of such issues would expand Rule 23(f) interlocutory review to include review of any question raised in a motion to dismiss that may potentially dispose of a lawsuit as to the class as a whole").

Nor does it matter that the district court rejected the Rule 12(b)(2) motion in the same document as the class certification order. On interlocutory appeal, we do not have "jurisdiction over every claim or defense addressed by the district court's order." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007) (discussing collateral order review); *see also Puente Arizona v. Arpaio*, 821 F.3d 1098, 1102-03, 1108-10 (9th Cir. 2016) (refusing to review Rule 12(b)(6) ruling made in "same order" over which court **[*882]** had jurisdiction). As Judge Posner has explained, even where a ruling is "laid out in the district court's class certification order, Rule 23(f) appeals are limited to those issues" that "bear on the soundness of the class certification decision." *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918, 922 (7th Cir. 2017) (cleaned up) (refusing to review order severing and transferring subclasses that was contained in same document as class certification order because it did not bear on Rule 23 requirements); *see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.4 (2d Cir. 2001) (holding that court lacked Rule 23(f) jurisdiction over order refusing to strike expert report submitted in support of class certification, **[**22]** even though it was contained in the same "order" granting class certification) *abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

The majority's reliance on *BP* is misplaced. *See BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021). That case concerned the scope of 28 U.S.C. § 1447(d), which provides for interlocutory review of "an order remanding a case," but does not define the bounds of that phrase. *Id.* at 1537. Here, by contrast, Rule 23 defines the bounds of an "order granting or denying class-action certification *under this rule*." Fed. R. Civ. P. 23(f) (emphasis added). Specifically, Rule 23(c)(1) provides that a "Certification Order" is a court's "determin[ation] by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1). That "determination," in turn, "depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b)." Advisory Committee Notes to Rule 23, subsection (c); *see also* Fed. R. Civ. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied and if" Rule 23(b) is satisfied). That is why this Court has held time and again that in a Rule 23(f) appeal, the "only question properly before us [is] . . . the motion for class certification," *see Stockwell*, 749 F.3d at 1113, and that we must therefore "limit [our] review to whether the district court correctly selected and applied Rule 23's criteria," *In re Wells Fargo*, 571 F.3d at 956-57. That is, Congress has expressly limited our review in that way. *BP*'s abstract interpretation **[**23]** of an entirely different statute

that lacks similar constraints should not apply here.

The majority's reliance on *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443-44 (7th Cir. 2020), and *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240, 248-49 & n.7 (5th Cir. 2020), fares no better. *Mussat* turned on the rule that "an order striking class allegation[s] is functionally equivalent to an order denying class certification." 953 F.3d at 444 (quoting *Microsoft v. Baker*, 137 S. Ct. 1702, 1711 n.7, 198 L. Ed. 2d 132 (2017)); *see also Bates v. Bankers Life & Cas. Co.*, 848 F.3d 1236, 1238 (9th Cir. 2017) (same). But that rule does not work in reverse: *denying* a motion to strike class allegations is not the "functional equivalent" of *granting* class certification, and no court has ever held as much. By the same token, the district court's denial of the motion to dismiss did not functionally grant class certification and is therefore not reviewable under *Mussat*'s reasoning.

In *Cruson*, the Fifth Circuit did not expressly consider whether it had jurisdiction over the waiver issue. This may have been due to precedent peculiar to that circuit, *see United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co.*, 843 F.3d 1033, 1042 (5th Cir. 2016) (asserting § 1292(b) jurisdiction over issue "that was raised in the district court and [that] the parties presented . . . in their appellate briefs"); *but see Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. **[*883]** 2001) (explaining that "under Rule 23(f), a party may appeal only the issue of class certification; no other issues may be raised"), or simply an oversight.

Whatever the case may be, *Cruson* simply cannot be squared with **[**24]** the binding precedent discussed above. Nor can it be squared with the D.C. Circuit's holding in *Molock*, which I find to be the more persuasive authority: class certification is "logically antecedent" to, and therefore a separate issue from, personal jurisdiction.

To be clear, the foregoing should not be taken as disagreement with the majority's well-reasoned analysis of the waiver issue. I simply do not believe that Rule 23(f) permits us to perform that analysis here. Because we also lack pendent jurisdiction, *see Poulos*, 379 F.3d at 671-72 (holding that we lacked pendent jurisdiction over a district court's exercise of personal jurisdiction in a Rule 23(f) appeal), and because "the district court properly selected and applied Rule 23's criteria," *see In re Wells Fargo*, 571 F.3d at 956-57, I respectfully dissent.

Lyngaas v. Curaden AG

United States Court of Appeals for the Sixth Circuit

January 13, 2021, Argued; March 24, 2021, Decided

File Name: 21a0069p.06

Nos. 20-1199/1200/1243

Reporter
992 F.3d 412 *; 2021 U.S. App. LEXIS 8601 **; 114 Fed. R. Evid. Serv. (Callaghan) 2259; 2021 WL 1115870

BRIAN LYNGAAS, D.D.S., individually and as the representative of a class of similarly situated persons, Plaintiff-Appellee/Cross-Appellant (20-1199/20-1200), Plaintiff-Appellant/Cross-Appellee (20-1200/20-1243), v. CURADEN AG, Defendant-Appellee/Cross-Appellant (20-1200/20-1243), CURADEN USA, INC., Defendant-Appellant/Cross-Appellee (20-1199/20-1200).

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:17-cv-10910—Mark A. Goldsmith, District Judge.

Lyngaas v. Curaden AG, 2019 U.S. Dist. LEXIS 201986, 2019 WL 6210690 (E.D. Mich., Nov. 21, 2019)

Lyngaas v. Curaden AG, 2019 U.S. Dist. LEXIS 86880, 2019 WL 2231217 (E.D. Mich., May 23, 2019)

Lyngaas v. Curaden AG, 2018 U.S. Dist. LEXIS 39805, 2018 WL 1251754 (E.D. Mich., Mar. 12, 2018)

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ON BRIEF: Brian S. Sullivan, DINSMORE & SHOHL LLP, Cincinnati, Ohio, for Curaden AG and Curaden USA, Incorporated.

David M. Oppenheim, Phillip A. Bock, BOCK, HATCH, LEWIS & OPPENHEIM, LLC, Chicago, Illinois, for Brian Lyngaas, D.D.S.

Judges: Before: CLAY, GILMAN, and THAPAR, Circuit Judges. GILMAN, J., delivered the opinion of the court in which CLAY, J., joined. THAPAR, J., delivered a separate opinion concurring in part and dissenting in part.

Opinion by: RONALD LEE GILMAN

Opinion

[*417] RONALD LEE GILMAN, Circuit Judge. This case involves two unsolicited fax advertisements received by Brian Lyngaas, D.D.S., in March 2016. Lyngaas asserts, on behalf of himself and all similarly situated class members, that Curaden AG and its U.S. subsidiary, Curaden USA, violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending the advertisements.

At the summary-judgment **[**2]** stage of the case, the district court ruled that Lyngaas could not pierce the corporate veil to hold Curaden AG liable for Curaden USA's action, that faxes received by a computer over a telephone line (in addition to faxes received by traditional fax machine) violated the TCPA, and that it had personal jurisdiction over both defendants. Following a bench trial, the district court held that Curaden USA violated the

TCPA by sending the two unsolicited fax advertisements to Lyngaas, but that Curaden AG was not liable as a "sender" under the TCPA. The court further held that Lyngaas's evidence and expert-witness testimony as to the total number of faxes successfully sent by Curaden USA were inadmissible due to unauthenticated fax records. It therefore established a claims-administration process for class members to verify their receipt of Curaden USA's unsolicited fax advertisements.

Both Lyngaas and Curaden USA appeal the judgment of the district court, and both Lyngaas and Curaden AG cross-appeal. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. FACTUAL BACKGROUND

Lyngaas is a dentist who practices in Livonia, Michigan. On March 8 and again on March 28, **[**3]** 2016, Lyngaas received on his workplace fax machine unsolicited faxes advertising the Curaprox Ultra Soft CS 5460 toothbrush. The toothbrush in question is manufactured by Curaden AG, a privately owned Swiss entity. Curaden USA, an Ohio corporation headquartered in Arizona, is a subsidiary of Curaden AG that promotes Curaden AG products, including the Curaprox Ultra Soft CS 5460 toothbrush, throughout the United States.

Although a standard written distribution agreement typically governs the practices of Curaden AG's subsidiary distributors, Curaden AG and Curaden USA operated instead under an oral agreement. This is because the written distribution agreement was exchanged but never formally executed. But since "[e]verybody ha[d] assumed it ha[d] been signed," according to the managing director of Curaden AG, many of the tenets of the standard written distribution agreement have been observed in practice by both entities. For example, Curaden USA was the exclusive distributor of Curaden AG products within the United States, consistent with § 2.1 of the distribution **[*418]** agreement, and Curaden USA "use[d] its best endeavours to promote the sale of the [Curaden AG] [p]roducts throughout the Territory," **[**4]** consistent with § 5.1.

Some of the terms of the standard distribution agreement, however, were not observed by Curaden USA. As relevant to this case, Curaden USA never presented its advertising materials to Curaden AG for review or approval, even though § 5.7 and § 5.8 of the distribution agreement gave Curaden AG the right to approve all marketing materials developed by its distributors.

Curaden USA planned a fax campaign as part of its marketing efforts. It purchased a target list of thousands of dental professionals' fax numbers, and Curaden USA employee Diane Hammond created the two fax advertisements at issue in this case. Both advertisements promoted the Curaprox Ultra Soft CS 5460 toothbrush and were directed to "dental professionals." Displayed on the advertisements was Curaden USA's contact information, including a fax number, phone number, email address, website, and social media accounts, all of which were connected to and exclusively maintained by Curaden USA. The advertisements made no mention of Curaden AG, instead referring all communications to Curaden USA.

Curaden USA did not provide the advertisements for review to either Curaden AG or to Richard Thomas, the managing director of Curaden **[**5]** UK and an advisor to all Curaden AG subsidiaries. Rather, on February 23, 2016, Curaden USA's vice president and managing director Dale Johnson approved the advertisement and directed Hammond to broadcast the faxes. Hammond in turn instructed Curaden USA employee Magen James to send the advertisement to the purchased target list of over 46,000 fax numbers. Curaden USA hired AdMax Marketing, a fax broadcasting company, to send the faxes. AdMax then hired another company, WestFax, to complete the job.

The first fax advertisement was sent, at James's direction, on March 8, 2016 to the target list.

Hammond then instructed James to send out a newer version of the advertisement to an attached list of the 46,000-plus fax numbers, updated to exclude those who had opted out after the first fax blast. This second advertisement was sent out, at James's direction, on March 28, 2016. After the faxes were transmitted, AdMax invoiced Curaden USA, and Curaden USA paid the invoices.

II. PROCEDURAL BACKGROUND

Lyngaas, on behalf of himself and all similarly situated class members, filed suit in March 2017, alleging violations of the TCPA. Curaden USA answered the complaint, whereas Curaden AG moved to **[**6]** dismiss the complaint based on a lack of personal jurisdiction over it. The district court denied Curaden AG's motion.

After a two-year discovery period, Curaden AG moved for summary judgment, arguing again that the court lacked personal jurisdiction over it, while Lyngaas moved both for summary judgment and to certify the class. Both Curaden AG and Curaden USA opposed class certification, arguing that Lyngaas had failed to support his motion with admissible evidence to establish the elements necessary for class certification, and that the court lacked personal jurisdiction over them as to the proposed out-of-state class members under *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017). The district court denied Lyngaas's summary-judgment motion, denied in part and granted in part **[*419]** Curaden AG's summary-judgement motion, and granted class certification.

After a two-day bench trial in September 2019, the court reviewed post-trial briefings and issued its opinion two months later. At the outset of the opinion, the court affirmed its reasoning from the earlier motion-to-dismiss and summary-judgment rulings, holding once again that it had personal jurisdiction over both defendants. The court also found that Curaden USA violated the TCPA by **[**7]** sending two unsolicited fax advertisements to Lyngaas as part of the two mass-fax campaigns. It thus awarded Lyngaas statutory damages of $500 for each unsolicited fax, *see* 47 U.S.C. § 227(b)(3)(B), for a total of $1,000. As for Curaden AG, however, the court held that Lyngaas had failed to establish that Curaden AG qualified as a "sender" under the TCPA.

The district court next held that Lyngaas had not established the total number of faxes successfully sent classwide, ruling that the summary-report logs (documents that purportedly list each successful recipient) were inadmissible due to inadequate authentication, and that testimony from Lyngaas's expert witness was inadmissible and unpersuasive. This caused the court to establish a claims-administration process to afford class members the opportunity to verify their receipt of Curaden USA's unsolicited fax advertisements.

Curaden USA timely appealed. Lyngaas responded with a cross-appeal and filed his own separate appeal, to which Curaden AG cross-appealed. Specifically, Lyngaas argues that the district court erred by finding that Curaden AG was not a "sender" for purposes of TCPA liability, by failing to admit key evidence at trial, and by granting summary **[**8]** judgment in favor of the defendants on the question of piercing the corporate veil. Curaden AG in turn asserts that the district court totally lacked personal jurisdiction over it, whereas Curaden USA argues that the district court did not have personal jurisdiction over it with regard to non-Michigan class members, and that the court improperly established a claims-administration process to award relief. Both Curaden AG and Curaden USA further argue that the district court erroneously found, when certifying the class, that a "telephone facsimile machine" includes faxes routed to computers, and that the district court improperly relied on inadmissible evidence when certifying the class.

III. ANALYSIS

A. Standard of review

We review *de novo* a district court's denial of a motion to dismiss for lack of personal jurisdiction and its denial of a motion for summary judgment. *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 548 (6th Cir. 2016). But we review a district court's decision of whether to certify a class under the abuse-of-discretion standard. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 457 (6th Cir. 2020).

In an appeal from a bench trial, we review the district court's conclusions of law *de novo*, but review its findings of fact under the clear-error standard. *Overton Distribs., Inc. v. Heritage Bank*, 340 F.3d 361, 366 (6th Cir. 2003). "A finding is 'clearly erroneous' when although **[**9]** there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Mabry*, 518 F.3d 442, 449 (6th Cir. 2008) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). "When factual findings rest upon credibility determinations, this Court affords great deference to the findings of the district court." *Schroyer v. **[*420]** Frankel*, 197 F.3d 1170, 1173 (6th Cir. 1999).

B. Personal jurisdiction over Curaden AG

In resolving Curaden AG's motions to dismiss and for summary judgment, the district court found that it had specific personal jurisdiction over Curaden AG based on Curaden AG's contacts with the state of Michigan and that, in the alternative, jurisdiction was proper under Rule 4(k)(2) of the Federal Rules of Civil Procedure based on Curaden AG's contacts with the United States as a whole. But the court then granted summary judgment in favor of Curaden AG on the question of whether Curaden USA served as an "alter ego" of Curaden AG, holding that the court should not pierce the corporate veil to exercise personal jurisdiction over Curaden AG on the basis of Curaden USA's actions. Lyngaas renews his "alter ego" theory on appeal, whereas Curaden AG again argues that the district court lacked personal jurisdiction over it on any basis.

1. Curaden USA as an alter ego of Curaden AG

We agree with the **[**10]** district court's conclusion that Curaden USA is not Curaden AG's alter ego. The alter-ego theory can subject a parent company to personal jurisdiction where "the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction." *Indah v. S.E.C.*, 661 F.3d 914, 921 (6th Cir. 2011) (citation omitted). In the present case, both parties correctly rely on Michigan law in determining whether alter-ego liability applies. *See Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Courtad, Inc.*, No. 12-2738, 2014 U.S. Dist. LEXIS 97911, 2014 WL 3613383, at *3-4 (N.D. Ohio July 18, 2014) ("Outside of labor law or ERISA claims, courts tend not to supplant state corporate liability doctrine with federal common law.").

To pierce the corporate veil under Michigan law, "first, the corporate entity must be a mere instrumentality of another; second, the corporate entity must be used to commit a fraud or wrong; and third, there must have been an unjust loss or injury to the plaintiff." *Spartan Tube & Steel v. Himmelspach (In re RCS Engineered Prods. Co.)*, 102 F.3d 223, 226 (6th Cir. 1996) (citing *Nogueras v. Maisel & Associates*, 142 Mich. App. 71, 369 N.W.2d 492, 498 (Mich. 1985)). Lyngaas argues that the district court erred, first, by not taking Curaden USA's undercapitalization into full account in the "mere instrumentality" analysis and, second, by using the incorrect standard in requiring Lyngaas to show that Curaden AG "engage[d] in deliberate wrongful conduct that was either designed to or actually **[**11]** did produce injury."

Regarding undercapitalization, that factor indeed provides at least prima facie weight in favor of

finding that Curaden USA was a "mere instrumentality" of Curaden AG because Curaden USA was not profitable, and the evidence is unclear as to what extent Curaden USA paid Curaden AG for the products it purchased. But undercapitalization is just one factor in the analysis. Whether the corporate entity is a "mere instrumentality of another" is determined by analyzing

> (1) whether the corporation is undercapitalized, (2) whether separate books are kept, (3) whether there are separate finances for the corporation, (4) whether the corporation is used for fraud or illegality, (5) whether corporate formalities have been followed, and (6) whether the corporation is a sham.

Lim v. Miller Parking Co., 560 B.R. 688, 706 (E.D. Mich. 2016) (quoting *Glenn v.* ***[*421]*** *TPI Petro., Inc.*, 305 Mich. App. 698, 854 N.W.2d 509, 520 (Mich. 2014)).

Lyngaas does not dispute the district court's findings that "[t]he two companies keep separate books . . . and follow corporate formalities," nor that "Curaden USA has its own employees and its own offices." Because the evidence further shows that the plan was for Curaden USA, launched in 2014, to be profitable within eight years, the district court did not err in finding that Curaden USA's "undercapitalization" **[**12]** was outweighed by the other five factors, none of which supported the finding of an alter-ego relationship. *See Needa Parts Mfg., Inc. v. PSNet, Inc.*, 635 F. Supp. 2d 642, 647 (E.D. Mich. 2009) ("While it may be true that PSNet was an undercapitalized start-up company, it does not follow that the court must rule as a matter of law that PSNet is a mere alter ego of PSNet Communications.").

Lyngaas also fails to point to any other telling signs of undercapitalization, such as leaving creditors unpaid or using Curaden USA as the parent company's bank account. *Cf. Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 705 (6th Cir. 1988) (piercing the corporate veil where the individual defendant paid corporate expenses out of his own pocket, the corporation paid the individual's personal expenses, the individual withdrew money from the corporation and left creditors unpaid, and the financial records were inadequate); *Grass Lake All Seasons Resort v. United States*, 2005 U.S. Dist. LEXIS 22448, 2005 WL 2095890, at *13 (E.D. Mich. Aug. 29, 2005) (piercing the corporate veil where the individual defendant looted the corporation for personal use, did not have his own bank account or property in his own name, and used the company to avoid paying taxes for over ten years).

As to whether "the manner of use effected a fraud or wrong on the complainant . . . , it is not necessary to prove that the owner caused the entity to directly harm the complainant; it is sufficient **[**13]** that the owner exercised his or her control over the entity in such a manner as to wrong the complainant." *Green v. Ziegelman*, 310 Mich. App. 436, 873 N.W.2d 794, 807 (Mich. Ct. App. 2015). Lyngaas states the correct standard, but points to no evidence showing how Curaden AG exercised its control over Curaden USA in such a manner as to wrong him or to pursue some unlawful end. *See Seasword v. Hilti, Inc.*, 449 Mich. 542, 537 N.W.2d 221, 224 (Mich. 1995) (holding that the corporate veil "may be pierced only where an otherwise separate corporate existence has been used to subvert justice or cause a result that is contrary to some other clearly overriding public policy") (alterations, citation, and internal quotation marks omitted).

"[E]stablishing an entity for the purpose of avoiding personal responsibility is not by itself a wrong that would warrant disregarding the entity's separate existence." *Ziegelman*, 873 N.W.2d at 807. The lack of "some form of culpable conduct," in short, dooms Lyngaas's theory. *See Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1105 (E.D. Mich. 1997). We will thus follow "[t]he general principle . . . that separate corporate identities will be respected." *In re RCS Engineered Prods. Co.*,

Inc., 102 F.3d 223, 226 (6th Cir. 1996) (quoting *Wodogaza v. H&R Terminals, Inc.*, 161 Mich. App. 746, 411 N.W.2d 848, 852 (Mich. Ct. App. 1987)).

2. Personal jurisdiction over Curaden AG due to its contacts with the United States

This leads us to the question of whether there is some other basis for personal jurisdiction over Curaden AG. The district court held that, pursuant to Rule 4(k)(2) of the Federal Rules of Civil Procedure, it **[*422]** had **[**14]** personal jurisdiction over Curaden AG due to Curaden AG's contacts with the United States as a whole. Notably, Curaden AG does not offer any argument to the contrary. Rule 4(k)(2) "acts as a sort of federal long-arm statute," *Sunshine Distrib., Inc. v. Sports Auth. Mich., Inc.*, 157 F. Supp. 2d 779, 788 (E.D. Mich. 2001) (internal citation and quotation marks omitted), and provides as follows:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
>
> A. the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> B. exercising jurisdiction is consistent with the United States Constitution and laws.

We have yet to apply Rule 4(k)(2) in a published opinion, likely because defendants rarely have the requisite relationship with the United States as a whole, but not with any individual state. Other circuits have addressed the application of Rule 4(k)(2), however, and we adopt their analyses here.

To establish that jurisdiction is proper under Rule 4(k)(2), "(1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction; and (3) the federal court's exercise of personal jurisdiction must comport with due process." **[**15]** *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 6 (1st Cir. 2018); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 940 (7th Cir. 2000) (similar). There is no dispute that the first two requirements are met here: this is a federal-question case and Curaden AG has pointed to no state where it could properly be sued. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651 (5th Cir. 2004) ("[S]o long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction." (citing *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001))). The remaining question is whether personal jurisdiction comports with due process.

Because this is a federal-question case in federal court, the due process requirements emanate from the Fifth rather than the Fourteenth Amendment. *Sunshine Distrib.*, 157 F. Supp. 2d at 788. But they "are the same as with any other personal jurisdiction inquiry, *i.e.* relatedness, purposeful availment, and reasonableness, only in reference to the United States as a whole, rather than a particular state." *Id.* (citing *Cent. States*, 230 F.3d at 941-42).

Curaden AG purposefully availed itself of the American market by launching Curaden USA here. And it mandated that Curaden USA "use its best endeavours to promote the sale of the Products throughout the [United States]." Finally, although it did not exercise its right of prior approval over Curaden USA's marketing materials in this case, Curaden AG nevertheless retains such **[**16]** a right. Curaden AG, in short, made a deliberate decision to target and exploit American markets, thus showing purposeful availment. *See Sunshine Distrib.*, 157 F. Supp. 2d at 789 (holding that the defendant purposefully availed itself of the American market where it "not only sought out and negotiated a licensing agreement with Razor U.S.A. to distribute its products throughout North America, including the United States," but also "essentially created Razor U.S.A. for this sole purpose"); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (noting that J. McIntyre directed marketing and sales efforts at the United

States when it **[*423]** contracted with a U.S. distributor to sell its machines in the country).

The next consideration is whether Lyngaas's TCPA claims arise out of—or relate to—Curaden AG's contacts with the United States. This court's standard for meeting that requirement is "lenient." *See Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002). "If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996).

Lyngaas's alleged injuries caused by the fax advertisements "relate to" Curaden AG's creation of its U.S. subsidiary and its direction for the subsidiary to promote Curaden AG's products throughout the United **[**17]** States. Curaden AG is correct, as we discuss later, that it was not the "sender" of the faxes for purposes of TCPA liability. But the standard here is not so stringent, and it is met when "the operative facts are at least marginally related to the alleged contacts" between the defendant and the forum. *Bird*, 289 F.3d at 875. That standard is clearly met here.

The final consideration is whether the exercise of jurisdiction over Curaden AG would be reasonable, such that it would "comport with traditional notions of fair play and substantial justice." *CompuServe*, 89 F.3d at 1268 (citation and internal quotation marks omitted). An inference arises that the third factor is satisfied if, as here, the first two factors are met. *Id.* But where the case involves a "non-resident *alien* defendant," the court must give "special weight to the 'unique burdens placed upon one who must defend oneself in a foreign legal system.'" *Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991) (emphasis in original) (quoting *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)).

We recognize that the burden on Curaden AG is high because it had no prior contact with the U.S. federal-court system. But that burden is nonetheless outweighed by other factors. First, the United States has an interest in enforcing federal laws. Second, Lyngaas's interest in obtaining relief **[**18]** is particularly high given that Curaden USA is not profitable and is unlikely to be profitable in the immediate future. *Cf. City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 666 (6th Cir. 2005) (finding the interests of the United States and class plaintiffs to be "relatively light" where the court's jurisdiction over the key defendants was already conceded and "the marginal addition of [one of the defendants] would add little or nothing to the potential recovery should the plaintiffs ultimately prevail on the merits and be awarded damages"). We therefore conclude that the district court's exercise of personal jurisdiction over Curaden AG is reasonable, and that it comports with due process. And because the district court properly exercised personal jurisdiction over Curaden AG due to Curaden AG's contacts with the United States as a whole, we need not reach the question of whether the court has personal jurisdiction over Curaden AG due to the latter's contacts with Michigan alone.

C. Curaden AG's liability under the TCPA

Having decided that personal jurisdiction over Curaden AG exists, we will now examine whether the district court erred in concluding that Curaden AG was not a "sender" for purposes of TCPA liability. The TCPA makes it "unlawful for **[**19]** any person within the United States . . . to use any telephone **[*424]** facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). In 2006, the Federal Communications Commission ("FCC") promulgated regulations that defined the "sender" of a fax as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10).

Lyngaas argues on appeal that the "whose goods or services are advertised or promoted" prong of the

FCC regulation creates a strict-liability standard that the district court improperly rejected. He argues that, even though Curaden AG did not itself send the faxes at issue, it is nonetheless strictly liable under the TCPA because the faxes "advertised or promoted" its toothbrush. Lyngaas relies on two Sixth Circuit cases in support of his strict-liability theory: *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016), and *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. 2015).

As the district court reasoned, however, both cases are inapplicable here because each involved defendants that, unlike Curaden AG, knowingly hired fax broadcasters for the purposes of fax advertising. *See Siding & Insulation*, 822 F.3d at 888 ("Alco acknowledged that it had paid B2B to **[**20]** provide advertising services by broadcasting faxes"); *Imhoff*, 792 F.3d at 630 ("[Defendants] directed B2B to send out 20,000 faxes to local businesses on behalf of the two Alfoccino restaurants."). The distinction is critical. This court has underscored the difference between (1) defendants that either dispatch the faxes themselves or "cause the fax[es] to be conveyed" by hiring a fax broadcaster (like the *Siding & Insulation* and *Imhoff* defendants, and, here, Curaden USA), *see Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800, 802 (6th Cir. 2018), and (2) defendants who do neither of the above and thus do not "send" the faxes at all. *Id.* The former are "senders" for purposes of TCPA liability and fit within the TCPA and the FCC regulation, whereas the latter fall outside the scope of the TCPA entirely. *Id.* ("Read in the context of the statute itself, the regulation does not strip the 'send' out of 'sender.'"). In sum, the TCPA does not impose strict liability on a manufacturer simply because its products wind up on the face of an unsolicited fax advertisement; the manufacturer must independently fit the role of a "sender." *See id.*

Because Curaden AG did not dispatch the faxes itself, the issue becomes whether Curaden AG "caused" the faxes to be sent. *Id.* In *Health One*, this **[**21]** court held that the two defendant manufacturers in question did not cause the faxes advertising their products to be sent because the pharmaceutical wholesaler that broadcasted the faxes acted entirely on its own. *Id.* at 801 ("Bristol and Pfizer neither caused the subject faxes to be conveyed, nor dispatched them in any way. Instead only Mohawk did those things. Bristol and Pfizer therefore did not 'send' the faxes and thus have no liability for them.").

But the present case differs slightly from *Health One* because, although Curaden AG did not hire a fax broadcaster to advertise its products, it did enter into a distribution agreement with Curaden USA to "use its best endeavours to promote the sale of the Products throughout the Territory." The determinative question, therefore, is whether entering into such a distribution agreement "caused" the sending of the fax advertisements.

As the district court noted, a case with a nearly identical agreement and factual scenario was resolved by this court just months before the district court's decision. In *Garner Properties & Management, **[*425]** LLC v. Marblecast of Michigan, Inc.*, No. 17-11439, 2018 U.S. Dist. LEXIS 216068, 2018 WL 6788013 (E.D. Mich. Dec. 26, 2018), defendant American Woodmark entered into a distribution agreement with defendant Marblecast that obligated Marblecast to "use its best efforts to **[**22]** promote, maintain and increase sales of [American Woodmark] products." 2018 U.S. Dist. LEXIS 216068, [WL] at *3. The district court, relying on *Health One*, found that American Woodmark was not a sender for purposes of the TCPA because, "[m]aterially, the Agreement neither explicitly requests nor authorizes Marblecast to advertise American Woodmark's products via fax. Moreover, Marblecast hired jBlast, the fax broadcaster, without the consent or direction of American Woodmark." *Id.* In June 2020, this court affirmed the district court's holding. *Garner Properties & Mgmt., LLC v. Marblecast of Michigan, Inc.*, 810 F.

App'x 454, 456 (6th Cir. 2020) (concluding that, "[i]n short, some level of knowledge that an unsolicited fax has been sent is required for an entity to qualify as a sender under the TCPA").

The distribution agreement in this case mirrors the agreement in *Garner Properties*. Further, the undisputed evidence shows that Curaden AG did not even know that Curaden USA planned to use faxes as a method of advertisement, much less that Curaden USA had hired a fax broadcaster or created the fax advertisements at issue. Curaden USA, not Curaden AG, paid AdMax's invoices and communicated with AdMax. *Cf. Garner Properties*, 2018 U.S. Dist. LEXIS 216068, 2018 WL 6788013, at *3 ("Marblecast did not discuss the Fax with anyone at American Woodmark before it was sent . . . . American Woodmark had no **[**23]** independent knowledge that Marblecast was sending the Fax."). Indeed, all of the contact and social media information listed on the faxes directed consumers to Curaden USA and not to Curaden AG.

Lyngaas correctly notes that *Garner Properties* differs from the case at hand in one respect: "Marblecast would have sent the Fax even had it never agreed to sell American Woodmark's products," *id.*, whereas Curaden USA is unlikely to have sent the two faxes had the distribution agreement not existed. But this distinction does not change the fact that Curaden AG did not possess even "some level of knowledge that an unsolicited fax ha[d] been sent." *See Garner Properties*, 810 F. App'x at 456. Because Curaden AG clearly lacked knowledge of and involvement in the fax advertisements, we agree with the district court's conclusion that Curaden AG was not a "sender" and thus not liable under the TCPA.

D. Whether faxes received by computers fall within the scope of the TCPA, 47 U.S.C. § 227(b)(1)(C)

We next address the reach of the TCPA as applied to the facts before us. The TCPA prohibits the "use [of] any telephone facsimile machine, computer, or other device to send, to a *telephone facsimile machine*, an unsolicited advertisement . . . ." 47 U.S.C. § 227(b)(1)(C) (emphasis added). Curaden **[**24]** AG and Curaden USA argue on appeal that a TCPA claim is not actionable if the unsolicited advertisement is received by any device (such as a computer through an "efax") other than a traditional fax machine. Thus, they argue, Lyngaas failed to satisfy the requirements of Rule 23(b) of the Federal Rules of Civil Procedure because he failed to establish which proposed class members received faxes on a traditional fax machine versus another device, such as a computer. We are unpersuaded by the defendants' attempt to limit a "telephone facsimile machine" to only traditional fax machines, however, because such a narrow definition **[*426]** does not comport with the plain language of the TCPA.

The TCPA defines a "telephone facsimile machine" as "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." 47 U.S.C. § 227(a)(3). This definition makes clear that a "telephone facsimile machine" encompasses more than traditional fax machines that automatically print a fax received over a telephone line. In particular, it includes "equipment" **[**25]** that has the "*capacity* . . . to transcribe text or images," *id.* (emphasis added), from or onto paper—as long as the electronic signal is transmitted or received over a telephone line. The statutory text alone, therefore, rebuts the defendants' argument.

The FCC reinforced this point. In 2003, after a period of notice-and-comment, the FCC issued an order explaining that "developing technologies permit one to send and receive facsimile messages in a myriad of ways," and concluding that "faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on

unsolicited faxes." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14133 ¶ 200 (2003). It reasoned that

> the purpose of the requirement that a "telephone facsimile machine" have the "capacity to transcribe text or images" is to ensure that the prohibition on unsolicited faxing not be circumvented. Congress could not have intended to allow easy circumvention of its prohibition when faxes are (intentionally or not) transmitted to personal computers and fax servers, rather than to traditional standalone facsimile machines.

Id. ¶ 201. But, the **[**26]** FCC stated, the statute's prohibition "does not extend to facsimile messages sent as email over the Internet." *Id.* at ¶ 200.

This last caveat prompted WestFax, the same company that transmitted the faxes at issue here, to seek clarification from the FCC as to whether an "efax" that is received on a fax server and then converted to an email is a "fax, an email or both." *In the Matter of Westfax, Inc. Petition for Consideration & Clarification*, 30 F.C.C. Rcd. 8620, 8622 ¶ 5 (2015). In response, the Consumer and Governmental Affairs Bureau (the Bureau) of the FCC issued a declaratory ruling in August 2015 "mak[ing] clear that a type of fax advertisement—an efax, a document sent as a conventional fax then converted to and delivered to a consumer as an electronic mail attachment—is covered by the consumer protections in the [TCPA]." *Id.* at 8620 ¶ 1. The Bureau reasoned that because efaxes, as defined by WestFax, were sent over telephone lines, it satisfied "the statutory requirement that the communication be a fax on the originating end." *Id.* at 8623 ¶ 9. And the "statutory requirements to be a fax on the receiving end" were satisfied because "[t]he definition of 'telephone facsimile machine' sweeps in the fax server and modem, along with the computer that receives the efax because together they by necessity **[**27]** have the capacity to 'transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.'" *Id.* (quoting 47 C.F.R. § 64.1200(f)(13)).

We are not persuaded by the dissent's disagreement with the Bureau's analysis because the dissent assumes that a computer receiving a fax exists in isolation, without the high probability that such a computer is connected to a printer and to a **[*427]** modem capable of receiving faxes, which as a whole is fully capable of receiving electronic signals over a telephone line and printing out a fax. (Indeed, a traditional fax machine is composed of a modem, scanner, and printer, and thus parallels the computer set-up mentioned above). Nor are we persuaded by the dissent's analysis based on the fact that the word "computer" appears in only part of the TCPA's prohibitory language, 47 U.S.C. § 227(b)(1)(C), because (1) a computer is not excluded from the statutory definition of a "telephone facsimile machine," *id.* § 227(a)(3), and (2) Congress presumably understood that a computer, as a stand-alone device, can be distinct from a telephone facsimile machine and yet part of one as an integrated piece of "equipment."

The Bureau also clarified its earlier email caveat: "By contrast, a fax *sent as an **[**28]** email* over the Internet—*e.g.*, a fax attached to an email message or a fax whose content has been pasted into an email message—is not subject to the TCPA." 30 F.C.C. Rcd. 8620, 8623-24, 2015 FCC LEXIS 2428 ¶ 10 (emphasis in original). In other words, with an efax "[t]here is an end-to-end communication that starts when the faxed document is sent over a telephone line and ends when the converted document is received on a computer," whereas emails originate not as a fax over a telephone line, but "over the Internet." *Id.*

In sum, the defendants' argument is overbroad. They ask us to hold that a fax received by any device (such as a computer) that is not a traditional fax machine falls outside the scope of the TCPA. The statutory definition, however, encompasses more than a traditional fax machine. Notably, it does not require the actual printing of the

advertisement, which dispels the defendants' argument that Congress was concerned only with the burdensome ink-and-paper costs of fax advertising.

For the sake of completeness on this issue, we note our awareness that the Bureau issued a declaratory ruling in December 2019 that efaxes sent through an "online fax service" are not covered by the TCPA. *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, 34 F.C.C.R. 11950, 2019 FCC LEXIS 3608, 2019 WL 6712128, *1, *3 ¶¶ 2, 11 (Dec. 19, 2019) **[**29]** . But an application for review of the Bureau's ruling is currently pending before the FCC, *see Applicant Career Counseling Services, Inc.'s Application for Review*, CG Docket Nos. 02-278, 05-338 (Jan. 8, 2020), the *Amerifactors* ruling is not mentioned by either party, and the ruling in any event would have no bearing on the case before us because the operative facts here took place more than three years earlier, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *see also Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) (holding that because, "[g]enerally, [r]etroactive application of policy is disfavored," the federal agency had to apply the version of its guidance that was in effect at the time of the incident in question) (citation and internal quotation marks omitted).

E. Whether class certification must be based on admissible evidence

We now turn to the issue of class certification. A district court's decision of whether to certify a class is reviewed under the abuse-of-discretion standard. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 457 (6th Cir. 2020). "An abuse of discretion **[**30]** occurs if the district court relies on clearly erroneous findings of fact, applies **[*428]** the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012)).

The defendants argue that the district court abused its discretion by relying on inadmissible evidence to certify the class. Specifically, they argue that, because Lyngaas failed to put forth admissible evidence showing which individuals actually received the fax advertisements, the district court should not have found that the "predominance" and "ascertainabilty" requirements of Rule 23(b) of the Federal Rules of Civil Procedure were satisfied. The defendants, however, did not move to decertify the class after the district court found at the bench trial that Lyngaas's evidence of the summary-report logs was inadmissible; rather, they argue now that the district court improperly certified the class and, as discussed later, improperly established a claims-administration process based on the inadmissible evidence.

A plaintiff seeking class certification must show that the class satisfies "all four of the Rule 23(a) prerequisites—numerosity, commonality, typicality, and adequate representation—and fall[s] within one of the three **[**31]** types of class actions listed in Rule 23(b)." *Young*, 693 F.3d at 537. The relevant Rule 23(b) requirement here is that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Moreover, although not explicitly stated in Rule 23 "the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young*, 693 F.3d at 537-38 (citation omitted). In this case, the district court found that the predominance and ascertainability requirements were met based on summary-report logs that purportedly listed each

successful recipient of the two fax advertisements by fax number. It noted that, although Lyngaas had yet to authenticate the logs, the court could still consider them at the class-certification stage.

This court has never required a district court to decide conclusively at the class-certification stage what evidence will ultimately be admissible at trial. Nor does any binding precedent impose such a requirement. *See Hicks*, 965 F.3d at 465 ("We have yet to settle this matter."). We conclude that, on this issue of first impression, the district court is correct.

As an initial matter, the Supreme Court has helpfully **[**32]** shed some light on this subject. In deciding whether to certify a class, the trial court must undertake a "rigorous analysis" to ensure "that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). Although this analysis sometimes requires the trial court to "probe behind the pleadings," at other times, "the issues are plain enough from the pleadings"—suggesting that admissible evidence is not always required. *Id.* at 160. Either way, a party seeking to maintain a class action must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (explaining that "the same analytical principles govern Rule 23(b).").

We hold, as have the Eighth and Ninth Circuits, that such "evidentiary proof" need not amount to admissible evidence, at least with respect to nonexpert **[*429]** evidence. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611, 614 (8th Cir. 2011) (holding that a district court need not "decide conclusively at the class certification stage what evidence will ultimately be admissible at trial"); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) ("Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.").

The Eighth and Ninth Circuits have persuasively explained that the differences between Rule 23, summary judgment, and trial "warrant greater evidentiary freedom at the class certification **[**33]** stage." *Sali*, 909 F.3d at 1005. Because class certification must occur at "an early practicable time after a person sues or is sued as a class representative," Fed. R. Civ. P. 23(c)(1)(A), "[l]imiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence . . . [a]nd transform[s] a preliminary stage into an evidentiary shooting match," *Sali*, 909 F.3d at 1004; *Zurn Pex*, 644 F.3d at 613 ("As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty.") (internal citation omitted).

Summary judgment and class certification occurred simultaneously in this case, but the district court nevertheless relied on the natural progression of litigation and evidentiary discovery. It noted that, although the summary-report logs were not admissible evidence, "Lyngaas has indicated that he will be able to admit the evidence at trial."

Further, unlike a summary-judgment decision or a judgement after trial, a class-certification order is "inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978); Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). **[**34]** Therefore, "[a]pplying the formal strictures of trial to such an early stage of litigation makes little common sense." *Sali*, 909 F.3d at 1004; *see also Zurn Pex*, 644 F.3d at 613-14 ("Because a decision to certify a class is far from a conclusive judgment on the merits of the case, it is 'of necessity not accompanied by the traditional rules and procedure applicable to civil trials.'") (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)) (alterations omitted)).

Numerous district courts in our circuit have indeed depended on the concept that the "manner and degree of evidence required" shifts through "successive stages of the litigation," *see Sali*, 909 F.3d at 1006, and have thus considered evidence at the class-certification stage that is reliable but that might ultimately be deemed inadmissible. In *Serrano v. Cintas Corp*, No. 04-40132, 2009 U.S. Dist. LEXIS 26606, 2009 WL 910702 (E.D. Mich. Mar. 31, 2009), *aff'd sub nom. Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013), for example, both parties submitted employee declarations in support of and in opposition to the plaintiffs' motions to certify the classes. *2009 U.S. Dist. LEXIS 26606, [WL]* at *2-3. The district court denied both parties' motions to strike the declarations, explaining that "[a]t this stage of litigation, the Court should consider all the evidence presented in support of and in opposition to class certification, and grant to the evidence the weight that the Court finds is most appropriate." *2009 U.S. Dist. LEXIS 26606, [WL]* at *3; see also Stephenson v. Family Solutions of Ohio, Inc., No. 1:18cv2017, 499 F. Supp. 3d 467, 2020 U.S. Dist. LEXIS 205972, 2020 WL 6485106, at *6 (N.D. Ohio Nov. 4, 2020) **[**35]** (rejecting the defendants' motion to strike the plaintiffs' unauthenticated exhibits, reasoning that the court's inquiry at the class-certification **[*430]** stage is "tentative, preliminary, and limited") (citation and internal quotation marks omitted); *Tedrow v. Cowles*, No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, 2007 WL 2688276, at *2-3 (S.D. Ohio Sept. 12, 2007) (finding that "the rules of evidence are not to be applied strictly in deciding a motion for class certification," and thus rejecting a motion to strike where the defendants disputed the authenticity of the exhibit).

The cases that the defendants rely on are unpersuasive. They first cite to *Sandusky Wellness Center, LLC v. ASD Specialty Healthcase, Inc.*, 863 F.3d 460 (6th Cir. 2017), in which this court upheld the district court's denial of class certification. The district court in that case had concluded that the plaintiff could not satisfy the predominance and ascertainability requirements when she had evidence that the fax in question was successfully transmitted to 75 percent of the individuals targeted, but lacked the fax logs to show which individuals actually received the fax. *Id.* at 470. Because "no circuit court has ever mandated certification of a TCPA class where fax logs did not exist," this court affirmed the district court's decision. *Id.* at 473. In the present **[**36]** case, however, the fax logs do exist. The only remaining question before the district court was whether they could be authenticated. In short, the requisite evidentiary proof was lacking in *Sandusky*, but was present here.

Defendants next cite to *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005), the only circuit case to explicitly state that "findings must be made based on adequate admissible evidence to justify class certification." *Id.* at 319. *Unger* is unhelpful, however, because the question of admissibility played no part in that court's disposition of the case. Although the *Unger* court indeed made the statement in its introductory paragraph, it later noted that "[c]lass certification hearings should not be mini-trials" and proceeded to focus on whether the proffered evidence was adequate—not whether it was admissible. *Id.* at 321, 325. It ultimately decertified the class because the district court had failed to consider, in a complex fraud case, several factors relevant to whether a proposed investor class satisfied Rule 23(b)(3)'s predominance requirement. *Id.* at 323-25.

By contrast, the district court here undertook the rigorous analysis required of it and correctly found sufficient evidence for class certification. The court had before it summary-report logs that detailed which **[**37]** fax numbers had purportedly received the faxes at issue, as well as other corroborating evidence, such as Curaden USA's target lists of fax numbers and numerous emails detailing the transmissions. All that was left was authentication of the summary-report logs. Requiring the court to "rely[ ] on formalistic evidentiary objections" at this stage would have

been inappropriate, particularly given Lyngaas's assurance that he would be able to authenticate the logs at trial. *See Sali*, 909 F.3d at 1006 ("By relying on admissibility alone as a basis to strike the Ruiz declaration, the district court rejected evidence that likely could have been presented in an admissible form at trial."). The court therefore did not abuse its discretion in granting class certification when it relied on evidence that had yet to be authenticated.

F. The district court's evidentiary rulings

We next examine the district court's evidentiary rulings. Decisions by a district court to admit or exclude evidence are reviewed under the abuse-of-discretion standard and reversed "only if we are firmly convinced of a mistake that affects substantial rights and amounts to more than harmless error." *United States v. **[*431]** Baldwin*, 418 F.3d 575, 579 (6th Cir. 2005) (internal quotation marks omitted). Lyngaas **[**38]** argues that the district court abused its discretion by excluding the summary-report logs and the opinions of his expert witness, Lee Howard, from evidence.

Regarding the summary-report logs, we agree with the district court's conclusion that the logs at issue do not constitute hearsay. The hearsay rule applies only to out-of-court statements, Fed. R. Evid. 801(c)(1), and the rule defines a "statement" as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion," Fed. R. Evid. 801(a). The "written assertion" here was not made by a "person"; the court instead found, and the defendants do not contest, that the logs were data compilations automatically generated by a computer. This means that the logs are not hearsay. *See Patterson v. City of Akron*, 619 F. App'x 462, 479-80 (6th Cir. 2015) (holding that a Taser Report was "merely a report of raw data produced by a machine" and thus did not constitute hearsay) (collecting similar cases); *United States v. Lamons*, 532 F.3d 1251, 1263-64 (11th Cir. 2008) (concluding that a computer-generated spreadsheet of telephone billing data was not hearsay).

But overcoming the defendants' hearsay objection was not sufficient to make the summary-report logs admissible. A computer-generated compilation might still "present evidentiary concerns. A machine might malfunction, **[**39]** produce inconsistent results or have been tampered with." *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015). "[S]uch concerns are addressed by the rules of authentication," *id.*, and Lyngaas thus had the burden of authenticating the logs.

Federal Rule of Evidence 901(a) requires a proponent of evidence to produce proof "sufficient to support a finding that the item is what the proponent claims it is." Rule 901(b) in turn provides a nonexhaustive list of means by which to authenticate evidence. By not presenting anyone to attest as to how the logs at issue were created or to personally vouch for their accuracy, Lyngaas failed to satisfy the requirements of Rule 901. Accordingly, the district court did not abuse its discretion in ruling that the logs were inadmissible as evidence.

Nor did the district court abuse its discretion in concluding that Howard's testimony was both unreliable under *Daubert* and unpersuasive. The court found that Howard's opinions regarding the successful number of fax transmissions were premised entirely on the unauthenticated summary-report logs, as well as by an affidavit from the president of WestFax that was filed in another case and thus did not address the specific data at issue in the present case. Howard's opinions, therefore, did not meet the *Daubert **[**40]*** requirement that an expert's "knowledge" be premised on "'good grounds' based on what is known" and not on "subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). And again, because of the lack of testimony describing how the report logs were created or

having anyone vouch for their accuracy, Howard's opinions regarding the logs were both speculative and unpersuasive. We will thus not disturb the district court's evidentiary rulings.

G. The district court's use of a claims-administration process

Because we find that the district court did not abuse its discretion in making its evidentiary rulings, we next consider the claims-administration process imposed by the court. Curaden USA does not dispute, **[*432]** and the court correctly found, that "Curaden USA sent two mass-fax transmissions." Nor is there any dispute that Lyngaas was one of the recipients of the fax advertisements. Nevertheless, Curaden USA argues that, because Lyngaas failed to establish the precise number of individuals who received the faxes, the claims-administration process established by the court to afford class members relief is inappropriate.

As the district court aptly noted, "courts [in class actions] must use their discretion, **[**41]** and in many cases their ingenuity, to shape decrees or to develop procedures for ascertaining damages and distributing relief that will be fair to the parties." (quoting 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1784 (3d ed. 2017)). The manner of a claims-administration process is to be driven by the particular needs of an individual case, *id.*, with the ultimate goal of distributing "as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible," 4 William B. Rubenstein, Newberg on Class Actions § 12:15 (5th ed. 2017).

Contrary to Curaden USA's argument, the situation at hand—where there exists a target list of fax numbers that were sent the unsolicited fax advertisement—is precisely the type best handled through a claims-administration process. *See, e.g.*, *Krakauer v. Dish Network, LLC*, No. 1:14-CV-333, 2017 U.S. Dist. LEXIS 117713, 2017 WL 3206324, at *5 (M.D.N.C. July 27, 2017) ("[T]he trial already established all of the elements necessary to prove a violation . . . . Whether a claimant is a class member is a question that can be more appropriately, fairly, and efficiently resolved through a claims administration process as authorized by Rule 23."); *Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 U.S. Dist. LEXIS 83996, 2016 WL 3620798, at *2 (W.D. Wash. June 28, 2016) **[**42]** ("Whether a given claimant is a rightful class member is an inquiry common to every consumer class action that reaches the claims administration stage."); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) (recognizing that a court need not ascertain "absent class members' actual identities . . . before a class can be certified," so long as the class members can be identified in the claims-administration process).

The class here consists of "[a]ll persons who were successfully sent one or more facsimiles in March 2016 offering the Curaprox '5460 Ultra Soft Toothbrush' for '.98 per/brush' to 'dental professionals only.'" To secure relief, claimants must submit sworn affidavits attesting to the following information: "(1) their name, (2) their contact information, including fax number and address, (3) their receipt of a fax from Curaden USA on March 8, 2016 and/or on March 28, 2016, and (4) that they did not expressly invite or permit Curaden USA to send them faxes." The claims administrator will then "verify[ ] the information contained in each claimant's affidavit with the information reflected on the target lists" and the parties will "confer regarding disputes or agreement with respect to each claimant's status **[**43]** as a class member."

Curaden USA's concern that those who did not receive the fax will erroneously be afforded damages is alleviated by the claims-administration process designed by the district court to weed out those who do not fit within the class definition. We therefore conclude that the district court's establishment of a claims-administration process was proper.

H. Personal jurisdiction over Curaden USA as to non-Michigan class members

Curaden USA's final argument is that, "pursuant to the Supreme Court's **[*433]** decision in *Bristol-Myers Squibb*," the "district court's exercise of jurisdiction over out-of-state plaintiffs violated Curaden USA's due process rights and should be reversed." In short, Curaden USA asks us to extend *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017)—which held that a state court in a *mass* action must have personal jurisdiction over the defendant as to each plaintiff—to federal *class* actions. This would require the district court to have personal jurisdiction over the defendant as to each unnamed class member.

We decline to extend *Bristol-Myers Squibb* in this manner. Long-standing precedent shows that courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions, **[**44]** and the personal-jurisdiction analysis has focused on the defendant, the forum, and the *named plaintiff*, who is the putative class representative. Besides being well established, this rule has a well-reasoned basis for its existence.

As the Seventh Circuit highlighted in *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), the argument made by Curaden USA would constitute "a major change in the law of personal jurisdiction and class actions." *Id.* at 448. There has long been a "general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant." *Id.* at 445. "For cases relying on specific jurisdiction over the defendant, minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs . . . . Once certified, the class as a whole is the litigating entity." *Id.*

This historical practice is not confined to the lower courts. The Supreme Court has "regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional **[**45]** problem" raised by Curaden USA. *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)), a nationwide class action brought in a federal court in California in which the defendant was headquartered in Arkansas and incorporated in Delaware, and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), a nationwide class action brought in a state court in Kansas in which the defendant was headquartered in Oklahoma and incorporated in Delaware). In sum, "[d]ecades of case law show that . . . the practice of federal courts"—i.e., precedent—has not required any contacts, let alone "minimum" contacts in the specific-jurisdiction sense, between absent class members and the forum. *Id.*

The facts at issue in *Bristol-Myers Squibb* reside outside the class-action context. *Bristol-Myers Squibb* involved not a class action in federal court, but a mass-tort action in state court. *Bristol-Myers Squibb*, 137 S. Ct. at 1777. Hundreds of individual plaintiffs (86 from California, and 592 from 33 other states) filed eight separate complaints in California state courts, asserting state-law claims based on injuries allegedly caused by Plavix, a blood-thinning drug. *Id.* at 1778. The separate complaints were assigned as a coordinated action to a state trial-court judge. *See Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal. 5th 783, 206 Cal. Rptr. 3d 636, 377 P.3d 874, 878 (2016). Such a coordinated mass action is "authorized under section 404 of the California Civil Procedure Code, but **[**46]** . . . has no analogue in the Federal **[*434]** Rules of Civil Procedure." *Mussat*, 953 F.3d at 446.

Bristol-Myers Squibb contested the state court's jurisdiction over the out-of-state plaintiffs' claims, arguing that those plaintiffs had no connection to

the state of California. *Bristol-Myers Squibb*, 137 S. Ct. at 1777-78. The California Supreme Court rejected the argument, holding instead that the out-of-state plaintiffs could bring their state-law claims in California court based on California's "sliding scale approach to specific jurisdiction." *Bristol-Myers Squibb*, 377 P.3d at 889 (citation omitted). That approach allowed the required "connection between the forum contacts and the claim" to be reduced depending on how "wide ranging the defendant's forum contacts" were. *Id.* at 885.

The United States Supreme Court reversed. It first examined precedent, noting that "the primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." *Bristol-Myers Squibb*, 137 S. Ct. at 1779. Should general jurisdiction not exist, the court turns to specific jurisdiction, under which "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." *Id.* at 1780 (alterations, citation, and internal quotation marks omitted) (emphasis in original). "[T]here must be an affiliation between the forum and the underlying controversy, **[**47]** principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (alterations, citation, and internal quotation marks omitted).

Against this backdrop, the Supreme Court held that California's "sliding scale approach" contravened these "settled principles regarding specific jurisdiction" because that approach relaxed "the strength of the requisite connection between the forum and the specific claims at issue." *Id.* at 1781. Critically, there was no "adequate link between the State and the nonresidents' claims." *Id.* That some plaintiffs were allegedly injured in California "does not allow the State to assert specific jurisdiction over the nonresidents' claims," even if the "third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents." *Id.*

The Supreme Court stated that its decision was nothing more than a "straightforward application . . . of settled principles of personal jurisdiction." *Id.* at 1783. And the Court was careful to cabin the scope of its decision. Because the Court had mentioned "federalism interests" and "the due process limits on the exercise of specific jurisdiction **[**48]** by a State," its final words noted that the decision did not address "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1780-84. It also did not touch on whether the same result would apply to a class action under Rule 23 of the Federal Rules of Civil Procedure. *See id.* at 1789 n.4 (Sotomayor, J., dissenting) ("[T]he Court today does not confront the question whether its opinion here would also apply to a class action.").

Despite the pains that the Supreme Court took to limit is decision, litigants have rushed to argue that *Bristol-Myers Squibb* renders many nationwide class actions constitutionally invalid for lack of specific personal jurisdiction over the defendant with respect to the claims of unnamed class members. The vast majority of lower courts have rejected their arguments, as has the only circuit court to have so far addressed the issue. *See Chernus v. Logitech, Inc.*, No. 17-673(FLW), 2018 U.S. Dist. LEXIS 70784, 2018 WL 1981481, at *7 **[*435]** (D.N.J. Apr. 27, 2018) (collecting cases); *Mussat*, 953 F.3d 441.

We follow their lead in holding that *Bristol-Myers Squibb* does not extend to federal class actions. There are at least two related reasons supporting the long-standing rule. First, a class action is formally one suit in which, as a practical matter, a defendant litigates against only the class representative. **[**49]** Second and relatedly, precedent shows that absent class members are not considered "parties," as a class representative is, for certain jurisdictional purposes.

The different procedures underlying a mass-tort action and a class action demand diverging specific personal jurisdiction analyses. *See Mussat*, 953 F.3d at 446-47. A class action is the product of the

certification procedures set forth in Rule 23, and these "[p]rocedural formalities matter," as they result in practical differences. *Id.* at 446. The Seventh Circuit persuasively points out that the Supreme Court, in *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008),

> stressed the importance of class certification as a pre-requisite for binding a nonparty (including an unnamed class member) to the outcome of a suit. *Id.* at 894. With that in mind, it rejected the notion of "virtual representation" as an end-run around the careful procedural protections outlined in Rule 23. *Id.* at 901. Class actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class.

Id. at 446-47.

In a coordinated mass action, each plaintiff is a named party. That means that the defendant must defend against each plaintiff and their individualized claims. Although the statute at issue in *Bristol-Myers* ***[**50]*** *Squibb* allowed the trial court to "consolidate their cases for resolution of shared legal issues," the court would eventually "mov[e] on to individual issues." *Mussat*, 953 F.3d at 447. These individual issues might "present significant variations" such that a defense would require different legal theories or different evidence. *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

In a class action, by contrast, "the lead plaintiffs earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b)." *Mussat*, 953 F.3d at 447. The defendant "is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense." *Sanchez*, 297 F. Supp. 3d at 1366. In this sense, the only "suit" before the court is the one brought by the named plaintiff. Thus, when the court considers whether the suit "arise[s] out of or relate[s] to the defendant's contacts with the forum," *Bristol-Myers*, 137 S. Ct. at 1780 (alterations and citation omitted), the court need analyze only the claims raised by the named plaintiff, who in turn represents the absent class members, *see Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

The dissent's contrary view fails to concentrate **[**51]** on the "affiliation between the forum and the underlying controversy," the core of the specific-jurisdiction inquiry. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780. Rather, the dissent hangs its hat on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, **[*436]** 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). But the Supreme Court in *Shutts*, confronted with a personal-jurisdiction challenge by the out-of-state defendant, in fact *allowed* the nationwide class action to proceed.

In that case, one Kansas resident and two Oklahoma residents brought a nationwide class action in a Kansas state court for interest on delayed royalty payments stemming from natural gas operations in eleven states. *Id.* at 799-801. The defendant, a Delaware corporation with its principal place of business in Oklahoma, attempted to avoid its obligations to non-Kansas residents on personal-jurisdiction grounds. It asserted that the "Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and similar cases" because the absent class members "did not possess 'minimum contacts' with Kansas." *Id.* at 802. As such, the defendant argued, absent class members should be required to affirmatively request inclusion into the class. *Id.* at 812.

The Supreme Court in *Shutts* expressly rejected the

defendant's attempt to impose the "minimum contacts" requirement **[**52]** of the Due Process Clause onto absent class members, finding that the defendant's argument was supported by "little, if any precedent." *Id.* at 812. Instead, the "minimal procedural due process protection" owed by the forum state to the absent class members was satisfied by a "fully descriptive" opt-out notice mailed to each class member, *id.* at 811-812, 814, as well as by class certification procedures requiring "that the named plaintiff at all times adequately represent the interests of the absent class members," *id.* at 812. In other words, due to the opt-out and certification procedures, the Kansas trial court could exercise jurisdiction over the absent class members. *Id.* at 811.

The dissent makes an unjustified inferential leap from *Shutts*. It argues that because a court must provide due process protection to absent class members, a court must also have specific personal jurisdiction over the defendant as to those absent class members. (Dissent at p. 36) But as the *Shutts* Court emphasized, the Due Process Clause places different demands on the court as to each, and the jurisdictional inquiry changes precisely because of the unique posture of a class action. The dissent, like the defendant in *Shutts*, both conflates jurisdictional inquiries and "ignores the differences between class-action **[**53]** plaintiffs, on the one hand, and defendants in nonclass civil suits on the other," *id.* at 812, as well as the differences between named plaintiffs and absent class members, *id.* at 809-810. These practical differences are more than material to the due process inquiry in *Shutts*; they are decisive. The class-certification procedures ensure the "common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, [and] the jurisdiction possessed over the class," thus fundamentally changing the nature of the suit and the jurisdictional analysis. *Id.* at 809.

Not only does the dissent read a new and unsupported holding into *Shutts* (that a court must have specific personal jurisdiction over the defendant as to each absent class member), but it then proceeds to read a new and unsupported holding into *Bristol-Myers Squibb* as well: that "a state court lacks the power to decide the absent class members' claims if they arise from wholly out-of-state activity." (Dissent at p. 37-38). What the dissent papers over is that **[*437]** *Bristol-Myers Squibb* involved a *mass* action rather than a *class* action, which, as we have already explained, is a very material distinction. In short, the dissent asserts that our analysis rests **[**54]** upon the difference between the jurisdictional powers of a state court versus a federal court (it does not), and that both *Shutts* and *Bristol-Myers Squibb* have already answered the jurisdictional question presented in this case (they have not).

To put this issue another way, we are tasked, when determining whether a court may exercise specific personal jurisdiction over a defendant, to analyze the "relationship among the defendant, the forum, and the litigation," *Daimler AG v. Bauman*, 571 U.S. 117, 132-33, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), and that relationship does not depend on the makeup of the unnamed class members. Curaden USA inflicted injuries in Michigan, and the resulting litigation—depositions, discovery, etc.—stemmed from those injuries. The litigation would not have changed had the absent class members been composed solely of Michiganders or of individuals spanning all fifty states. That is because class-action procedures allowed the district court to treat the class as a single litigating entity represented by one Michigander. Indeed, only after Lyngaas's claim was litigated and after judgment was rendered, were the absent class members brought into the picture to collect their due through an administrative process. To find, therefore, that the **[**55]** underlying suit changes depending on the diversity of absent class members is to ignore the practical realities of class-action litigation and the formal status of the class representative vis-à-vis the absent class members.

The Supreme Court has recognized as much, and has thus held that these procedures make

"[n]onnamed class members . . . parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002); *see also Shutts*, 472 U.S. at 808 ("[A] 'class' or 'representative' suit [is] an exception to the rule that one could not be bound by judgment *in personam* unless one [is] made fully a party in the traditional sense."). The *Devlin* Court concluded, in determining whether absent class members could appeal a court-approved settlement, that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin*, 536 U.S. at 10.

Regarding subject-matter jurisdictional inquires, the Supreme Court has held that absent class members are not considered parties at all. *See id.* at 10 (noting that absent class members are not considered parties for assessing whether the requirement of diverse citizenship under 28 U.S.C. § 1332 has been met); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566-67, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (recognizing that, as long **[**56]** as the named representative meets the amount-in-controversy requirement, jurisdiction exists over the claims of the unnamed class members). And this is so even though subject-matter jurisdiction is a constitutional and statutory requirement, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), and is perhaps more fundamental than personal jurisdiction because it cannot be waived or forfeited, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). As the *Mussat* court aptly concluded, we "see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction . . . : the named representatives must be able to demonstrate either general or specific personal jurisdiction, **[*438]** but the unnamed class members are not required to do so." 953 F.3d at 447.

In sum, long-standing precedent regarding personal jurisdiction over defendants as to absent class members is well supported. We therefore reject Curaden USA's jurisdictional argument.

IV. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

Concur by: THAPAR (In Part)

Dissent by: THAPAR (In Part)

Dissent

CONCURRING IN PART AND DISSENTING IN PART

THAPAR, Circuit Judge, concurring in part and dissenting in part. While I agree with most of the majority's thoughtful opinion, I believe a federal rule and a federal **[**57]** statute require us to narrow the class.

Federal courts follow federal rules of procedure. When those rules incorporate other restrictions, courts must comply with those restrictions as well. Here, that means the federal district court must respect the due process principles that would apply in state court. A Michigan state court could not resolve the claims of out-of-state class members (without violating the defendant's right to due process). Because of the federal rules, neither can the federal court. Since the court lacks personal jurisdiction over one of the defendants for the claims of out-of-state class members, I would exclude those plaintiffs from the class.

Federal courts also follow federal statutes. Here, the statutory question is comparatively simple: Does the Telephone Consumer Protection Act make it illegal to send unauthorized fax ads to computers? The majority concludes that it does, because it considers a computer to be a type of "telephonic facsimile machine." I respectfully disagree.

I.

This is a nationwide class action filed in the Eastern District of Michigan. The named plaintiff, a dentist in Michigan, sued Curaden USA, a toothbrush company incorporated and headquartered **[**58]** in Ohio. The plaintiff claims that Curaden faxed toothbrush ads to hundreds of dentists across the country in violation of federal law. Curaden argues that a Michigan court can resolve the dispute only for Michigan dentists; the ones from other states must sue elsewhere.

Curaden is right. Courts do not have unlimited authority to bind parties to their judgments. Here, a Michigan state court could not decide the claims of out-of-state dentists. Although this case is in federal court, the state court rules are what matter. Why? Because the federal rules ordinarily require federal courts to "follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 571 U.S. 117, 125, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); Fed. R. Civ. P. 4(k)(1)(A). (There are exceptions, but none apply here.) A Michigan court's jurisdiction is limited by Michigan law and by the Fourteenth Amendment to the Constitution. The parties agree that Michigan law does not pose an obstacle, so what follows is an analysis of the Fourteenth Amendment's constraints on a state court's jurisdiction.

Of course, the Fifth Amendment (not the Fourteenth) supplies the due process limits on jurisdiction in federal courts. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783-84, 198 L. Ed. 2d 395 (2017). But the crucial question is what the Fourteenth Amendment allows. That's because the federal rule authorizing jurisdiction over Curaden **[*439]** USA, Rule 4(k)(1)(A), incorporates the Fourteenth Amendment's protections. **[**59]** *See Daimler*, 571 U.S. at 121 ("The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the [federal] District Court from exercising jurisdiction over Daimler in this case . . . ."). The majority does not consider this aspect of Rule 4(k)(1)(A), and its analysis relies in part on the distinction between federal and state courts. But until the rules change, that's a distinction without a difference: The Fourteenth Amendment matters just as much in federal court.

A.

State courts, like federal courts, have the authority to decide cases and issue binding judgments. But this power is limited. Under the Due Process Clause of the Fourteenth Amendment, a state court cannot bind citizens of another state (without their consent) unless those citizens had some relevant contact with the forum state. This requirement—called "personal jurisdiction"—is one of the constitutional guarantees of due process.

Three basic principles frame the personal jurisdiction analysis for corporations. First, a state court has personal jurisdiction to adjudicate any claims against corporations that are "at home" in the state. *Daimler*, 571 U.S. at 126-27. Second, it can also adjudicate claims against a corporation of another state, as long as the claims "arise out of or relate to" the corporation's contacts with the forum state. *Id.* (cleaned up). Third, any **[**60]** party can consent to a state court's exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Take a simplified version of this case as an example. If Curaden USA—an Ohio corporation—sent an unlawful fax to a dentist in Texas, the dentist could sue in Ohio or in Texas. The Ohio state court could issue a judgment that binds the defendant because Curaden is at home in Ohio. The Texas state court could too, because the claim arises out of Curaden's contacts in Texas. And both courts could bind the dentist, who consented to jurisdiction by choosing the forum.

What if the Texan dentist sued in Michigan? A Michigan state court would dismiss the case for lack of jurisdiction. Curaden is not at home in Michigan, and the claim does not arise out of or relate to the company's contacts with Michigan. *See Daimler*, 571 U.S. at 126-27. So without Curaden's

consent, the Michigan court would have no power to bind the company to its judgment.

Now suppose the company sent the same fax to thousands of dentists at the same time—the Texan dentist and a host of Michigan dentists too. Since the company sent the fax to Michigan dentists in exactly the same way as it did the dentist in Texas, you might think that the Texan's claim "relates to" the company's **[**61]** contacts with Michigan. *See id.* (affirming that state courts have specific personal jurisdiction over claims that "arise out of or *relate to* the defendant's contacts with the forum" (emphasis added) (cleaned up)); 2 William B. Rubenstein, Newberg on Class Actions § 6:26 (5th ed. 2020) (explaining the theory). So could the Texan sue in Michigan? No. The Supreme Court recently rejected this precise argument. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."). The State of Michigan still has nothing to do with the dispute between a Texan dentist and an **[*440]** Ohio corporation, even if Michigan dentists were injured in the same way.

Brian Lyngaas, the class representative, is not a Texan. He is a Michigan dentist who could have sued just for the faxes that Curaden sent to his Michigan office. And if he had, the Michigan state court would have jurisdiction over Curaden for this claim. But Lyngaas seeks redress for unlawful faxes sent to hundreds of dentists across the country. If dentists from other **[**62]** states joined Lyngaas's suit, the Michigan court would dismiss their claims—Curaden would have rightly argued that the court lacked personal jurisdiction.

On this much we all agree.

B.

So where do we part ways? The majority believes that a court can resolve a class action even when it would lack personal jurisdiction to decide the claims of absent class members. I do not.

1.

A court cannot bind all parties to a class action unless it has personal jurisdiction over all parties for each claim—including the claims of absent class members. The Supreme Court said as much in *Phillips Petroleum Co. v. Shutts*, a nationwide class action brought by investors who alleged that Phillips Petroleum owed them interest on delayed royalty payments. 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). Phillips, the defendant, argued that a Kansas state court lacked personal jurisdiction over the claims of the out-of-state plaintiffs. It's unusual for defendants to show solicitude for the due process rights of the opposing party. But as the Court explained, Phillips had a "great interest in ensuring that the absent plaintiff's claims [were] properly before the forum." *Id.* at 809. If the Kansas court had no personal jurisdiction over the absent class members on these **[**63]** claims, the plaintiff class would not be bound by the final judgment and could bring similar claims against Phillips in future lawsuits. *Id.* at 811-12. Phillips prevailed on the first premise of this argument: The Kansas court needed personal jurisdiction to adjudicate the claims of out-of-state class members.

Thanks to this analysis in *Shutts*, we know that in a class action as in all actions, a court must have personal jurisdiction to bind the parties to its judgment. Ultimately, the *Shutts* Court held that the Kansas court did have personal jurisdiction to adjudicate the claims of the absent class members. *Id.* at 811. Since the plaintiffs had a meaningful chance to opt out of the class, the choice not to opt out implied consent. *Id.* at 812-14. Thus, the exercise of jurisdiction satisfied the due process requirements of the Fourteenth Amendment. *Id.* The plaintiffs consented by choosing not to opt out, and Phillips consented by failing to object to personal jurisdiction on its own behalf. (As I explain below, Phillips's failure to object was not as strange as it may seem.)

This reasoning follows the fundamental principle that a court's power to bind extends only as far as its jurisdiction. William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1827-28 (2008). In a class action, **[**64]** a court resolves the claims of each class member, and its decision is binding. When the claims have merit, the court's judgment also requires the defendant to provide the class members with some relief. As a leading treatise has explained, "If the class prevails in the case, the goal is a binding judgment over the defendant as to the claims of the entire nationwide class—and the deprivation of the defendant's property accordingly." Rubenstein, *supra*, § 6:26. **[*441]** So it makes sense that the court must separately evaluate its personal jurisdiction for the claims of absent class members (if a party asks it to). Courts must have jurisdiction over the parties for each claim they conclusively resolve.

Although *Shutts* concerned the personal jurisdiction rights of the absent plaintiffs, and not those of the defendants present in the forum, there is no reason to think that the analysis is one-sided. The *Shutts* Court itself explained that a defendant's due process interests are even more acute than those of absent class members. 472 U.S. at 808-10; *see also id.* at 807 ("[T]he requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest, and . . . represents a restriction on judicial **[**65]** power . . . as a matter of individual liberty." (citation omitted)). And more fundamentally, a court must be able to bind both parties to its decision. What use is a judgment binding on the plaintiffs if it is not also binding on the defendant?

2.

Thus, a court needs personal jurisdiction to bind the defendant with respect to the class claims. To find out whether the court has personal jurisdiction, we need to examine these claims—we cannot just assume that jurisdiction over the class representative's claims confers jurisdiction over the claims of the class. Why? Because a state court lacks the power to decide the absent class members' claims if they arise from wholly out-of-state activity. And that's true even if they concern the same subject matter as a claim the court can decide—including the claim of the class representative. *See supra*, Part I.A; *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

It doesn't matter that the defendant, unlike the absent class members, is already present in court to defend against the representative's claim. A defendant's due process interests do not vanish just because it has been haled into a forum. The Court has explained that "[n]othing" in its cases "suggests that a particular quantum of local **[**66]** activity should give a State authority over a far larger quantum of activity having no connection to any in-state activity." *Daimler*, 571 U.S. at 139 n.20 (cleaned up); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559, 198 L. Ed. 2d 36 (2017). Indeed, that is the whole point of specific (rather than general) jurisdiction. A court might have specific jurisdiction to adjudicate particular claims against a company, but that does not give the court the power to decide all similar disputes involving that defendant. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

This case makes the point. A Michigan state court has jurisdiction to decide the claims of Michigan dentists. But without the defendant's consent, it lacks jurisdiction to decide the claims of dentists in other states. *See supra*, Part I.A; *Bristol-Myers Squibb*, 137 S. Ct. at 1781. Not individually, not jointly, and not as part of a class action.

C.

The majority breaks with this precedent and writes a different rule: As long as the court has jurisdiction to adjudicate the claims of the class representative, it can bind the defendant for the claims of the whole class. That position means that a class action gives a court the power to exceed its ordinary jurisdictional reach. Because of the class action, a court without power to decide a claim between a Texan dentist and an Ohio corporation

could do just that. **[**67]**

[*442] How come? In the majority's view, that's how it's always been done. It has a point. Courts have long adjudicated nationwide class actions against defendants in states where defendants are not subject to the general jurisdiction of the courts. *Shutts* itself is one example. Phillips, the defendant, was incorporated in Delaware and headquartered in Oklahoma, but the plaintiff class sued in Kansas state court. If my view of jurisdiction is correct, Phillips could have simply refused to consent to the Kansas court's jurisdiction over it. Instead, it chased a creative jurisdictional argument all the way to the Supreme Court—on behalf of the plaintiffs!

Why didn't Phillips just contest jurisdiction on its own account? It probably thought there was no use. Phillips, a giant multinational corporation, had continuous and systematic contacts in all fifty states. At the time, the prevailing view was that a company with such pervasive contacts was subject to the general jurisdiction of courts in every state. But the Supreme Court has since explained that this view was wrong. "The general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts," for a "corporation **[**68]** that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 571 U.S. at 139 n.20 (cleaned up); *see also id.* at 152-54 (Sotomayor, J., concurring) (describing "the new rule" as a departure from the "settled approach" to general jurisdiction that had been taught to generations of law students). Instead, a corporation with operations in every state is ordinarily subject to general jurisdiction in only two: its place of incorporation and its principal place of business. *BNSF*, 137 S. Ct. at 1559. We know now what Phillips did not.

I agree that after *Bristol-Myers Squibb*, it would be difficult to bring a nationwide class action in forums other than the defendant's home states. In the majority's view, this observation carries the day. After all, the *Bristol-Myers Squibb* Court said it was applying "settled principles of personal jurisdiction" when it decided the case. 137 S. Ct. at 1783; *see also Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020) (taking the same position and explaining that a contrary view would effect "a major change in the law of personal jurisdiction and class actions"). But any change in class-action practice largely stems from *general* jurisdiction cases decided before *Bristol-Myers Squibb*—in particular, *Daimler* and its precursor, *Goodyear Dunlop Tires Operations v. Brown*. 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (*Daimler*); 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (*Goodyear*). These cases clarified **[**69]** that the scope of general jurisdiction was narrower than many (including Phillips, most likely) had believed it to be.

That isn't to say that *Bristol-Myers Squibb* does not matter. It does. As explained above, before the *Bristol-Myers Squibb* decision, plaintiffs could have tried to argue that specific jurisdiction allowed nationwide class actions against a corporation running identical operations throughout the country. They would have said that a claim arising from activity in one state "relates to" identical activity taking place in another state. But after *Bristol-Myers Squibb*, that doesn't cut it. *See* 137 S. Ct. at 1781; Rubenstein, *supra*, § 6:26. *Bristol-Myers Squibb* foreclosed this potential (but already tenuous) basis for specific jurisdiction.

In the end, this issue is not fundamentally about *Bristol-Myers Squibb*. That decision just clarified when a court has specific jurisdiction over a corporate defendant with regard to many identical claims. The question is whether a court **[*443]** must have personal jurisdiction over that defendant as to the claims of absent class members at all. Following *Shutts* and the basic principles of jurisdiction, the answer is yes.

The majority bases its contrary view on the theory that "absent class **[**70]** members are not considered parties at all" when it comes to "subject-matter jurisdictional inquiries"—so we should exclude them from the personal jurisdiction

inquiry, too. Majority Op. at 31-32; *see also Mussat*, 953 F.3d at 447-48 ("We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue . . . . [A] district court need not have personal jurisdiction over the claims of absent class members at all."). But the premise and its application to personal jurisdiction are flawed.

First, the premise. It is not true that courts may overlook absent class members for the purposes of subject matter jurisdiction. On the contrary—the claims of each absent class member must satisfy the constitutional and statutory prerequisites. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) ("Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental [subject matter] jurisdiction over the other claims in the action."). If "the district court has no statutory basis for exercising supplemental jurisdiction over the additional claims" in a class action, those claims must be dropped. *Id.* at 558.

So what is the majority **[**71]** getting at? It correctly observes that some of the ordinary statutory constraints on subject matter jurisdiction in diversity cases do not apply to absent class members: They do not have to allege any particular amount in controversy, and they can be citizens of the same state as a defendant. *See id.* at 566-67; 28 U.S.C. § 1367.

But that's not because there's an unwritten class-action exception to jurisdictional requirements. It's because Congress can and did create exceptions to its own statutory prerequisites. (The amount-in-controversy and complete-diversity requirements are not constitutional. *See Exxon Mobil*, 545 U.S. at 566-67; *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967).) A court can exercise jurisdiction over class claims that do not themselves meet these requirements because the supplemental jurisdiction statute authorizes them to. *See Exxon Mobil*, 545 U.S. at 566-67; 28 U.S.C. § 1367; *cf.* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in relevant part in 28 U.S.C. § 1332(d)) (also modifying the statutory prerequisites to diversity jurisdiction).

Personal jurisdiction, like subject matter jurisdiction, also has constitutional and statutory requirements. And Congress can lift or modify the statutory requirements for personal jurisdiction just the same. *See infra*, Part I.D. But nothing about the class action changes the basic rule—a court cannot **[**72]** adjudicate claims without jurisdiction. Contrary to the majority's position, invoking that device neither excuses nor satisfies the personal jurisdiction requirement. [1]

[*444] D.

So does this spell the end of the nationwide class action? Certainly not. Typically, plaintiffs will have no problem bringing nationwide class actions against a corporation in its state of incorporation or in the state where it has its headquarters. Here, the plaintiffs sued in Detroit. But just sixty miles south is the great city of Toledo, where the plaintiffs could have sued without a problem. For a nationwide class action, is that really too much to ask?

If it is, Congress has an out. Remember, the plaintiffs sued in a federal court in Michigan. That court's personal jurisdiction is limited to the

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[1] The majority is correct that the procedures for certifying a class action satisfied the *Shutts* plaintiffs' due process interests in personal jurisdiction. But it is incorrect to infer that "the class-certification procedures . . . fundamentally chang[e] . . . the jurisdictional analysis." Majority Op. at 30. The basic personal jurisdiction framework remains the same: Litigants have always been able to consent to personal jurisdiction, and the *Shutts* Court's exercise of jurisdiction hinged on the plaintiffs' consent. *Shutts*, 472 U.S. at 812-14. The class-certification procedures are relevant because they let the plaintiffs opt out, and so the court could infer consent from those who chose not to opt out. *Id.* Class-action defendants who object on jurisdictional grounds have plainly not consented.

jurisdictional reach of a Michigan state court, but only by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(k)(1)(A); *Daimler*, 571 U.S. at 125. Congress has created exceptions to this rule before and can do so again.

One exception even applies to Curaden USA's co-defendant and parent company, Curaden AG. As the majority opinion correctly explains, Curaden AG is subject to the district court's jurisdiction under a different part of the federal **[**73]** rule. Unlike Rule 4(k)(1)(A), Rule 4(k)(2) allows a federal court to exercise jurisdiction over the parent company for claims under federal law because that company has contacts with the United States and "is not subject to jurisdiction in any state's courts of general jurisdiction." Since Curaden USA is subject to the jurisdiction of Ohio's courts, the rule doesn't apply. But nothing prevents Congress from authorizing all federal courts to exercise personal jurisdiction over any corporation with sufficient contacts to the United States.

Since Congress has not done so yet, the Fourteenth Amendment analysis still governs here. Curaden USA cannot be subject to the jurisdiction of a Michigan state court for claims concerning faxes sent to out-of-state dentists. Because of Rule 4(k)(1)(A), the same goes for federal court. [2]

If a district court finds itself with a class of claims beyond its jurisdictional reach, what is it to do? The simple answer, once the class has been certified, is to narrow the class to exclude the claims of out-of-state class members.

What about before certification? That's a little more complicated. Until the class has been certified, only the named plaintiff's claims are before the court. *See* A. Benjamin Spencer, *Out of the Quandary: **[**74]** Personal Jurisdiction over Absent Class Member Claims Explained*, 39 Rev. Litig. 31, 38 (2019); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 313, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011); *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002) (Scalia, J., dissenting) ("Not even petitioner, however, is willing to advance the novel and surely erroneous argument that a nonnamed class member **[*445]** is a party to the class-action litigation *before the class is certified*."). Thus, a pre-certification motion to dismiss for lack of personal jurisdiction would be premature. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298, 445 U.S. App. D.C. 417 (D.C. Cir. 2020). A court cannot dismiss claims that are not before it.

But that does not mean defendants are out of options at the pleading stage. A court may grant a motion to strike class allegations before certification. *See* Fed. R. Civ. P. 23(d)(1) ("In conducting an action under this rule, the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly."). So if a company believes that a court would lack personal jurisdiction for the claims of out-of-state members of the putative class, "the proper procedural move is to file a motion to strike the nationwide class allegations." *Penikila v. Sergeant's Pet Care Prods., LLC*, 442 F. Supp. 3d 1212, 1214 (N.D. Cal. 2020); *see also* Spencer, *supra*, at 49-51. That way, a defendant would not have to subject itself to the burdens of "extensive class discovery" when the nationwide **[**75]** class is uncertifiable. *Molock*, 952 F.3d at 304 (Silberman, J., dissenting).

II.

One final point about the class: Not all class members can state a claim for relief. Some of the class members' claims involve e-faxes that were sent to computers. The Telephone Consumer

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[2] Although creative lawyers could argue that Rule 23 implicitly abrogates Rule 4(k)(1)(A) and makes the Fourteenth Amendment analysis irrelevant, neither the plaintiff nor the majority has suggested that it does. In any case, that argument would be unpersuasive. The constraints of Rule 4(k)(1)(A) do not hinder the operation of Rule 23. All they do is require litigants to bring class actions in the appropriate forum. Since the two rules are "capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

Protection Act makes it illegal (with certain exceptions) "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The district court and majority conclude that this prohibition applies to e-faxes sent to computers because, in their view, the term "telephone facsimile machine" encompasses computers. I disagree.

The statute defines "telephone facsimile machine" as "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." *Id.* § 227(a)(3). A computer, on its own, does not have the capacity to do either. You need to hook it up to extra equipment first—a printer or a scanner.

So does a computer fall under the statutory definition? At first glance, **[**76]** it doesn't look like it—a fax sent to a computer is not a fax sent to equipment with the capacity to scan or print.

And there's another clue in the statute. Recall that the TCPA makes it illegal to use a "telephone facsimile machine" or a "computer" to send an unsolicited advertisement "to a telephone facsimile machine." *Id.* § 227(b)(1)(C). Congress expressly included computers alongside "telephone facsimile machine[s]" in the (broad and open-ended) list of sender devices. But it omitted computers from the list of receiver devices.

Given this distinction, we cannot read "telephone facsimile machine" to encompass computers without creating two interpretive problems. First, "[w]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). Here, the difference occurred not across sections, but in different parts of the same sentence. So if we can assume that Congress remembered what it said in the first half of the sentence **[*446]** by the time it got to the second, we can take it that the omission of "computer" in the second half was no accident. Second, our **[**77]** job is to "give effect to each word" in the statute. *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (cleaned up). If "telephone facsimile machine" included "computers," Congress would not have listed them separately.

In my view, understanding a "computer" to be a "telephone facsimile machine" conflicts with the statutory definition, the syntax of the relevant provision, and the common understanding of both terms. Since the TCPA imposes liability for faxes sent to "telephone facsimile machines" and not to "computers," I would exclude from the class any claims involving faxes sent to computers.

* * *

Because of these constraints, I believe the class should not include claims concerning faxes that were sent to fax machines outside of Michigan and faxes sent to all computers. Otherwise, I join the majority opinion.

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Chamber of Commerce of the United States v. Bonta

United States Court of Appeals for the Ninth Circuit

December 7, 2020, Argued and Submitted, San Francisco, California; September 15, 2021, Filed

No. 20-15291

Reporter
13 F.4th 766 *; 2021 U.S. App. LEXIS 27659 **; 2021 WL 4187860

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE; NATIONAL RETAIL FEDERATION; CALIFORNIA RETAILERS ASSOCIATION; NATIONAL ASSOCIATION OF SECURITY COMPANIES; HOME CARE ASSOCIATION OF AMERICA; CALIFORNIA ASSOCIATION FOR HEALTH SERVICES AT HOME, Plaintiffs-Appellees, v. ROB BONTA[*], in his official capacity as the Attorney General of the State of California; LILIA GARCIA-BROWER, in her official capacity as the Labor Commissioner of the State of California; JULIE A. SU, in her official capacity as the Secretary of the California Labor and Workforce Development Agency; KEVIN RICHARD KISH, in his official capacity as Director of the California Department of Fair Employment and Housing of the State of California, Defendants-Appellants.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:19-cv-02456-KJM-DB. Kimberly J. Mueller, Chief District Judge, Presiding.

Summary:

SUMMARY[***]

Federal Arbitration Act / Preemption

The panel reversed, in part, the district court's conclusion that California Assembly Bill 51 is preempted by the Federal Arbitration Act; affirmed the district court's determination that the civil and criminal penalties associated with AB 51 were preempted; vacated the district court's preliminary injunction enjoining AB 51's enforcement; and remanded for further proceedings.

AB 51, which added § 432.6 to the California Labor Code, was enacted with the purpose of ensuring that individuals are not retaliated against for refusing to consent to the waiver of rights and procedures established in the California Fair Employment and Housing Act and the California Labor Code; and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion. Other provisions of the California Code, specifically Labor Code § 433 and Government Code § 12953, render violations of § 432.6 a misdemeanor offense and open an employer to potential civil sanctions. The district court concluded that AB 51 placed agreements to arbitrate **[**2]** on unequal footing with other contracts and also that AB 51 stood as an obstacle to the purposes and objectives of the Federal Arbitration Act ("FAA"). The district court preliminarily enjoined enforcement of § 432.6(a)-(c) as to arbitration agreements covered by the FAA.

The panel held that California Labor Code § 432.6 neither conflicted with the language of § 2 of the FAA nor created a contract defense by which executed arbitration agreements could be

[*] Rob Bonta has been substituted for his predecessor, Xavier Becerra, as California Attorney General under Fed. R. App. P 43(c)(2).

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

invalidated or not enforced. A thorough review of the historical context of the FAA, its legislative history, and subsequent Supreme Court jurisprudence demonstrated that Congress was focused on the enforcement and validity of consensual written agreements to arbitrate and did not intend to preempt state laws requiring that agreements to arbitrate be voluntary. The panel held that § 432.6 did not make invalid or unenforceable any agreement to arbitrate, even if such agreement was consummated in violation of the statute. Rather, the panel noted that while mandating that employer-employee arbitration agreements be consensual, § 432.6 specifically provides that nothing in the section was intended to invalidate a written arbitration agreement that was otherwise enforceable under the FAA. The panel determined **[**3]** that § 432.6 applied only in the absence of an agreement to arbitrate and expressly provided for the validity and enforceability of agreements to arbitrate. The panel held that because the district court erred in concluding that § 432.6(a)-(c) were preempted by the FAA, it necessarily abused its discretion in granting Appellees a preliminary injunction.

The panel agreed, however, that the civil and criminal penalties associated with AB 51 stood as an obstacle to the purposes of the FAA and were therefore preempted. The panel held that Section § 432.6 was not preempted by the FAA because it was solely concerned with pre-agreement employer behavior, but because the accompanying enforcement mechanisms sanctioning employers for violating § 432.6 necessarily included punishing employers for entering into an agreement to arbitrate. The panel held that a state law that incarcerates an employer for six months for entering into an arbitration agreement directly conflicts with § 2 of the FAA. Therefore, the panel held that Government Code § 12953 and Labor Code § 433 were preempted to the extent that they applied to executed arbitration agreements covered by the FAA.

Dissenting, Judge Ikuta stated that AB 51 has a disproportionate impact on arbitration agreements by making it a crime for **[**4]** employers to require arbitration provisions in employment contracts. She stated that the majority abetted California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it barred only nonconsensual agreements. Judge Ikuta stated that the majority's ruling conflicted with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1425, 197 L. Ed. 2d 806 (2017), which held that the FAA invalidates state laws that impede the formation of arbitration agreements. The majority ruling also created a circuit split with sister circuits, which have held that too-clever-by-half workarounds and covert efforts to block the formation of arbitration agreements are preempted by the FAA just as much as laws that block enforcement of such agreements.

Counsel: Chad A. Stegeman (argued), Deputy Attorney General; Michelle M. Mitchell, Supervising Deputy Attorney; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, San Francisco, California; for Defendants-Appellants.

Andrew J. Pincus (argued), Archis A. Parasharami, and Daniel E. Jones, Mayer Brown LLP, Washington, D.C.; Bruce J. Sarchet and Maurice Baskin, Littler Mendelson PC, Sacramento, **[**5]** California; Donald M. Falk, Mayer Brown LLP, Palo Alto, California; Erika C. Frank, California Chamber of Commerce, Sacramento, California; Steven P. Lehotsky and Jonathan Urick, U.S. Chamber Litigation Center, Washington, D.C.; for Plaintiffs-Appellees.

Cliff Palefsky and Matt Koski, McGuinn Hillsman & Palefsky, San Francisco, California, for Amicus Curiae California Employment Lawyers Association.

Judges: Before: Carlos F. Lucero,** William A.

** The Honorable Carlos F. Lucero, United States Circuit Judge for

Fletcher, and Sandra S. Ikuta, Circuit Judges.
Opinion by Judge Lucero; Dissent by Judge Ikuta.

Opinion by: Carlos F. Lucero

Opinion

[*770] LUCERO, Circuit Judge:

The Federal Reporter is awash with descriptions of "judicial hostility" to arbitration that spurred enactment of the Federal Arbitration Act (FAA). Evolution of this "hostility" is traced not to the particular desires of individual judges but to two doctrines of English common law: ouster (which made illegal any agreement that lessened a statutory grant of judicial jurisdiction) and revocability (which allowed a party to withdraw consent to arbitrate at any point prior to the arbitrator's ruling). These two doctrines were followed for their "antiquity" rather than their "excellence or reason." *See U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915). By the turn of the twentieth **[**6]** century, litigants, lawyers, and judges all agreed that the two doctrines **[*771]** should be sent hence from American jurisprudence.

This goal was achieved by enactment of the FAA, which intended "to make the contracting party live up to his agreement." H.R. Rep. No. 68-96, at 1 (1924). Following enactment of the FAA, parties could "no longer refuse to perform [their] contract when it [became] disadvantageous," ensuring that an arbitration agreement would be "placed upon the same footing as other contracts, where it belongs." *Id.* In furtherance of this congressional intent, the Court has repeatedly instructed that "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (cleaned up). Just as clearly, the Court has emphasized: "The first principle that underscores all of our arbitration decisions is that arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415, 203 L. Ed. 2d 636 (2019) (cleaned up). "[T]he FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

The jurisprudence surrounding the preemptive scope of the FAA has grown on the precedential trellis of these basic principles. Each time the Supreme Court has clarified the preemptive **[**7]** scope of the FAA, it has done so by ruling on the enforceability or validity of executed agreements to arbitrate, explaining that the FAA does not preempt the field of arbitration. Today we are asked to abandon the framework of FAA preemption of state rules that selectively invalidate or refuse to enforce arbitration agreements, ignore the holding of *Volt*, and nullify a California law enacted to codify what the enactors of the FAA took as a given: that arbitration is a matter of contract and agreements to arbitrate must be voluntary and consensual. As we read California Labor Code § 432.6, the state of California has chosen to assure that entry into an arbitration agreement by an employer and employee is mutually consensual and to declare that compelling an unwilling party to arbitrate is an unfair labor practice. We are asked by plaintiffs to hold that the FAA requires parties to arbitrate when but one party desires to do so. Our research leads to nothing in the statutory text of the FAA or Supreme Court precedent that authorizes or justifies such a departure from established jurisprudence, and we decline to so rule. Thus, we must reverse the judgment of the district court.

Yet operation of other provisions within **[**8]** the California code renders a violation of § 432.6 a misdemeanor offense and opens an employer to potential civil sanctions. The imposition of civil and criminal sanctions for the act of executing an arbitration agreement directly conflicts with the

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the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

FAA and such an imposition of sanctions is indeed preempted. We therefore affirm the district court as to the application of Labor Code § 433 and Government Code § 12953 to arbitration agreements covered by § 1 of the FAA.

I

A

California Governor Gavin Newsom signed into law California Assembly Bill 51, 2019 Cal. Stats. Ch. 711 (AB 51), on October 10, 2019. Section 1 of AB 51 declares that "it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act . . . and the Labor Code." AB 51. Pursuant to this policy, AB **[*772]** 51 was enacted with the "purpose of . . . ensur[ing] that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion." *Id.* Arbitration is not singled out by AB 51. Rather, AB 51 covers a range **[**9]** of waivers, including non-disparagement clauses and non-disclosure agreements.

AB 51 added § 432.6 to the California Labor Code. That section provides:

> (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.
>
> (b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation. **[**10]**
>
> (c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.
>
> . . .
>
> (f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

Cal. Lab. Code § 432.6. Its placement in Article 3 of the Labor Code brings § 432.6 under Labor Code § 433, which states that "[a]ny person violating this article is guilty of a misdemeanor." This, in turn, makes a violation of § 432.6 "punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both." Cal. Lab. Code § 23.

Finally, AB 51 also added § 12953 to the California Government Code. That section provides: "It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code." Cal. Gov't Code § 12953. Other provisions within the Government Code create civil sanctions for "unlawful employment practices," including investigation by the Department of Fair Housing and Employment and potential civil litigation brought either by that Department on behalf of an aggrieved individual or, if the Department declines to initiate litigation, by the individual **[**11]** in a

private suit. *See* Cal. Gov't Code §§ 12960-12965.

B

AB 51 was enacted with an effective date of January 1, 2020. Cal. Lab. Code § 432.6(h). On December 9, 2019, Appellees filed a complaint for declaratory and injunctive relief, seeking a declaration that AB 51 was preempted by the FAA and asking the court to preliminarily and permanently enjoin Appellants from enforcing the statute. The same day, Appellees filed **[*773]** a motion for a preliminary injunction. While the injunction motion was pending, Appellees filed a motion for a temporary restraining order, which was granted on December 30, 2019, two days before AB 51 was to take effect.

The trial court conducted a hearing on the motion for a preliminary injunction on January 10, 2020. It granted Appellees' motion for a preliminary injunction via minute order on January 31, 2020 and issued a detailed decision on February 7, 2020. After resolving issues of jurisdiction that are not contested on appeal,[1] the court turned to the merits of Appellees' preliminary injunction motion. Concluding that AB 51 placed agreements to arbitrate on unequal footing with other contracts and also that it stood as an obstacle to the purposes and objectives of the FAA, the trial court found that Appellees were likely **[**12]** to succeed on the merits of their claim. After determining the other injunction factors also favored Appellees, the court preliminarily enjoined Appellants from enforcing § 432.6(a)-(c) as to arbitration agreements covered by the FAA.

[1] While the issue is not contested on appeal, we have satisfied ourselves of the district court's jurisdiction and our own. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The trial court correctly determined that it had subject matter jurisdiction under 28 U.S.C. § 1331. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983). We, in turn, have jurisdiction to review a grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1).

II

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "The first factor—likelihood of success on the merits—is the most important factor." *California v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (en banc) (quotations omitted). "If a movant fails to establish likelihood of success on the merits, we need not consider the other factors." *Id.* "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020). We review the legal issues underlying the grant de novo "because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018) (quotation omitted).

III

A

The Supremacy Clause states:

> This Constitution, and the laws of the United **[**13]** States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. It "provides a rule of decision for determining whether federal or state law applies in a particular situation." *Kansas v. Garcia*, 140 S. Ct. 791, 801, 206 L. Ed. 2d 146

(2020) (quotation omitted). If Congress "enacts a law that imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," then "the federal law takes precedence and the state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480, 200 L. Ed. 2d 854 **[*774]** (2018). The Supreme Court has identified three types of preemption: "conflict, express, and field." *Id.* (quotations omitted). Of these, only conflict preemption is relevant to the present appeal. Express preemption occurs when Congress passes a statute that explicitly preempts state law. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). Field preemption occurs when "Congress has legislated so comprehensively that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986). The Supreme Court has explained that neither express nor field preemption is applicable to the FAA. *See Volt*, 489 U.S. at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent **[**14]** to occupy the entire field of arbitration.").

Conflict preemption manifests in two ways: "impossibility" preemption and "obstacle" preemption. Impossibility preemption occurs when "it is impossible . . . to comply with both state and federal requirements" and obstacle preemption occurs when a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 761 (9th Cir. 2015) (quotation omitted).

B

At issue in this appeal is the preemptive scope of 9 U.S.C. § 2, the "primary substantive provision of the [FAA]." *Concepcion*, 563 U.S. at 339 (quotation omitted). It provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Conflict preemption analysis under the FAA follows the basic structure outlined above, but the sheer volume **[**15]** of FAA preemption jurisprudence has created an FAA-specific gloss to the doctrines of impossibility and obstacle preemption.

To understand how impossibility preemption operates in FAA cases, a brief discussion of the statute's "saving clause" is required. The last clause of § 2 provides that "an agreement in writing" to arbitrate a dispute "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). The saving clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825 (9th Cir. 2019) (quoting *Concepcion*, 563 U.S. at 339). To fall within the saving clause and avoid preemption, a rule must "put arbitration agreements on an equal plane with other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017).

It is this "equal plane" or "equal footing" principle that guides impossibility preemption under the FAA. If a state-law contract defense treats arbitration agreements less favorably than any other

contract—that is, if the defense allows **[*775]** for an agreement to arbitrate **[**16]** to be invalidated or not enforced in circumstances where another contract would be enforced or deemed valid—that contract defense does not fall within the saving clause. Outside the protective ambit of the saving clause, a contract defense that provides for the invalidation or nonenforcement of an arbitration agreement is in direct conflict with the FAA's mandate; it is thus impossible for the contract defense and the FAA to coexist, and the FAA must prevail. Importantly, the "equal footing principle" applies the same to a contract defense that "discriminat[es] on its face against arbitration" as it does to "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426.

If a state rule places arbitration agreements on equal footing with other contracts and thus falls within the saving clause, it may still be preempted by "the ordinary working of conflict pre-emption principles," including obstacle preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Under obstacle preemption, a state statute or rule is preempted by the FAA if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives **[**17]** of Congress." *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). "The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 344 (cleaned up). Rules that selectively interfere with the enforcement of arbitration agreements are therefore preempted by the FAA. A state rule may also stand as an obstacle to the FAA through "subtle methods" that "interfer[e] with fundamental attributes of arbitration." *Lamps Plus*, 139 S. Ct. at 1418 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622, 200 L. Ed. 2d 889 (2018)).

With this understanding of preemption under the FAA, we turn to the principal question before us: Is § 432.6 of the California Labor Code preempted by § 2 of the FAA?[2]

C

1

Preemption analysis begins with the text of the two statutes. The FAA and § 432.6 do not conflict because, by its terms, § 2 of the FAA simply does not apply to § 432.6. The California law does not create a contract defense that allows for the invalidation or nonenforcement of an agreement to arbitrate, nor does it discriminate on its face against the enforcement of arbitration agreements. Indeed, the only reference in § 432.6 to executed arbitration agreements covered by the FAA is a provision that protects their enforcement. *See* Cal. Lab. Code § 432.6(f). That § 432.6 cannot be used to invalidate, revoke, or fail to enforce an arbitration agreement removes it from saving clause jurisprudence. Supreme **[**18]** Court and Ninth Circuit caselaw uniformly applies saving clause analysis in instances where a party relies on a contract defense or state rule to invalidate or not enforce an existing agreement to arbitrate. *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1619-20; *Kindred Nursing*, 137 S. Ct. at 1426; *Concepcion*, 563 U.S. at 337-38; *Preston v. Ferrer*, 552 U.S. 346, 349-51, 128 S. Ct. 978, 169 L. Ed. 2d 917, (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683-84, 116 S. Ct. 1652, 134 L. Ed. 2d 902 **[*776]** (1996); *Perry v. Thomas*, 482 U.S. 483, 484-86, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987); *Blair*, 928 F.3d at 823-24; *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430-33 (9th Cir. 2015). Unlike this line of cases, the present appeal does not concern a state rule that provides a contract defense through which an agreement to arbitrate may be invalidated. *See Concepcion*, 563 U.S. at 339. Nor does it

[2] We separately consider the FAA's preemptive effect on Government Code § 12953 and Labor Code § 433, which we conclude do conflict with § 2. *See* section III.D, *infra*.

"prohibit[] outright the arbitration of a particular type of claim." *Id.* at 341. Therefore, it is not "impossible" for § 432.6 and the FAA to coexist. *See Ryan*, 786 F.3d at 761.

Concluding the contrary, the trial court relied largely on *Kindred Nursing* and *Casarotto*. *See Chamber of Com. of United States v. Becerra*, 438 F. Supp. 3d 1078, 1097-98 (E.D. Cal. 2020). It reasoned that by prohibiting an employer from forcing a prospective or current employee to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act," *id.* at 1087 (quoting Cal. Lab. Code § 432.6), § 432.6 "embod[ied] . . . a legal rule hinging on the primary characteristic of an arbitration agreement, and placing arbitration agreements in a class apart from any contract." *Id.* at 1098 (quotations omitted) (citing *Kindred Nursing*, 137 S. Ct. at 1427; *Casarotto*, 517 U.S. at 688). This reasoning would be persuasive if either (1) § 432.6 regulated the enforcement or validity of arbitration agreements **[**19]** or (2) *Kindred Nursing* or *Casarotto* held that regulation of pre-agreement conduct was preempted by the FAA. But neither condition is met.

As discussed, § 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute. Rather, while mandating that employer-employee arbitration agreements be consensual, it specifically provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Lab. Code § 432.6(f). Placing a pre-agreement condition on the waiver of "any right, forum, or procedure" does not undermine the validity or enforceability of an arbitration agreement—its effects are aimed entirely at conduct that takes place prior to the existence of any such agreement. Both *Kindred Nursing* and *Casarotto* analyzed state rules that rendered an executed agreement to arbitrate invalid or unenforceable. Neither preempted a rule that regulated pre-agreement behavior.

Kindred Nursing considered the "clear-statement rule" announced by the Kentucky Supreme Court. 137 S. Ct. at 1426. At issue in that case were two arbitration agreements executed by individuals who were authorized **[**20]** through powers of attorney to act on behalf of others. *Id.* at 1424-25. At least one authorization was broad enough for it to be "impossible to say that entering into an arbitration agreement was not covered." *Id.* at 1426 (quotation omitted and alteration adopted). Despite this, the Kentucky Supreme Court invalidated the arbitration agreements. It explained that "the jury guarantee is the sole right the [Kentucky] Constitution declares 'sacred' and 'inviolate,'" and, as such, "an agent could deprive her principal of an 'adjudication by judge or jury' only if the power of attorney 'expressly so provided.'" *Id.* at 1426 (alteration adopted) (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328-29 (Ky. 2015)). Reversing the Kentucky Supreme Court, *Kindred Nursing* explained that Kentucky's "clear-statement rule" was preempted by the FAA because it "relied on the uniqueness of an agreement to arbitrate as its basis," and "failed to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426, 1426-27 (cleaned up). In so **[*777]** holding, the Court rejected an argument that the FAA does not preempt state rules that govern only the formation of arbitration agreements:

> By its terms, then, the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"—that **[**21]** is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.

Id. at 1428.

It is this passage that the district court and Appellees contend controls the outcome of the present appeal. They focus on the language "what it takes to enter into them" for the proposition that the

FAA preempts regulation of pre-agreement behavior. *See Becerra*, 438 F. Supp. 3d at 1096. However, reading this passage in context, the language was not intended to break new jurisprudential ground. The Court itself explained that its conclusion "falls well within the confines of (and goes no further than) present well-established law." 137 S. Ct. at 1429 (quotation and citation omitted). As in all past cases, the court was concerned with "rule[s] selectively finding arbitration contracts invalid because improperly formed." In other words, the Court only addressed pre-agreement behavior to the extent it provided the basis to invalidate *already executed* contracts. It is simply not persuasive to argue, as Appellees do, that the Supreme Court dramatically expanded the preemptive scope of **[**22]** the FAA in seven words of dicta—especially considering this dicta is nestled within language that explicitly references executed arbitration agreements ("the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'" and "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made," *id.* at 1428). Reading this passage in the broader context of *Kindred Nursing* also has the advantage of better according with the text of the FAA, which mandates that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In contrast, Appellees' assertion that *Kindred Nursing* recognizes FAA preemption for instances in which there is no agreement to arbitrate at issue would expand the scope of the FAA far beyond its text. Appellees' argument amounts to asserting field preemption, which stands in direct contradiction to the Court's holding in *Volt*. *Volt*, 489 U.S. at 477 ("The FAA . . . does [not] reflect a congressional intent to occupy the entire field of arbitration."). Absent binding precedent demanding a contrary conclusion, **[**23]** we decline to depart from the clear text of the FAA.

For similar reasons, *Casarotto* does not support Appellees' case. *Casarotto* considered a Montana statute that "declare[d] an arbitration clause unenforceable unless notice that the contract is subject to arbitration is typed in underlined capital letters on the first page of the contract." 517 U.S at 683 (quotation omitted and alterations adopted). The Court held that the Montana statute was preempted by the FAA, concluding it "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 687. *Casarotto* is an example of straightforward conflict preemption analysis of a state rule that declared an executed arbitration agreement invalid. It does not support the proposition that the FAA preempts state regulation of pre-agreement **[*778]** behavior in the absence of an executed arbitration agreement.

California Labor Code § 432.6 neither conflicts with the language of § 2 of the FAA nor creates a contract defense by which executed arbitration agreements may be invalidated or not enforced. Under the "impossibility" preemption framework, § 432.6 is not preempted by the FAA.

2

Even though **[**24]** § 432.6 does not directly conflict with the FAA, it may still be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The first step in the obstacle preemption analysis is to establish what precisely were the purposes and objectives of Congress in enacting the FAA. A thorough review of the historical context of the FAA, its legislative history, and subsequent Supreme Court jurisprudence demonstrates that Congress was focused on the enforcement and validity of consensual written agreements to arbitrate and did not intend to preempt state laws requiring that agreements to arbitrate be voluntary.

Congress passed the FAA "to overrule the

judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). Prior to the FAA, "courts considered agreements to arbitrate unenforceable executory contracts" and breaching an agreement to arbitrate generally "resulted in nominal legal damages." Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 Fla. L. Rev. 711, 719 (2015). The refusal to enforce arbitration agreements stemmed from American adoption of the English common law doctrines of ouster and revocability. *See **[**25]*** David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1225-26 (2013). The former declared illegal any agreement that reduced statutory judicial jurisdiction and the latter allowed a party to withdraw their consent to arbitrate at any time prior to the arbitrator's ruling. *See id.*; *see also Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451, 22 L. Ed. 365, 49 How. Pr. 314 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."). In the decades preceding the passage of the FAA, ouster and revocability had become unloved children of English common law. *See* Horton, *supra*, at 1225-26 ("By the dawn of the twentieth century, the ouster and revocability doctrines were condemned by judges, lawyers, and business groups as anomalous and unjust." (cleaned up)); *see also Meacham v. Jamestown, F. & C.R. Co.*, 211 N.Y. 346, 354, 105 N.E. 653 (1914) (Cardozo, J., concurring) ("It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.").

The context of the FAA's passage was thus the widespread opposition to English common law doctrines that mandated that consensual written arbitration agreements were invalid and unenforceable. Securing the validity and enforceability of arbitration **[**26]** agreements was precisely what Congress intended to achieve through the FAA. The House Report accompanying its passage declared: "The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction [of] admiralty, or which may be the subject of litigation in the Federal courts." H.R. Rep. No. 68-96, at 1 (1924). The Senate Report agreed, describing the purpose of the statute as "[t]o make valid and enforceable written **[*779]** provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." S. Rep. No. 68-536, at 1 (1924). The House Report also makes explicit that the FAA was laser-focused on ensuring that people who agreed to arbitrate a dispute were held to their word:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it **[**27]** belongs.

H.R. Rep. No. 68-96, at 1.

In the almost-century since it became law, the Supreme Court has expounded on the congressional purpose animating the FAA, explaining that its passage signified "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The Court has reiterated this principle time and again over the years, but each time, without fail, it has noted that the FAA enshrined the enforceability and validity of consensual, written agreements to arbitrate disputes. *See Concepcion*, 563 U.S. at 344 ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.") (cleaned up); *see also, e.g., Epic Sys. Corp.*, 138 S. Ct. at 1621; *Am. Exp.*

Co. v. Italian Colors Rest., 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013); *Volt*, 489 U.S. at 478; *Dean Witter Reynolds*, 470 U.S. at 219. The statute, legislative history, and caselaw thus all agree that the purpose of the FAA is to ensure that written, consensual agreements to arbitrate disputes are valid and enforceable as a matter of contract.

In light of Congress' clear purpose to ensure the validity and enforcement of consensual arbitration agreements according to their terms, it is difficult to see how § 432.6, which in no way affects the validity and enforceability of such **[**28]** agreements, could stand as an obstacle to the FAA. Irrespective of AB 51's enforcement mechanisms, an employee may attempt to void an arbitration agreement that he was compelled to enter as a condition of employment on the basis that it was not voluntary. If a court were to find that such a lack of voluntariness is a generally applicable contract defense that does not specifically target agreements to arbitrate, the arbitration agreement may be voided in accordance with saving clause jurisprudence. This specific question is not before us, and we do not answer it.

The district court focused its obstacle preemption analysis on the potential civil and criminal liability AB 51 imposes on employers who include a compulsory arbitration clause as a condition of employment. *See Becerra*, 438 F. Supp. 3d at 1099-1100. Appellees dedicate a substantial portion of their brief to the same concern. As explained more fully below, we agree that the civil and criminal penalties associated with AB 51 stand as an obstacle to the purposes of the FAA and are therefore preempted. Outside of their concerns over potential civil and criminal liability, Appellees' sole remaining argument for obstacle preemption is that § 432.6 interferes with their "federally **[**29]** protected right to enter into arbitration agreements with their workers." Of course, nothing in § 2 grants an employer the right to force arbitration agreements on unwilling employees. The only "federally protected right" conferred by the FAA is the right to have consensual **[*780]** agreements to arbitrate enforced according to their terms. Because nothing in § 432.6 interferes with this right, it does not stand as an obstacle to the purposes and objectives of the FAA.

D

The dissent expounds on the expansive nature of FAA preemption and details the perceived invidious intent of the California Legislature.[3] Yet for all its colorful language, it does not meaningfully engage with the question at the core of this case: Does the text of the FAA or the precedent interpreting it expand the preemptive scope of the statute to situations in which there is no agreement to arbitrate at issue? As explained above, the answer to this question is "no." That answer undergirds our resolution of this case and undermines the entirety of the dissent's argument.

Attempting to escape the conclusion that this case falls outside of existing precedent[4] delineating the preemptive scope of the FAA, the dissent asserts that we "misread[] **[**30]** the clear import" of *Kindred Nursing*, which it claims "confirmed the rule that the FAA invalidates state laws that impede the formation of arbitration agreements." A review of the cited portion of *Kindred Nursing* reveals no such broad holding. Rather, the Supreme Court is explicit that the FAA preempts a state rule that "selectively find[s] arbitration contracts invalid because improperly formed." *Kindred Nursing*, 137 S. Ct. at 1428. It was not happenstance, as the dissent asserts, that *Kindred Nursing* evaluated a

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[3] Contrary to the dissent's implications, it is unremarkable that the California Legislature would be cognizant of relevant federal law and make efforts to draft a statute that avoided preemption. Indeed, one could argue that writing and passing laws that are not preempted is a core duty of a state legislature.

[4] Our dissenting colleague asserts that "we don't need to wait until the next Supreme Court reversal" to hold that AB 51 is preempted by the FAA. To the contrary, basic principles of federalism caution us against expanding the preemptive scope of a federal statute absent explicit instruction from the high court.

state rule that declared invalid certain *executed* arbitration agreements. Instead, the existence of an agreement to arbitrate was crucial to its holding. It was the very fact that the Kentucky rule invalidated an executed agreement to arbitrate that ran afoul of the FAA's mandate that "an arbitration agreement . . . be treated as 'valid, irrevocable, and enforceable.'" *Id.* (quoting 9 U.S.C. § 2). The dissent is correct to explain that *Kindred Nursing* emphasized that the FAA preempts rules affecting the initial validity of arbitration agreements, but that is not at issue in this case. As explained above, we are presented with a state rule that applies only in the absence of an agreement to arbitrate and that *expressly **[**31]** provides* for the validity and enforceability of agreements to arbitrate. The text of the FAA does not preempt such a rule, and, despite the dissent's attempt to shoehorn its argument into the holding of *Kindred Nursing*, nor does the governing caselaw.

E

The regulation of pre-agreement employer behavior in § 432.6 does not run afoul of the FAA, but the civil and criminal sanctions attached to a violation of that section do. They stand as an obstacle to the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, and are therefore preempted by the FAA.

As mentioned, § 433 of the California Labor Code makes any violation of that article, including § 432.6, a misdemeanor offense. Labor Code § 23 makes any misdemeanor within the Labor Code "punishable **[*781]** by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both." Cal. Lab. Code § 23. Additionally, AB 51 added § 12953 to the California Government Code, which makes a violation of Labor Code § 432.6 "an unlawful employment practice." This, in turn, subjects an individual or entity who violates § 432.6 to civil sanctions including state investigation and private litigation. *See* Cal. Gov't Code §§ 12960-12965.

Regulation of pre-agreement conduct in § 432.6 differs significantly from these enforcement **[**32]** mechanisms. Section § 432.6 is not preempted by the FAA because it is solely concerned with pre-agreement employer behavior, but the accompanying enforcement mechanisms that sanction employers for violating § 432.6 necessarily include punishing employers for entering into an agreement to arbitrate.[5] A state law that incarcerates an employer for six months for entering into an arbitration agreement "directly conflicts with § 2 of the FAA." *Casarotto*, 517 U.S. at 687. An arbitration agreement cannot simultaneously be "valid" under federal law and grounds for a criminal conviction under state law. The potential civil sanctions provided by Government Code § 12953 are also preempted. We conclude that, much like a state may not "prohibit[] outright the arbitration of a particular type of claim," *Kindred Nursing*, 137 S. Ct. at 1426 (quotation omitted), it also may not impose civil or criminal sanctions on individuals or entities for the act of executing an arbitration agreement. Therefore, we hold that Government Code § 12953 and Labor Code § 433 are preempted to the extent that they apply to executed arbitration agreements covered by the FAA.[6]

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[5] Section 432.6(a) forbids employers from requiring an arbitration agreement as a condition of employment regardless of whether an arbitration agreement is executed. Similarly, an employer violates § 432.6(b) by threatening to retaliate against an employee for refusing to sign an arbitration agreement, even if the employee subsequently agrees to sign.

[6] Appellees assert that enjoining application of § 433 to agreements covered by the FAA would amount to a "judicial rewrite of [California's] statutory scheme." Not so. It is well settled that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by "for example, . . . enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force . . . ." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006); *see also Volt*, 489 U.S. at 477 (a state law that violates the FAA is "pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the

IV

Appellees have not established that they are likely to succeed on the merits of their complaint for declaratory and injunctive relief, and, therefore, "we need not consider the other [preliminary **[**33]** injunction] factors." *Azar*, 950 F.3d at 1083. Because the district court erred in concluding that § 432.6(a)-(c) were preempted by the FAA it "necessarily abuse[d] its discretion" in granting Appellees a preliminary injunction. *adidas Am.*, 890 F.3d at 753 (quotation omitted). Accordingly, the preliminary injunction is vacated, and the case is remanded for further proceedings consistent with this opinion.

V

We **REVERSE IN PART** the trial court's conclusion that AB 51 is preempted by the FAA, **VACATE** the preliminary injunction, and **REMAND** for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

Dissent by: Sandra S. Ikuta

Dissent

[*782] IKUTA, Circuit Judge, dissenting:

Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA. This time, California has enacted AB 51, which has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts. Cal. Lab. Code §§ 432.6(a)-(c), 433; Cal. Gov't Code § 12953. And today the majority abets California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it bars **[**34]** only nonconsensual agreements. The majority's ruling conflicts with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428-29, 197 L. Ed. 2d 806 (2017), and creates a circuit split with the First and Fourth Circuits. Because AB 51 is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent, I dissent.

I

By its terms, the FAA ensures that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA preempts any state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). The Supreme Court has long recognized the FAA's broad purpose: it declares "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), and embodies a "national policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). When faced with a principle of "state law, whether of legislative or judicial origin," that burdens arbitration and that "takes its meaning precisely from the fact that a contract to arbitrate is at issue," we must strike it down as preempted by the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). And **[**35]** even when a state law generally applies to a range of agreements, the FAA preempts the law if it "interferes with fundamental attributes of

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accomplishment and execution of the full purposes and objectives of Congress" (quotation omitted)).

arbitration" and obstructs the purpose of the FAA. *Concepcion*, 563 U.S. at 344. As the Supreme Court has explained, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

AB 51 is just such a state law that obstructs the purpose of the FAA. The history of AB 51 reveals it was the culmination of a many-year effort by the California legislature to prevent employers from requiring an arbitration provision as a condition of employment. California has long known that the FAA preempted laws that made arbitration agreements unenforceable, because the Supreme Court has so often struck down its anti-arbitration legislation or judge-made rules.[1]

[*783] In light of these rulings, the California legislature took a different approach to anti-arbitration legislation. In 2015, it passed Assembly Bill 465, which banned employers from requiring arbitration agreements as a condition of employment and rendered unenforceable any offending **[**36]** contract. Text of AB 465, 2015-16 Cal. Leg., Reg. Sess. (2015).[2] California Governor Jerry Brown vetoed this bill on the ground that such a "blanket ban" had been "consistently struck down in other states as violating the Federal Arbitration Act" and noted that the California Supreme Court and United States Supreme Court had invalidated similar legislation. Governor's Veto Message for AB 465, 2015-16 Cal. Leg., Reg. Sess. (2015); *see, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530-31, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam); *Perry*, 482 U.S. at 484, 489; *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). That same year, the Supreme Court overruled a California court's interpretation of an arbitration agreement, because it did not place arbitration contracts "on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58-59, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) (quoting *Buckeye*, 546 U.S. at 443). This decision was followed by yet another defeat of state anti-arbitration legislation when a California court held that the FAA preempted another California statute, which had made agreements to arbitrate certain state civil rights claims unenforceable. *See Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 323, 230 Cal. Rptr. 3d 258 (2018).

Undeterred, the state legislature tried again in 2018 and passed AB 3080, which prohibited an employer from requiring an employee to waive a judicial forum as a condition of employment. Text of AB 3080, 2017-18 Cal. Leg., Reg. Sess. (2018). Governor Brown exercised **[**37]** his veto power again, explaining that AB 3080 "plainly violates federal law." Governor's Veto Message for AB 3080, 2017-18 Cal. Leg., Reg. Sess. (2018). Governor Brown cited the "clear" direction from the United States Supreme Court in *Imburgia*, 136 S. Ct. at 468, and *Kindred Nursing*, 137 S. Ct. at 1428.

Twice-vetoed but still undeterred, the California Assembly introduced AB 51 in December 2018. This bill, now before us, took the same approach as the vetoed AB 3080: instead of barring enforcement of arbitration agreements offered as a condition of employment, it instead penalized the formation or attempted formation of such agreements. Text of AB 51, 2019-20 Cal. Leg., Reg. Sess. (2019); *see also* Cal. Lab. Code §§ 432.6(a)-(c), 433. While it prohibited an employer

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[1] *See, e.g., Concepcion*, 563 U.S. at 352 (holding that the FAA preempted the California rule that contract provisions disallowing classwide arbitration are unconscionable); *Preston v. Ferrer*, 552 U.S. 346, 349-50, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008) (holding that the FAA preempted a California law giving a state agency primary jurisdiction over a dispute involving the California Talent Agency Act despite the parties' agreement to arbitrate such disputes); *Perry*, 482 U.S. at 484, 489 (holding that the FAA preempted a state statute permitting litigation of wage collection actions despite the existence of any private agreement to arbitrate).

[2] The relevant legislative history referenced here is publicly available on the California Legislative Information website: https://leginfo.legislature.ca.gov/.

from requiring an applicant for employment to enter an arbitration agreement, it provided that an executed arbitration agreement was nevertheless enforceable. *See* Cal. Lab. Code § 432.6(a)-(b), (f).

Accompanying legislative reports reveal the purpose of AB 51 and explain the oddity of penalizing the formation of arbitration agreements while permitting their enforcement. The California Senate Judiciary **[*784]** Committee report on AB 51 recognized that "there is little doubt that, if enacted, the bill would be challenged in court and there is some chance, under **[**38]** the current composition of the U.S. Supreme Court, that it would be found preempted." Senate Judiciary Committee Report at 7, 2019-20 Cal. Leg., Reg. Sess. (2019). These reports acknowledge candidly that, in light of such anticipated scrutiny, "AB 51 seeks to sidestep the preemption issue." Senate Labor, Public Employment and Retirement Committee Report at 4, 2019-20 Cal. Leg., Reg. Sess. (2019). The reports assured legislators that AB 51 "successfully navigates around" Supreme Court precedent and "avoids preemption by applying only to the condition in which an arbitration agreement is made, as opposed to banning arbitration itself." Senate Judiciary Committee Report at 8; Assembly Labor and Employment Committee Report at 3, 2019-20 Cal. Leg., Reg. Sess. (2019). AB 51's author noted that this contrivance gave the legislature "a reasoned case" that the bill would not be preempted, given that "[t]here has not been a preemption case in the absence of an arbitration agreement." Senate Judiciary Committee Report at 7; Assembly Labor and Employment Committee Report at 3. Another key component of the "reasoned case" for avoiding preemption, according to the legislators, was that AB 51 prevented **[**39]** "forced arbitration," which was not the "result of mutual consent" but was imposed on employees "against their will." Assembly Judiciary Committee Report at 5, 2019-20 Cal. Leg., Reg. Sess. (2019); Senate Judiciary Committee Report at 4. According to the legislators, this rationale was consistent with Supreme Court cases stressing the fundamental rule that arbitration agreements be consensual. Senate Judiciary Committee Report at 8 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)).

California's new governor, Gavin Newsom, signed the bill into law, even though AB 51 was identical in many respects to vetoed AB 3080. *See id.* at 9.

II

A

As this history suggests, the California legislature developed AB 51 with the focused intent of opposing arbitration and sidestepping the FAA's preemptive sweep by penalizing the formation, or attempted formation, of disfavored arbitration agreements but not interfering with the enforcement of such agreements.

Specifically, under Section 432.6 of the California Labor Code, an employer "shall not, as a condition of employment . . . require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of the California Fair Employment and Housing Act [(FEHA)]" or the California Labor Code, "including the **[**40]** right to file and pursue a civil action or a complaint with . . . any court." Cal. Lab. Code § 432.6(a). Thus, employers may not require employees to sign a standard employment contract that includes an arbitration provision, even if the contract includes a voluntary opt-out clause. *See* Cal. Lab. Code § 432.6(c). Moreover, an employer cannot refuse to hire a prospective employee who declines to enter into an arbitration agreement or otherwise "threaten, retaliate or discriminate against" such an employee. Cal. Lab. Code § 432.6(b). Violating Section 432.6 amounts to an "unlawful employment practice" for which aggrieved employees and the state may bring civil suits against employers. *See* Cal. Gov't Code §§ 12953, 12960. Violating Section 432.6 also constitutes a criminal offense. *See* Cal. Lab. Code § 433. Should the employee sign such an employment contract, however, the arbitration agreement it contains is perfectly

[*785] enforceable because Section 432.6(f) provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Lab. Code § 432.6(f).

In short, AB 51 criminalizes offering employees an agreement to arbitrate, even though the arbitration provision itself is lawful and enforceable once the agreement is executed. The question is, does this too-clever-by-half workaround **[**41]** actually escape preemption? The majority says it does, but this is clearly wrong: under Supreme Court precedent, Section 432.6 is entirely preempted by the FAA.

B

Although the Supreme Court has not addressed California's specific legislative gimmick—criminalizing contract formation if it includes an arbitration provision—this is not surprising, given that California designed the gimmick to sidestep any existing Supreme Court precedents. But even so, the Supreme Court has made it clear that the FAA preempts this type of workaround, which is but the latest of the "great variety of devices and formulas" disfavoring arbitration. *See Concepcion*, 563 U.S. at 342 (cleaned up).

As a threshold matter, California's circumvention exemplifies the exact sort of '"hostility to arbitration' that led Congress to enact the FAA." *Kindred Nursing*, 137 S. Ct. at 1428 (quoting *Concepcion*, 563 U.S. at 339); *see also Buckeye*, 546 U.S. at 443. The Supreme Court has made clear that the FAA displaces not only state laws that discriminate on their face against arbitration, but also those that "covertly accomplish[] the same objective," *Kindred Nursing*, 137 S. Ct. at 1426. Indeed, even if state laws are "generally applicable," the FAA preempts them where "in practice they have a 'disproportionate impact' on arbitration." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (quoting *Concepcion*, 563 U.S. at 341-342). AB 51 is the poster child for covertly **[**42]** discriminating against arbitration agreements and enacting a scheme that disproportionately burdens arbitration.

More specifically, Supreme Court precedent makes clear that the FAA preempts laws like AB 51 that burden the formation of arbitration agreements. Long ago, the Supreme Court held that the FAA preempted a Montana law making an arbitration clause unenforceable unless it had a specific type of notification on the first page of the contract. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). In *Casarotto*, the state supreme court reasoned—much like California here—that this notice requirement did not "undermine the goals and policies of the FAA" because the "notice requirement did not preclude arbitration agreements altogether" but instead ensured that arbitration agreements had to be entered "knowingly." *Id.* at 685 (quoting *Casarotto v. Lombardi*, 268 Mont. 369, 381, 886 P.2d 931 (1994)). The Court rejected this reasoning. *Id.* at 688.

Kindred Nursing has now confirmed the rule that the FAA invalidates state laws that impede the formation of arbitration agreements. In *Kindred Nursing*, the Court struck down the Kentucky Supreme Court's "clear-statement rule" which provided that a person holding a power of attorney for a family member could not enter into an arbitration agreement for that family member, unless **[**43]** the power of attorney gave the person express authority to do so. 137 S. Ct. at 1425-26. The Supreme Court held that this clear-statement rule—which imposed a burden only on contract formation—violated the FAA, because it "singles out arbitration agreements **[*786]** for disfavored treatment." *Id.* at 1425.

The majority attempts to distinguish *Kindred Nursing* on the ground that it addresses "pre-agreement behavior to the extent it provided the basis to invalidate *already executed* contracts." Majority at 20. This misreads the clear import of the case. In *Kindred Nursing*, the parties opposing arbitration, like the majority here, advanced an

argument "based on the distinction between contract formation and contract enforcement." 137 S. Ct. at 1428. According to their argument, Kentucky's clear-statement rule "affects only contract-formation, because it bars agents without explicit authority from entering into arbitration agreements." *Id.* The opponents argued (like the majority here) that "the FAA has no application to contract formation issues" and claimed that the "FAA's statutory framework applies only *after* a court has determined that a valid arbitration agreement was formed." *Id.* (cleaned up). Although the opponents acknowledged that the FAA **[**44]** "requires a State to enforce all arbitration agreements (save on generally applicable grounds) once they have come into being," they claimed (like the majority here) that "States have free rein to decide—irrespective of the FAA's equal-footing principle—whether such contracts are validly created in the first instance." *Id.*

The Court expressly rejected these arguments. *Id.* "By its terms," the Court explained, the FAA "cares not only about the enforcement of arbitration agreements, but also about their initial validity—that is, about what it takes to enter into them." *Id.* (cleaned up). Because the Kentucky rule "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements" and "thus flouted the FAA's command to place those agreements on an equal footing with all other contracts," the FAA preempted Kentucky's rule. *Id.* at 1429. This common-sense conclusion that state law cannot impede parties' abilities to enter arbitration agreements fit "well within the confines of (and goes no further than) present well-established law." *Id.* (quoting *Imburgia*, 577 U.S. at 58). To hold otherwise, the Court explained, would render the FAA "helpless to prevent even the most blatant discrimination against arbitration." **[**45]** *Id.* In reaching this conclusion, the Court put no weight on the fact that the arbitration agreement at issue in *Kindred Nursing* had already been executed.[3] Rather, *Kindred Nursing*'s bottom line is that a state cannot single out arbitration agreements by imposing special limiting rules at the formation stage. *Id* at 1428-29.

Kindred Nursing's holding that the FAA preempts rules that burden the formation of an arbitration agreement, *see* 137 S. Ct. at 1428-29, applies equally to AB 51, which is intentionally designed to burden and penalize an employer's formation, or attempted formation, of an arbitration agreement with employees. *See* Cal. Lab. Code § 432.6(a)- (c); *see also* Cal. Lab. Code § 433; Cal. Gov't Code § 12953. In upholding AB 51, which "specially impede[s] the ability of [employers] to enter into arbitration agreements" and "thus flout[s] the FAA's command to place those agreements on an equal footing with all **[*787]** other contracts," *Kindred Nursing*, 137 S. Ct. at 1429, the majority directly conflicts with the rule stated in *Kindred Nursing*.

In addition to conflicting with *Kindred Nursing*, the majority's ruling today creates a split with two of our sister circuits. Long before *Kindred Nursing* reached its common-sense conclusion, our sister circuits prevented state efforts like California's that attempted **[**46]** to sidestep the FAA while disfavoring arbitration. The First Circuit held that the FAA preempted Massachusetts regulations that prohibited securities firms from requiring clients to agree to arbitration "as a nonnegotiable condition precedent to account relationships." *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1117, 1125 (1st Cir. 1989). Even if this regulation did not invalidate the arbitration agreements themselves, the First Circuit rejected as "too clever by half" the state's

[3] The majority's argument that "the existence of an agreement to arbitrate was crucial" to *Kindred Nursing*, Majority at 27, is baseless; instead, the Supreme Court focused on the FAA's applicability to contract formation, including state rules that barred specified individuals from entering into arbitration agreements. *See, e.g.*, 137 S. Ct. at 1428-29 (noting that if the FAA did not apply to rules impeding contract formation, a state would be free to hold that everyone was incompetent to enter into an arbitration agreement, which would render the FAA meaningless). AB 51 is such a rule impeding contract formation, as it criminalizes employers' attempts to enter into an arbitration agreement.

attempt to regulate parties' conduct instead of the parties' agreements. *Id.* at 1122-23.[4] Applying well-established preemption principles, *Connolly* reasoned that "[s]tate law need not clash head on with a federal enactment in order to be preempted." *Id. Connolly* explained that the threatened loss of a business license for offering clients a standard agreement including an arbitration provision was "an obstacle of greater proportions even than the chance that, in a given dispute, an arbitration agreement might be declared void." *Id.* at 1124. Thus, the regulations were preempted as "at odds with the policy which infuses the FAA." *Id.*

The Fourth Circuit similarly held that the FAA preempted a Virginia law that made it unlawful for automobile manufacturers and distributors to fail to include a particular **[**47]** clause in franchise agreements. *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990). That clause would provide that any contract provision that "denies access to the procedures, forums, or remedies" provided by state law "shall be deemed to be modified to conform to such laws or regulations." *Id.* (quoting Va. Code Ann. § 46.1-550.5:27). As interpreted by the court, the statute forbade "only nonnegotiable arbitration provisions and not negotiable arbitration agreements." *Id.* Analogizing to *Connolly*, the Fourth Circuit held that the statute conflicted with the FAA because it "essentially prohibited nonnegotiable arbitration agreements." *Id.*

AB 51's contrived approach closely tracks the impermissible workarounds disapproved of by the First and Fourth Circuits. *See Connolly*, 883 F.2d at 1122; *Saturn*, 905 F.2d at 724. Without even acknowledging the existence of this conflicting authority, and contrary to our rule that we may not create a direct conflict with other circuits "[a]bsent a strong reason to do so," *see United States v. Cuevas-Lopez*, 934 F.3d 1056, 1067 (9th Cir. 2019) (quoting *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987)), the majority silently creates a circuit split that will require en banc review or Supreme Court intervention to resolve, *see Hart v. Massanari*, 266 F.3d 1155, 1169, 1171 (9th Cir. 2001); *see also* Fed. R. App. P. 35(b)(1)(A)-(B).[5]

[*788] Taking into account these precedents and the broad preemptive scope of the FAA, it is clear that the FAA preempts AB 51, which prohibits employers from entering **[**48]** into arbitration agreements with their employees as a condition of employment. Under *Kindred Nursing*, such a rule is invalid, 137 S. Ct. at 1428-29, and AB 51 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

III

The contrary arguments raised by California and the majority are not persuasive.

A

First, California and the majority claim that AB 51 does not pose an obstacle to the FAA because it is simply a prohibition against so-called "forced arbitration." Under this theory, AB 51 seeks to protect employees from involuntary contracts forced upon them by employers. According to the majority, California enacted AB 51 "to assure that entry into an arbitration agreement by an employer

[4] This held true even though the regulations would lead to enforcement even in the absence of any executed arbitration agreement. The regulations proscribed "[r]equiring . . . that a customer . . . execute" a non-negotiable arbitration provision, prohibited "[r]equesting . . . that a customer . . . execute" an arbitration provision without disclosing that it cannot be non-negotiable, and even prohibited "[r]equesting . . . that a customer . . . execute" an arbitration provision without disclosing its effect. *Connolly*, 883 F.2d at 1125 (quoting 950 Mass. Code Regs. § 12.204(G)(1)(a)-(c) (1988)).

[5] Although the majority claims the dissent "does not meaningfully engage" with the core question whether the preemptive scope of the FAA extends "to situations in which there is no agreement to arbitrate at issue," Majority at 26, it is the majority that dodges this core question by ignoring our sister circuits' rulings that the FAA does indeed preempt state laws that impede parties from freely entering into arbitration agreements.

and employee is mutually consensual and to declare that compelling an unwilling party to arbitrate is an unfair labor practice." Majority at 8. These guardrails protecting employees from unwanted arbitration provisions do not interfere with the FAA, the majority reasons, because nothing in 9 U.S.C. § 2 "grants an employer the right to force arbitration agreements on unwilling employees." Majority at 25. The majority's reasoning parrots the assurances offered by California **[**49]** legislators that AB 51 is consistent with the Supreme Court's instruction that "consent is the touchstone of arbitration agreements" and that AB 51 merely ensures "employees may *choose* to waive their rights in order to get or keep a job, but they are never *forced* to." Senate Judiciary Committee Report at 8.

There is no merit to this argument, which misunderstands basic principles of California contract law, Supreme Court caselaw regarding consent in arbitration cases, and AB 51 itself. Contrary to the majority, a contract may be "consensual," as that term is used in contract law, even if one party accepts unfavorable terms due to unequal bargaining power.

It is a basic principle of contract law that a contract is not enforceable unless there is mutual, voluntary consent. *See, e.g.*, Cal. Civ. Code §§ 1565, 1567; *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 789, 249 Cal. Rptr. 3d 295, 444 P.3d 97 (2019); *Morrill v. Nightingale*, 93 Cal. 452, 455, 28 P. 1068 (1892). It has long been established that parties to a contract are generally deemed to have consented to all the terms of a contract they sign, even if they have not read it. *See, e.g., Marin Storage & Trucking Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049, 107 Cal. Rptr. 2d 645 (2001); *Greve v. Taft Realty Co.*, 101 Cal. App. 343, 351-52, 281 P. 641 (1929). This is true even if the contract at issue is an adhesion contract, defined by California courts as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing **[**50]** party only the opportunity to adhere to the contract or reject it," *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781 (1961). Despite unequal bargaining power, "a contract of adhesion is fully enforceable according to its terms **[*789]** unless certain other factors are present," such as when a provision "does not fall within the reasonable expectations of the weaker or 'adhering' party" or when a provision "is unduly oppressive or unconscionable." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819-20, 171 Cal. Rptr. 604, 623 P.2d 165 (1981) (per curiam) (cleaned up). And although adhesion contracts do not fit the "classical model of 'free' contracting by parties of equal or near-equal bargaining strength," they are an "inevitable fact of life for all citizens." *Id.* at 817-818.

Of course, mandatory arbitration provisions in employment contracts of adhesion are not enforceable if the provisions are procedurally and substantively unconscionable, or otherwise unenforceable under generally applicable contract rules. *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125-26, 251 Cal. Rptr. 3d 714, 447 P.3d 680 (2019). Unequal bargaining power, "economic pressure," "sharp practices," and "surprise" can help establish procedural unconscionability. *Id.* at 126-29 (cleaned up). Moreover, if a party is forced to sign a contract by threats or physical coercion, for instance, the contract would lack mutual consent and be unenforceable "upon such grounds as exist at law or in equity **[**51]** for the revocation of any contract." 9 U.S.C. § 2. Therefore, there is no risk of employers forcing arbitration agreements on unwilling employees, as those terms are understood in California contract law. Majority at 8, 25. AB 51 does nothing to change these basic principles.

In short, under California law, an employee "consents" to an employment contract by entering into it, even if the contract was a product of unequal bargaining power and even if it contains terms (such as an arbitration provision) that the employee dislikes, so long as the terms are not invalid due to unconscionability or other generally applicable contract principles. An employee's

preference for litigating disputes with an employer, without more, does not make an arbitration agreement nonconsensual.

Because the parties to a contract are deemed to consent to its terms, the "basic precept that arbitration 'is a matter of consent, not coercion,'" means only that courts must "ensure that 'private arbitration agreements are enforced according to their terms'" even in the face of state laws imposing different requirements on the contracting parties. *Stolt-Nielsen*, 559 U.S. at 681-682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). Thus, this fundamental rule of consent means only that "the FAA pre-empts **[**52]** state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,'" *Volt*, 489 U.S. at 478 (quoting *Southland*, 465 U.S. at 10), and also preempts any similar judge-made rules of contract construction or public policy that seek "ends other than the intent of the parties," such as a rule "preferring interpretations that favor the public interest," *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417, 203 L. Ed. 2d 636 (2019). Therefore, contrary to California and the majority, the concept of "consent" in the Supreme Court's arbitration decisions is not violated when there is economic pressure to enter into an agreement with disadvantageous terms, or when the party to the contract with lesser bargaining power is subjectively unhappy with those terms.

This principle applies equally to employment contracts and employment-related lawsuits. In upholding a contract provision requiring arbitration of Age Discrimination in Employment Act claims, the Supreme Court rejected the argument that **[*790]** the agreement was invalid due to the "unequal bargaining power between employers and employees." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). The Court stated that "[m]ere inequality in bargaining power" is not sufficient to refuse to enforce an arbitration agreement in the employment context, because "arbitration **[**53]** agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 33 (quoting 9 U.S.C. § 2).

Accordingly, there is no support for California's description of AB 51 as simply an assurance that employees will not be the victims of forced arbitration or be compelled to arbitrate claims against their wills. Majority at 8, 25. For the same reason, there is no support for the majority's view that AB 51 merely takes away an employer's ability "to force arbitration agreements on unwilling employees." Majority at 25. Rather, AB 51 disproportionately targets and burdens employers offering arbitration agreements as a condition of employment, which "does not place arbitration contracts on equal footing with all other contracts" and therefore fails to give "due regard to the federal policy favoring arbitration." *Imburgia*, 577 U.S. at 58 (cleaned up). Therefore, even if AB 51 applies to a handful of other agreements in addition to arbitration agreements, its interference with parties' abilities to agree to arbitration stands as an obstacle to the "'accomplishment and execution of the full purposes and objectives of Congress,'" and "thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344, 352 **[**54]** (quoting *Hines*, 312 U.S. at 67).

B

Second, the majority attempts to rescue its opinion by ruling that AB 51's civil and criminal penalties under Section 12953 of the California Government Code and Section 433 of the California Labor Code "are preempted to the extent that they apply to executed arbitration agreements covered by the FAA." Majority at 29. The majority acknowledges that the FAA preempts any rule that imposes liability for conduct resulting in an executed arbitration agreement. Majority at 28-29. In case the effect of this novel holding is not clear, it means that if the employer offers an arbitration agreement to the prospective employee as a condition of

employment, and the prospective employee executes the agreement, the employer may not be held civilly or criminally liable. But if the prospective employee refuses to sign, then the FAA does not preempt civil and criminal liability for the employer under AB 51's provisions. In other words, the majority holds that if the employer successfully "forced" employees "into arbitration against their will," Senate Judiciary Committee Report at 4, the employer is safe, but if the employer's efforts fail, the employer is a criminal.

Despite holding that AB 51 is preempted in **[**55]** part, the majority's unusual bifurcated approach still conflicts with the FAA. Most important, it does not "place arbitration agreements upon the same footing as other contracts." *Southland*, 465 U.S. at 16, n.11 (cleaned up). Until AB 51, neither the California legislature nor any state court has held that a person can be prosecuted for attempting to enter into a legal and enforceable agreement. But that is the import of the majority's ruling today. Because, as the majority acknowledges, an executed arbitration agreement is valid and enforceable (except on grounds that are generally applicable to all contracts), the employer's conduct proscribed by Section 432.6—offering an employment **[*791]** agreement that requires arbitration—results in a contract that is both lawful and enforceable. But the majority upholds Section 432.6 and its associated sanctions so long as they are not applied to conduct leading to executed arbitration agreements. This holding means that an employer's attempt to enter into an arbitration agreement with employees is unlawful, but a completed attempt is lawful. This tortuous ruling is analogous to holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing **[**56]** the drug transaction, the dealer cannot be prosecuted. Needless to say, such a bizarre approach does not apply to any other contracts in California. As such, it is preempted by the FAA for disfavoring arbitration contracts and obstructing the purpose and objectives of the FAA.

IV

In sum, AB 51's transparent effort to sidestep the FAA in order to disfavor arbitration agreements in employment contracts is meritless. By upholding this maneuver, the majority conflicts with *Kindred Nursing*, which held that the FAA invalidates state laws that impede the formation of arbitration agreements. 137 S. Ct. at 1425. The majority also silently splits from our sister circuits, which have held that too-clever-by-half workarounds and covert efforts to block the formation of arbitration agreements are preempted by the FAA just as much as laws that block enforcement of such agreements. So we don't need to wait until the next Supreme Court reversal to know that we must apply those principles here. The majority's bifurcated, half-hearted, and circuit-splitting approach to invalidating AB 51 makes little sense, except to the extent it aims at abetting California in disfavoring arbitration. Because the appellants here have **[**57]** demonstrated a likelihood of success on the merits and the district court correctly determined that the remaining preliminary injunction factors supported injunctive relief, I would affirm the district court. I therefore dissent.

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Morgan v. Sundance, Inc.

United States Court of Appeals for the Eighth Circuit

September 23, 2020, Submitted; March 30, 2021, Filed

No. 19-2435

Reporter
992 F.3d 711 *; 2021 U.S. App. LEXIS 9215 **; 2021 WL 1181677

Robyn Morgan, on behalf of herself and all similarly situated individuals, Plaintiff - Appellee v. Sundance, Inc., Defendant - Appellant

Subsequent History: US Supreme Court certiorari granted by, Motion granted by Morgan v. Sundance, Inc., 2021 U.S. LEXIS 5660 (U.S., Nov. 15, 2021)

Prior History: [1]** Appeal from United States District Court for the Southern District of Iowa - Iowa City.

Morgan v. Sundance, Inc., 2019 U.S. Dist. LEXIS 178422, 2019 WL 5089205 (S.D. Iowa, June 28, 2019)

Counsel: For Robyn Morgan, on behalf of herself and all similarly situated individuals, Plaintiff - Appellee: Charles R. Ash, IV, SOMMERS & SCHWARTZ, Southfield, MI; Paige Fiedler, Madison Elizabeth Fiedler-Carlson, FIEDLER LAW FIRM, PLC, Johnston, IA; Beth Rivers, PITT & MCGEHEE, Royal Oak, MI; Jason J. Thompson, SOMMERS & SCHWARTZ, Southfield, MI.

For Sundance, Inc., Defendant - Appellant: Kevin J. Driscoll, FINLEY LAW FIRM, Des Moines, IA: Scott C. Fanning, Joel W. Rice, FISHER & PHILLIPS, Chicago, IL.

Judges: Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

Opinion by: GRASZ

Opinion

[*713] GRASZ, Circuit Judge.

Sundance, Inc. appeals the district court's order denying its motion to compel arbitration of Robyn Morgan's claims. We reverse.

I. Background

In September 2018, Morgan sued Sundance for violations of the Fair Labor Standards Act. *See* 29 U.S.C. § 201. Morgan alleged Sundance failed to pay her, and other similarly situated employees, for overtime.

In November 2018, Sundance moved to dismiss Morgan's complaint, arguing that under the "first-to-file" rule,[1] a similar lawsuit filed in a Michigan federal court (the "Michigan case") barred this lawsuit. **[**2]** The district court denied Sundance's motion to dismiss more than four months later in March 2019.

Sundance then answered Morgan's complaint, but did not assert its right to arbitrate Morgan's claims. After filing its answer, Morgan participated in a settlement mediation with the Michigan case plaintiffs. The Michigan case settled, but Morgan's case moved forward.

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[1] The "first-to-file" rule, as an extension of comity principles, states "where two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case." *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985).

In May 2019, after the failed mediation and nearly eight months after the filing of Morgan's complaint, Sundance moved to compel arbitration. The district court denied the motion, concluding Sundance's participation in the litigation waived its right to arbitration.

II. Discussion

We review de novo the district court's conclusion that Sundance waived its right to compel arbitration, and we examine the underlying factual findings for clear error. *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016). "[A]ny doubts concerning waiver of arbitrability should be resolved in favor of arbitration." *Id.* (internal quotation marks and citation omitted).

A party waives its right to arbitration if it: "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other **[*714]** party by these inconsistent acts." *Messina*, 821 F.3d at 1050 (internal quotation marks and citation **[**3]** omitted). Utilizing this test, we conclude the district court erred in determining Sundance waived its right to arbitrate because Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan.

Regarding the first element, Sundance does not dispute its knowledge of an existing right to arbitration because the Morgan-Sundance employment agreement included the arbitration clause.

We next consider the second element—whether Sundance acted inconsistently with its right to arbitrate. "A party acts inconsistently with its right to arbitrate if it 'substantially invokes the litigation machinery before asserting its arbitration right, . . . when, for example, it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner.'" *Id.* at 1050 (quoting *Lewallen v. Green Tree Servicing*, 487 F.3d 1085, 1090 (8th Cir. 2007)). "To safeguard its right to arbitration, a party must 'do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration[.]'" *Id.* at 1050 (quoting *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995)). A court looks to all of the circumstances to decide whether the act is truly inconsistent with its right to arbitrate. **[**4]** *See Lewallen*, 487 F.3d at 1090-94 (considering a party's discovery requests, its failure to timely assert its right to arbitration, and its motion to dismiss in upholding a finding that the party acted inconsistently with its right to arbitrate).

The district court found that Sundance substantially invoked the litigation machinery primarily by waiting eight months to assert its right to arbitrate this dispute. During the eight months prior to asserting its right to arbitration, Sundance failed to mention the arbitration clause in its answer or motion to dismiss. The district court stated Sundance's conduct during the delay was sufficient to find Sundance invoked the litigation machinery. We question this finding in light of the totality of the circumstances.

First of all, the time during which Sundance's motion to dismiss was under advisement must also be considered. This made up half the delay the district court attributed to Sundance. Second, Sundance participated in mediation of the case. Mediation is an effort to avoid "invok[ing] the litigation machinery." *See Lewallen*, 487 F.3d at 1090.

It is true, as the district court noted, that Sundance failed to assert its right to arbitration in its answer. Sundance's strategy of waiting to assert **[**5]** its right to arbitration until after filing a motion to dismiss and an answer demonstrates an active participation in the litigation process and seemingly an invocation of the litigation machinery. However, instead of focusing on Sundance's failure to raise its right to arbitration earlier, the district court should have considered the nature of Sundance's motion to

dismiss. In this regard, we conclude it significant that Sundance did not address the merits of the dispute, but instead focused on the quasi-jurisdictional "first-to-file" rule. So, although there was an eight-month delay, the parties spent very little of this time actively litigating and no time on the merits of the case. Thus, shifting to arbitration would not duplicate the parties' efforts.

This all bears on the third element: prejudice. "Whether inconsistent actions constitute prejudice is determined on a case-by-case basis." *Stifel, Nicolaus & **[*715]** Co. v. Freeman*, 924 F.2d 157, 159 (8th Cir. 1991). "Prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or litigation of substantial issues going to the merits." *Id.* A "delay in seeking to compel arbitration 'does not itself constitute prejudice[,]'" but it can "combine with other **[**6]** factors to support a finding of prejudice." *Messina*, 821 F.3d at 1051; *see also Kelly v. Golden*, 352 F.3d 344, 350 (8th Cir. 2003) (concluding claimant's delay in seeking arbitration prejudiced defending party who incurred expense, experienced "substantial" delay, and would have to duplicate its efforts).

The district court found Morgan was prejudiced by having to respond to Sundance's motion to dismiss over the eight-month span of litigation. We disagree. Four months of the delay entailed the parties waiting for disposition of Sundance's motion to dismiss. No discovery was conducted. And, the record lacks any evidence that Morgan would have to duplicate her efforts during arbitration. Instead, most of Morgan's work focused on the quasi-jurisdictional issue, not the merits of the case. For these reasons, we hold Morgan was not prejudiced by Sundance's litigation strategy.

In the absence of a showing of prejudice to Morgan, we conclude Sundance did not waive its contractual right to invoke arbitration.

III. Conclusion

The judgment of the district court is reversed, and the case is remanded for proceedings consistent with this opinion.

Dissent by: COLLOTON

Dissent

COLLOTON, Circuit Judge, dissenting.

When Morgan sued Sundance, Inc., in the Southern District of Iowa, Sundance made a strategic **[**7]** choice to forego arbitration for more than seven months. At that point, Sundance asked the district court to compel arbitration and dismiss the lawsuit. On this record, Sundance waived its right to arbitration under the contract, and I would affirm the order of the district court denying the motion to compel.

In response to Morgan's complaint, Sundance did not move to compel arbitration. Instead, Sundance expressed its preference for a judicial forum in the Eastern District of Michigan and moved to stay or dismiss this action under the "first-filed rule." (This rule concerns selection of venue; it is not "quasi-jurisdictional." *See Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993)). Sundance argued that Morgan's case was "duplicative" of an action pending in federal court in Michigan, and urged the district court in Southern Iowa to avoid "conflicting rulings and duplicative discovery" by staying or dismissing this case.

When the district court denied that motion, Sundance answered Morgan's complaint on the merits. The answer listed fourteen affirmative defenses, but made no mention of arbitration. The parties then participated in a mediation, but no settlement agreement was reached. Only then, more than seven months after the complaint **[**8]** was filed, did Sundance move to compel arbitration in May 2019. This conduct by Sundance amounts to a waiver of its contractual right to arbitration. "To safeguard its right to arbitration, a party must do all

it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) (internal quotation omitted). In the terms of our cases, Sundance knew of its existing right to arbitration and acted inconsistently with that right. *See Stifel, Nicolaus & Co. v.* ***[*716]*** *Freeman*, 924 F.2d 157, 158 (8th Cir. 1991).

Moving to dismiss or stay this action as "duplicative" so that it could be litigated in federal court in Michigan is an action inconsistent with arbitration. When a party waits to seek arbitration until after it loses a motion to transfer venue, it demonstrates an effort to play "heads I win, tails you lose"—a game that is inconsistent with exercising a right to arbitration. *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1050-51 (8th Cir. 2016). Filing an answer that sets forth numerous defenses on the merits, but never mentions a right to arbitrate the dispute, is also inconsistent with the right. "The filing of an answer is, after all, the main opportunity for a defendant to give notice of potentially dispositive issues to the plaintiff; and the intent **[**9]** to invoke an arbitration provision is just such an issue." *Johnson Assocs. Corp. v. HL Operating Co.*, 680 F.3d 713, 718 (6th Cir. 2012).

Sundance then engaged in a mediation process designed to resolve a lawsuit in federal court. This was further participation in litigation-related activities, and another act inconsistent with arbitration. Settlements depend on the parties' assessment of the applicable law, the procedural characteristics of the forum, the availability of discovery, the cost of litigation, and the overall potential risks and rewards of proceeding to a final decision. The relevant calculations may differ considerably depending on whether an action is pending in federal court or in arbitration. Mediation in one forum is not interchangeable with mediation in the other. *See* Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 Harv. Negot. L. Rev. 185, 202-03 (2019) ("Unable to predict and thus manage the downside risk of arbitration, negotiators will be more willing to settle a claim in arbitration as opposed to that same claim in court.").

When Sundance eventually moved to compel arbitration, the company acknowledged that its change of heart was tactical. In its memorandum, Sundance asserted that *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019), filed April 24, 2019, had "a significant bearing on this litigation," because **[**10]** "[u]nder the prior state of the law, [Sundance] risked being compelled to arbitrate this matter as a collective action." The district court concluded that Sundance was wrong on the law: *Lamps Plus* held that an *ambiguous* agreement is insufficient to establish that parties agreed to arbitrate on a classwide basis, *id*. at 1415, but the Sundance arbitration agreement is *silent* on the question. The "prior state of the law" already established that a court may not compel arbitration on a classwide basis when an agreement is silent on the availability of such arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-87, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). But even assuming that Sundance's agreement is arguably ambiguous, the salient point is that Sundance was content with a judicial forum until it believed that an intervening court decision improved its prospects in arbitration.

The majority does not dispute that Sundance acted inconsistently with arbitration, but reverses the district court's determination of waiver on the ground that Morgan was not prejudiced. Prejudice is a debatable prerequisite. Arbitration is a contractual right, and "in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance." *Cabinetree v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (citing E. Allan Farnsworth, **[**11]** Contracts § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960)). Accordingly, some **[*717]** circuits allow a finding of waiver of arbitration without a showing of prejudice. *St. Mary's Med. Ctr. v. Disco Alum. Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992); *Nat'l*

Found. for Cancer Rsch. v. A.G. Edwards & Sons, 821 F.2d 772, 777, 261 U.S. App. D.C. 284 (D.C. Cir. 1987).

This court initially followed a Ninth Circuit decision to establish a prejudice requirement, *Stifel*, 924 F.2d at 158-59, but later acknowledged the conflict in authority and recognized that the issue was "unsettled" by the Supreme Court. *Erdman Co. v. Phx. Land & Acq., LLC*, 650 F.3d 1115, 1119 (8th Cir. 2011); *see Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App'x 921, 924-25 (11th Cir. 2010) (holding that prejudice is required), *cert. granted*, 562 U.S. 1215, 131 S. Ct. 1556, 179 L. Ed. 2d 299, *cert. dismissed*, 563 U.S. 1029, 131 S. Ct. 2955, 180 L. Ed. 2d 243 (2011). Under current circuit law, the prejudice threshold is "not onerous." *Erdman Co.*, 650 F.3d at 1119 (quoting *Hooper v. Adv. Am., Cash Adv. Ctrs.*, 589 F.3d 917, 923 (8th Cir. 2009)). As the Seventh Circuit put it, "[o]ther courts require evidence of prejudice—but not much." *Cabinetree*, 50 F.3d at 390.

Morgan showed sufficient prejudice to support the district court's determination of waiver. We concluded in a prior decision that nearly identical conduct by a defendant—waiting eight months to mention arbitration while forcing a plaintiff to defend against a motion to transfer venue to another judicial district—supported a finding of prejudice. *Messina*, 821 F.3d at 1051. Sundance also led Morgan to waste time and money engaging in a fruitless mediation based on an inaccurate premise that the case would be litigated in federal court. These impositions on the plaintiff are enough to satisfy **[**12]** the modest prejudice requirement employed in this circuit.

For these reasons, I would affirm the order of the district court denying the motion to compel arbitration.

United Food & Commer. Workers Union v. Zuckerberg

Supreme Court of Delaware

June 30, 2021, Submitted; September 23, 2021, Decided

No. 404, 2020

Reporter
2021 Del. LEXIS 298 *; 2021 WL 4344361

UNITED FOOD AND COMMERCIAL WORKERS UNION AND PARTICIPATING FOOD INDUSTRY EMPLOYERS TRISTATE PENSION FUND, Plaintiff-Below, Appellant, v. MARK ZUCKERBERG, MARC ANDREESSEN, PETER THIEL, REED HASTINGS, ERSKINE B. BOWLES, and SUSAN D. DESMOND-HELLMANN, Defendants-Below, Appellees and FACEBOOK, INC., Nominal Defendant-Below, Appellee.

Subsequent History: Case Closed October 12, 2021.

Prior History: [*1] Court Below — Court of Chancery of the State of Delaware. No. 2018-0671-JTL.

UFCW & Participating Food Indus. Empls Tri-State Pension Fund v. Zuckerberg, 250 A.3d 862, 2020 Del. Ch. LEXIS 319, 2020 WL 6266162 (Del. Ch., Oct. 26, 2020)

Disposition: AFFIRMED.

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David E. Ross, Esquire, Garrett **[*2]** B. Moritz, Esquire, R. Garrett Rice, Esquire, ROSS ARONSTAM & MORITZ LLP, Wilmington, Delaware; Attorneys for Appellee Facebook, Inc.

Judges: Before SEITZ, Chief Justice; VALIHURA, VAUGHN, TRAYNOR, and MONTGOMERY-REEVES, Justices, constituting the Court en banc.

Opinion by: MONTGOMERY-REEVES

Opinion

MONTGOMERY-REEVES, Justice:

In 2016, the board of directors of Facebook, Inc. ("Facebook") voted in favor of a stock reclassification (the "Reclassification") that would

allow Mark Zuckerberg—Facebook's controller, chairman, and chief executive officer—to sell most of his Facebook stock while maintaining voting control of the company. Zuckerberg proposed the Reclassification to allow him and his wife to fulfill a pledge to donate most of their wealth to philanthropic causes. With Zuckerberg casting the deciding votes, Facebook's stockholders approved the Reclassification.

Not long after, numerous stockholders filed lawsuits in the Court of Chancery, alleging that Facebook's board of directors violated their fiduciary duties by negotiating and approving a purportedly one-sided deal that put Zuckerberg's interests ahead of the company's interests. The trial court consolidated more than a dozen of these lawsuits into a single **[*3]** class action. At Zuckerberg's request and shortly before trial, Facebook withdrew the Reclassification and mooted the fiduciary-duty class action. Facebook spent more than $20 million defending against the class action and paid plaintiffs' counsel more than $68 million in attorneys' fees under the corporate benefit doctrine.

Following the settlement, another Facebook stockholder—the United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund ("Tri-State")—filed a derivative complaint in the Court of Chancery. This new action rehashed many of the allegations made in the prior class action but sought compensation for the money Facebook spent in connection with the prior class action.

Tri-State did not make a litigation demand on Facebook's board. Instead, Tri-State pleaded that demand was futile because the board's negotiation and approval of the Reclassification was not a valid exercise of its business judgment and because a majority of the directors were beholden to Zuckerberg. Facebook and the other defendants moved to dismiss Tri-State's complaint under Court of Chancery Rule 23.1, arguing that Tri-State did not make demand or prove that demand was futile. Both sides **[*4]** agreed that the demand futility test established in *Aronson v. Lewis*[1] applied to Tri-State's complaint.

In October 2020, the Court of Chancery dismissed Tri-State's complaint under Rule 23.1. The court held that *exculpated* care claims do not excuse demand under *Aronson's* second prong because they do not expose directors to a substantial likelihood of liability. The court also held that the complaint failed to raise a reasonable doubt that a majority of the demand board lacked independence from Zuckerberg. In reaching these conclusions, the Court of Chancery applied a three-part test for demand futility that blended the *Aronson* test with the test articulated in *Rales v. Blasband*.[2]

Tri-State has appealed the Court of Chancery's judgment. For the reasons provided below, this Court affirms the Court of Chancery's judgment. The second prong of *Aronson* focuses on whether the derivative claims would expose directors to a substantial likelihood of liability. Exculpated claims do not satisfy that standard because they do not expose directors to a substantial likelihood of liability. Further, the complaint does not plead with particularity that a majority of the demand board lacked independence. Thus, the **[*5]** Court of Chancery properly dismissed Tri-State's complaint for failing to make a demand on the board.

Additionally, this Opinion adopts the Court of Chancery's three-part test for demand futility. When the Court decided *Aronson*, raising a reasonable doubt that the business judgment standard of review would apply exposed directors to a substantial likelihood of liability for care violations. The General Assembly's enactment of Section 102(b)(7) and other developments in corporate law have weakened the connection between rebutting the business judgment standard and exposing directors to a risk that would sterilize their judgment with respect to a litigation demand.

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[1] 473 A.2d 805 (Del. 1984).

[2] 634 A.2d 927 (Del. 1993).

Further, the *Aronson* test has proved difficult to apply in many contexts, such as where there is turnover on a corporation's board. The Court of Chancery's refined articulation of the *Aronson* standard helps to address these issues. Nonetheless, this refined standard is consistent with *Aronson*, *Rales*, and their progeny. Thus, cases properly applying those holdings remain good law.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

A. The Parties and Relevant Non-Parties

Appellee Facebook is a Delaware corporation with its principal place of business in **[*6]** California.[3] Facebook is the world's largest social media and networking service and one of the ten largest companies by market capitalization.[4]

Appellant Tri-State has continuously owned stock in Facebook since September 2013.[5]

Appellee Mark Zuckerberg founded Facebook and has served as its chief executive officer since July 2014.[6] Zuckerberg controls a majority of Facebook's voting power and has been the chairman of Facebook's board of directors since January 2012.[7]

Appellee Marc Andreessen has served as a Facebook director since June 2008.[8] Andreessen was a member of the special committee that negotiated and recommended that the full board approve the Reclassification.[9] In addition to his work as a Facebook director, Andreessen is a cofounder and general partner of the venture capital firm Andreessen Horowitz.[10]

Appellee Peter Thiel has served as a Facebook director since April 2005.[11] Thiel voted in favor of the Reclassification.[12] In addition to his work as a Facebook director, Thiel is a partner at the venture capital firm Founders Firm.[13]

Appellee Reed Hastings began serving as a Facebook director in June 2011 and was still a director when Tri-State filed its complaint.[14] Hastings voted **[*7]** in favor of the Reclassification.[15] In addition to his work as a Facebook director, Hastings founded and serves as the chief executive officer and chairman of Netflix, Inc. ("Netflix").[16]

Appellee Erskine B. Bowles began serving as a Facebook director in September 2011 and was still a director when Tri-State filed its complaint.[17] Bowles was a member of the special committee that negotiated and recommended that the full board approve the Reclassification.[18]

Appellee Susan D. Desmond-Hellman began serving as a Facebook director in March 2013 and was still a director when Tri-State filed its complaint.[19] Desmond-Hellman was the chair of the special committee that negotiated and recommended that the full board approve the

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[3] App. to Opening Br. 19 (hereinafter, "A_").

[4] A19-20.

[5] A19.

[6] A20.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] A51.

[11] A21.

[12] *Id.*

[13] A57.

[14] *See id.*

[15] *Id.*

[16] A60.

[17] *See id.*

[18] *Id.*

[19] *See id.*

Reclassification.[20] In addition to her work as a Facebook director, Desmond-Hellman served as the chief executive officer of the Bill and Melinda Gates Foundation (the "Gates Foundation") during the events relevant to this appeal.[21]

Sheryl Sandberg has been Facebook's chief operating officer since March 2018 and has served as a Facebook director since January 2012.[22]

Kenneth I. Chenault began serving as a Facebook director in February 2018 and was still a director **[*8]** when Tri-State filed its complaint.[23] Chenault was not a director when Facebook's board voted in favor of the Reclassification in 2016.[24]

Jeffery Zients began serving as a Facebook director in May 2018 and was still a director when Tri-State filed its complaint.[25] Zients was not a director when Facebook's board voted in favor of the Reclassification in 2016.[26]

B. Zuckerberg Takes the Giving Pledge

According to the allegations in the complaint, in December 2010, Zuckerberg took the Giving Pledge, a movement championed by Bill Gates and Warren Buffet that challenged wealthy business leaders to donate a majority of their wealth to philanthropic causes.[27] Zuckerberg communicated widely that he had taken the pledge and intended to start his philanthropy at an early age.[28]

In March 2015, Zuckerberg began working on an accelerated plan to complete the Giving Pledge by making annual donations of $2 to $3 billion worth of Facebook stock.[29] Zuckerberg asked Facebook's general counsel to look into the plan.[30] Facebook's legal team cautioned Zuckerberg that he could only sell a small portion of his stock—$3 to $4 billion based on the market price—without dipping below majority voting control.[31] To **[*9]** avoid this problem, the general counsel suggested that Facebook could follow the "Google playbook" and issue a new class of non-voting stock that Zuckerberg could sell without significantly diminishing his voting power.[32] The legal team recommended that the board form a special committee of independent directors to review and approve the plan and noted that litigation involving Google's reclassification resulted in a $522 million settlement.[33] Zuckerberg instructed Facebook's legal team to "start figuring out how to make this happen."[34]

C. The Special Committee Approves the Reclassification

At an August 20, 2015 meeting of Facebook's board, Zuckerberg formally proposed that Facebook issue a new class of non-voting shares, which would allow him to sell a substantial amount of stock without losing control of the company.[35] Zuckerberg also disclosed that he had hired Simpson Thacher & Bartlett LLP ("Simpson Thacher") to give him personal legal advice about "what creating a new class of stock might look

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[20] *Id.*

[21] A27.

[22] A46.

[23] *See id.*

[24] *See* A46; A41.

[25] *See* A46.

[26] *See* A46; A41.

[27] A23.

[28] *Id.*

[29] A24.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] A26.

like."[36]

A couple of days later, Facebook established a special committee, which was composed of three purportedly-independent directors: Andreessen, Bowles, and Desmond-Hellman (the **[*10]** "Special Committee").[37] The board charged the Special Committee with evaluating the Reclassification, considering alternatives, and making a recommendation to the full board.[38] The board also authorized the Special Committee to retain legal counsel, financial advisors, and other experts.[39]

Facebook management recommended and the Special Committee hired Wachtell, Lipton, Rosen & Katz ("Wachtell") as the committee's legal advisor.[40] Before meeting with the Special Committee, Wachtell called Zuckerberg's contacts at Simpson Thacher to discuss the potential terms of the Reclassification.[41] Simpson Thacher rejected as non-starters several features from the Google playbook, such as a stapling provision that would have required Zuckerberg to sell a share of his voting stock each time that he sold a share of the non-voting stock, and a true-up payment that would compensate Facebook's other stockholders for the dilution of their voting power.[42] By the time Wachtell first met with the Special Committee, the key contours of the Reclassification were already taking shape, and the Special Committee anticipated that the Reclassification would occur. Thus, the Special Committee focused on suggesting **[*11]** changes to the Reclassification rather than considering alternatives or threatening to reject the plan.[43]

Following the recommendation of Bowles, the Special Committee hired Evercore Group L.L.C. ("Evercore") as its financial advisor.[44] Evercore was founded by Roger Altman, a personal friend of Bowles who had helped him with various political efforts.[45] Evercore's team leader observed that it had been hired "in the second inning" and that negotiations were well underway before it began to advise the Special Committee on the Reclassification.[46]

As the negotiations progressed, the Special Committee largely agreed to give Zuckerberg the terms that he wanted and did not consider alternatives or demand meaningful concessions.[47] For example, the Special Committee did not ask Zuckerberg to revisit any of the terms that Simpson Thacher identified as non-starters and did not try to place restrictions on Zuckerberg's ability to sell as much stock as he wanted, for whatever purpose, on any timetable that he desired.[48] Similarly, the Special Committee asked for only small concessions from Zuckerberg, such as a sunset provision that was designed to discourage Zuckerberg from leaving the company **[*12]** despite the absence of any demonstrable reason to believe that Zuckerberg would step away from his existing Facebook duties.[49]

On November 9, 2015, Zuckerberg publicly reaffirmed the Giving Pledge.[50] The next day, Zuckerberg circulated a draft announcement within

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] A27.

[41] A29.

[42] *Id.*; *see UFCW & Participating Food Indus. Empls Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 871 (Del. Ch. 2020) (hereinafter, "Op. at __").

[43] *Id.*

[44] A30.

[45] *Id.*

[46] *Id.*

[47] *See* A30-40.

[48] A31-32.

[49] A41.

[50] A33.

Facebook that would disclose his intent to begin making large annual donations to complete the pledge.[51] Zuckerberg asked for feedback on the announcement from various people, including Desmond-Hellman.[52] Zuckerberg also informed Bowles and Andreessen of his planned announcement.[53] Bowles and Andreessen told Zuckerberg that they were "proud" of him for taking the Giving Pledge and announcing his plan to begin donating his wealth to philanthropic causes.[54] Zuckerberg also told Warren Buffett, Bill Gates, and Melinda Gates of his planned announcement.[55] Melinda Gates forwarded an email that she received from Zuckerberg to Desmond-Hellman, adding a smiley-face emoji.[56] At that time, Desmond-Hellman was the chief executive officer of the Gates Foundation.[57]

A few weeks later, Zuckerberg published a post on his Facebook page announcing that he planned to begin making large donations of his Facebook stock.[58] The post noted that Zuckerberg **[*13]** intended to "remain Facebook's CEO for many, many years to come"[59] and did not mention that his plan hinged on the Special Committee's approval of the Reclassification.[60] The Special Committee did not try to use the public announcement as leverage to extract more concessions from Zuckerberg.[61]

Throughout the negotiations about the Reclassification, Andreessen engaged in facially dubious back-channel communications with Zuckerberg about the Special Committee's deliberations.[62] For example, during a March 2016 teleconference with the Special Committee, Zuckerberg pushed for an eight-year leave of absence.[63] Andreessen sent Zuckerberg text messages during the meeting that provided live updates on which lines of argument were working[64] and which were not.[65] When confronted with these text messages later on, Desmond-Hellmann agreed that it appeared Andreessen had been "coaching" Zuckerberg through the negotiations.[66]

On April 13, 2016, the Special Committee recommend that the full board approve the Reclassification.[67] The next day, Facebook's full board accepted the Special Committee's recommendation and voted to approve the Reclassification.[68] Zuckerberg and Sandberg **[*14]** abstained from voting on the Reclassification.[69]

D. Facebook Settles a Class Action Challenging the Reclassification

On April 27, 2016, Facebook revealed the Reclassification to the public.[70] The announcement was timed to coincide with the company's best-ever quarterly earnings report.[71] Evercore's project leader, Altman, sent Desmond-Hellmann an email remarking, "Anytime [Facebook] announces

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[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] A34.

[57] A27.

[58] A34.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] A36-40.

[63] A38.

[64] *See, e.g., id.* ("NOW WE'RE COOKING WITH GAS.").

[65] *See, e.g., id.* ("This line of argument is not helping . . . .").

[66] *Id.*

[67] A41.

[68] *Id.*

[69] A41 n.4.

[70] A42.

[71] *Id.*

earnings like that, no one will care about an equity recapitalization."[72]

On April 29, 2016, the first class action was filed in the Court of Chancery challenging the Reclassification.[73] Several more similar complaints were filed, and in May 2016 the Court of Chancery consolidated thirteen cases into a single class action (the "Reclassification Class Action").[74]

On June 20, 2016, Facebook held its annual stockholders meeting.[75] Among other things, the stockholders were asked to vote on the Reclassification.[76] Zuckerberg voted all of his stock in favor of the plan.[77] Including Zuckerberg's votes, a majority of Facebook's stockholders approved the Reclassification.[78] More than three-quarters of the minority stockholders voted against the Reclassification.[79]

On June 24, 2016, Facebook agreed that **[*15]** it would not go forward with the Reclassification while the Reclassification Class Action was pending.[80] The Court of Chancery certified the Reclassification Class Action in April 2017 and tentatively scheduled the trial for September 26, 2017.[81] About a week before the trial was scheduled to begin, Zuckerberg asked the board to abandon the Reclassification.[82] The board agreed, and the next day Facebook filed a Form 8-K with the Securities and Exchange Commission disclosing that the company had abandoned the Reclassification and mooted the Class Action.[83] The Form-8K also disclosed that despite abandoning the Reclassification, Zuckerberg planned to sell a substantial number of shares over the coming 18 months.[84]

In a companion Facebook post, Zuckerberg explained that he "knew [the Reclassification] was going to be complicated and [that] it wasn't a perfect solution." The post continued, "Today I think we have a better one" that would allow Zuckerberg and his wife to "fully fund [our] philanthropy and retain voting control of Facebook for 20 years or more."[85] The post also clarified that this new plan would not "change [our] plans to give away 99% of our Facebook shares during our lives. **[*16]** In fact, we now plan to accelerate our work and sell more of those shares sooner."[86] By January 3, 2019, Zuckerberg had sold about $5.6 billion worth of Facebook stock without the Reclassification.

E. Tri-State Files a Class Action Seeking to Recoup the Money that Facebook Spent Defending and Settling the Reclassification Class Action

Facebook spent about $21.8 million defending the Reclassification Class Action, including more than $17 million on attorneys' fees. Additionally, Facebook paid $68.7 million to the plaintiff's attorneys in the Reclassification Class Action to settle a claim under the corporate benefit doctrine.[87]

On September 12, 2018, Tri-State filed a derivative action in the Court of Chancery seeking to recoup

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[72] A43.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] A43-44.

[84] A44.

[85] *Id.*

[86] *Id.*

[87] A45.

the money that Facebook spent defending and settling the Reclassification Class Action.[88] The complaint asserted a single count alleging that Zuckerberg, Andreessen, Thiel, Hastings, Bowles, and Desmond-Hellmann (collectively, the "Director Defendants") breached their fiduciary duties of care and loyalty by improperly negotiating and approving the Reclassification.[89] When Tri-State filed its complaint, Facebook's board was composed of nine directors: Zuckerberg, Andreessen, **[*17]** Bowles, Desmond-Hellman, Hastings, Thiel, Sandberg, Chenault, and Zients (collectively, the "Demand Board").[90]

The complaint alleged that demand was excused as futile under Court of Chancery Rule 23.1 because "the Reclassification was not the product of a valid exercise of business judgment" and because "a majority of the Board face[d] a substantial likelihood of liability[] and/or lack[ed] independence."[91] Facebook and the Director Defendants moved to dismiss the complaint under Court of Chancery Rule 23.1 for failing to comply with the demand requirement.[92]

On October 26, 2020, the Court of Chancery issued a memorandum opinion dismissing the complaint for failing to comply with Rule 23.1. The court held that demand was required because the complaint did not contain particularized allegations raising a reasonable doubt that a majority of the Demand Board received a material personal benefit from the Reclassification, faced a substantial likelihood of liability for approving the Reclassification, or lacked independence from another interested party.[93]

Tri-State appeals the Court of Chancery's judgment dismissing the derivative complaint under Rule 23.1 for failing to make a demand on the board or plead with particularity facts establishing that demand would **[*18]** be futile.

II. STANDARD OF REVIEW

"[O]ur review of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary."[94]

III. ANALYSIS

"A cardinal precept" of Delaware law is "that directors, rather than shareholders, manage the business and affairs of the corporation."[95] This precept is reflected in Section 141(a) of the Delaware General Corporation Law ("DGCL"), which provides that "[t]he business and affairs of every corporation organized under this chapter *shall be managed by or under the direction of a board of directors* except as may be otherwise provided in this chapter or in [a corporation's] certificate of incorporation."[96] The board's authority to govern corporate affairs extends to decisions about what remedial actions a corporation should take after being harmed, including whether the corporation should file a lawsuit against its directors, its officers, its controller, or an outsider.[97]

"In a derivative suit, a stockholder seeks to displace

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[88] Op. at 875.

[89] *Id.*

[90] A46.

[91] *Id.*

[92] Op. at 869.

[93] *Id.* at 890-900.

[94] *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

[95] *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds* 746 A.2d 244 (Del. 2000).

[96] 8 *Del C.* § 141(a) (emphasis added).

[97] *See, e.g., Lenois v. Lawal*, 2017 Del. Ch. LEXIS 784, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017) (The board's "managerial decision making power . . . encompasses decisions whether to initiate, or refrain from entering, litigation." (quoting *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981)) (citing *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991); *Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990); *Aronson*, 473 A.2d at 811)).

the board's [decision-making] authority over a litigation asset and assert the corporation's claim."[98] Thus, "[b]y its very nature[,] the derivative action" encroaches "on the managerial freedom of directors" by seeking to **[*19]** deprive the board of control over a corporation's litigation asset.[99] "In order for a stockholder to divest the directors of their authority to control the litigation asset and bring a derivative action on behalf of the corporation, the stockholder must" (1) make a demand on the company's board of directors or (2) show that demand would be futile.[100] The demand requirement is a substantive requirement that "'[e]nsure[s] that a stockholder exhausts his intracorporate remedies,' 'provide[s] a safeguard against strike suits,' and 'assure[s] that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur.'"[101]

Court of Chancery Rule 23.1 implements the substantive demand requirement at the pleading stage by mandating that derivative complaints "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." To comply with Rule 23.1, the plaintiff must meet "stringent requirements of factual particularity that differ substantially from . . . permissive notice **[*20]** pleadings."[102] When considering a motion to dismiss a complaint for failing to comply with Rule 23.1, the Court does not weigh the evidence, must accept as true all of the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor.[103]

The plaintiff in this action did not make a pre-suit demand. Thus, the question before the Court is whether demand is excused as futile. This Court has articulated two tests to determine whether the demand requirement should be excused as futile: the *Aronson* test and the *Rales* test.[104] The *Aronson* test applies where the complaint challenges a decision made by the same board that would consider a litigation demand.[105] Under *Aronson*, demand is excused as futile if the complaint alleges particularized facts that raise a reasonable doubt that "(1) the directors are disinterested and independent[,] [or] (2) the challenged transaction was otherwise the product of a valid business judgment."[106] This reflects the "rule . . . that where officers and directors are under an influence which sterilizes their discretion, they cannot be considered proper persons to conduct litigation on behalf of the corporation. Thus, **[*21]** demand would be futile."[107]

The *Rales* test applies in all other circumstances. Under *Rales*, demand is excused as futile if the complaint alleges particularized facts creating a "reasonable doubt that, as of the time the complaint is filed," a majority of the demand board "could have properly exercised its independent and disinterested business judgment in responding to a demand."[108] "Fundamentally, *Aronson* and *Rales* both 'address the same question of whether the board can exercise its business judgment on the corporat[ion]'s behalf'in considering demand."[109]

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[98] Op. at 16.

[99] *Aronson*, 473 A.2d at 811.

[100] *Lenois*, 2017 Del. Ch. LEXIS 784, 2017 WL 5289611 at *9.

[101] *Id.* (alterations in original) (first quoting *Aronson*, 473 A.2d at 811-12; and then quoting *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988)).

[102] *Brehm*, 746 A.2d at 254.

[103] *See, e.g., White v. Panic*, 783 A.2d 543, 549 (Del. 2001).

[104] *Aronson*, 473 A.2d at 805; *Rales*, 634 A.2d at 927.

[105] *See, e.g., Rales*, 634 A.2d at 933.

[106] *Aronson*, 473 A.2d at 814.

[107] *Id.* (citations omitted).

[108] *Rales*, 634 A.2d at 934.

[109] *Lenois*, 2017 Del. Ch. LEXIS 784, 2017 WL 5289611, at *9 (quoting *Kaplan*, 540 A.2d at 730).

For this reason, the Court of Chancery has recognized that the broader reasoning of *Rales* encompasses *Aronson*, and therefore the *Aronson* test is best understood as a special application of the *Rales* test.[110]

While Delaware law recognizes that there are circumstances where making a demand would be futile because a majority of the directors "are under an influence which sterilizes their discretion" and "cannot be considered proper persons to conduct litigation on behalf of the corporation,"[111] the demand requirement is not excused lightly because derivative litigation upsets the balance of power that the DGCL establishes **[*22]** between a corporation's directors and its stockholders. Thus, the demand-futility analysis provides an important doctrinal check that ensures the board is not improperly deprived of its decision-making authority, while at the same time leaving a path for stockholders to file a derivative action where there is reason to doubt that the board could bring its impartial business judgment to bear on a litigation demand.

In this case, Tri-State alleged that demand was excused as futile for several reasons, including that the board's negotiation and approval of the Reclassification would not be "protected by the business judgment rule" because "[t]heir approval was not fully informed" or "duly considered,"[112] and that a majority of the directors on the Demand Board lacked independence from Zuckerberg.[113] The Court of Chancery held that Tri-State failed to plead with particularity facts establishing that demand was futile and dismissed the complaint because it did not comply with Court of Chancery Rule 23.1.[114]

On appeal, Tri-State raises two issues with the Court of Chancery's demand-futility analysis. First, Tri-State argues that the Court of Chancery erred by **[*23]** holding that exculpated care violations do not satisfy the second prong of the *Aronson* test.[115] Second, Tri-State argues that its complaint contained particularized allegations establishing that a majority of the directors on the Demand Board were beholden to Zuckerberg.[116]

For the reasons provided below, this Court affirms the Court of Chancery's judgment.

A. Exculpated Care Violations Do Not Satisfy *Aronson's* Second Prong

The directors and officers of a Delaware corporation owe two overarching fiduciary duties—the duty of care and the duty of loyalty.[117] "[P]redicated upon concepts of gross negligence," the duty of care requires that fiduciaries inform

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[110] *See, e.g., Hughes v. Hu*, 2020 Del. Ch. LEXIS 162, 2020 WL 1987029, at *12 (Del. Ch. Apr. 27, 2020); *In re Wal-Mart Stores, Inc. Del. Derivative Litig.*, 2016 Del. Ch. LEXIS 75, 2016 WL 2908344, at *11 (Del. Ch. May 13, 2016); *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 Del. Ch. LEXIS 33, 2006 WL 391931, at *4 (Del. Ch. Feb. 13, 2006).

[111] *Aronson*, 473 A.2d at 814.

[112] A47. The complaint also contains conclusory allegations that the Director Defendants acted in bad faith. *Id.* (The Director Defendants' "approval was not fully informed, not duly considered, *and was not made in good faith* for the best interests of Facebook."). On appeal, Tri-State concedes that the complaint did not plead with particularity that a majority of the Demand Board was subject to liability for acting in bad faith. *Compare* Op. at 895-900 (holding that the complaint did not allege with particularity bad faith claims against Hastings, Thiel, or Bowles) *with* Opening Br. (not contesting this holding). Accordingly, the Court does not address whether demand is excused as futile under the second prong of the *Aronson* test because a majority of the Demand Board committed *non-exculpated* breaches of their fiduciary duties.

[113] *See* A45-63.

[114] Op. at 900-01.

[115] Opening Br. 23-36.

[116] *Id.* at 37-47.

[117] *See, e.g., Dohmen v. Goodman*, 234 A.3d 1161 (Del. 2020) ("Directors of Delaware corporations owe duties of care and loyalty to the corporation and its stockholders." (citing *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006))); *Gantler v. Stephens*, 965 A.2d 695, 708-709 (Del. 2009) (holding "that corporate officers owe fiduciary duties that are identical to those owed by corporate directors").

themselves of material information before making a business decision and act prudently in carrying out their duties.[118] The duty of loyalty "'requires an undivided and unselfish loyalty to the corporation'and 'demands that there shall be no conflict between duty and self-interest.'"[119]

Tri-State alleges that the Director Defendants breached their duty of care in negotiating and approving the Reclassification. Section 102(b)(7) of the DGCL authorizes corporations to adopt a charter provision insulating directors from liability for breaching their duty of **[*24]** care:

> "[T]he certificate of incorporation may . . . contain any or all of the following matters:
> (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; . . . or (iv) for any transaction from which the director derived an improper personal benefit.

Facebook's charter contains a Section 102(b)(7) clause;[120] as such, the Director Defendants face no risk of personal liability from the allegations asserted in this action. Thus, Tri-State's demand-futility allegations raise the question whether a derivative plaintiff can rely on exculpated care violations to establish that demand is futile under the second prong of the *Aronson* test. The Court of Chancery held that exculpated care claims do not excuse demand because the second prong of the *Aronson* test focuses on whether a director faces a substantial **[*25]** likelihood of liability.[121] Tri-State argues that this analysis was wrong because *Aronson's* second prong focuses on whether the challenged transaction "satisfies the applicable standard of review," not on whether directors face a substantial likelihood of liability.[122]

The following discussion is divided into three parts. The first part affirms the Court of Chancery's holding that, in light of subsequent developments, exculpated care claims do not excuse demand under *Aronson's* second prong. The second part explains why Tri-State's counterarguments do not change our analysis. The third part adopts the Court of Chancery's three-part test as the universal test for demand futility.

1. The second prong of *Aronson* focuses on whether the directors face a substantial likelihood of liability

The main question on appeal is whether allegations of exculpated care violations can establish that demand is excused under *Aronson's* second prong. According to Tri-State, the second prong excuses demand whenever the complaint raises a reasonable doubt that the challenged transaction was a valid exercise of business judgment, regardless of whether the directors face a substantial likelihood **[*26]** of liability for approving the challenged transaction. Thus, exculpated care violations can establish that demand is futile.[123]

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[118] *See, e.g.*, *Aronson*, 473 A.2d at 812.

[119] *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 721 (Del. 2020) (citations omitted) (quoting *Guth v. Loft*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939)).

[120] App. to Answering Br. 77 ("Limitation of Liability. To the fullest extent permitted by law, no director of the corporation shall be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. Without limiting the effect of the preceding sentence, if the General Corporation Law is hereafter amended to authorize the further elimination or limitation of the liability of a director, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law, as so amended." (emphasis removed)).

[121] Op. at 878-86.

[122] Opening Br. 26.

[123] *See id.* at 23-36.

Tri-State's argument hinges on the plain language of *Aronson's* second prong, which focuses on whether "the challenged transaction was . . . the product of a valid business judgment":

> [I]n determining demand futility, the Court of Chancery . . . must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) *the challenged transaction was otherwise the product of a valid business judgment*. Hence, the Court of Chancery must make two inquiries, one into the independence and disinterestedness of the directors and *the other into the substantive nature of the challenged transaction and the board's approval thereof*.[124]

Later opinions issued by this Court contain similar language that can be read to suggest that *Aronson's* second prong focuses on the propriety of the challenged transaction.[125] These passages do not address, however, why *Aronson* used the standard of review as a proxy for whether the board could impartially consider a litigation demand. The likely answer is that, **[*27]** before the General Assembly adopted Section 102(b)(7) in 1995,[126] rebutting the business judgment rule through allegations of care violations exposed directors to a substantial likelihood of liability. Thus, even if the demand board was independent and disinterested with respect to the challenged transaction, the litigation presented a threat that would "sterilize [the board's] discretion" with respect to a demand.[127]

Aronson supports this conclusion. For example, in *Aronson* the Court noted that, although naming directors as defendants is not enough to establish that demand would be futile, "in rare cases *a transaction* may be so egregious on its face that board approval cannot meet the test of business judgment, and a *substantial likelihood of liability* therefore exists. . . . [I]n that context demand is excused."[128] This passage helps to illuminate the connection that the Court drew between rebutting the business judgment rule and the board's ability to consider a litigation demand. At that time, if the business judgment rule did not apply, allowing the derivative litigation to go forward would expose **[*28]** the directors to a substantial likelihood of liability for breach-of-care claims supported by well-pleaded factual allegations. It is reasonable to doubt that a director would be willing to take that personal risk. Thus, demand is excused.

On the other hand, if the business judgment rule would apply, allowing the derivative litigation to go forward would expose the directors to a minimal threat of liability. A remote threat of liability is not a good enough reason to deprive the board of control over the corporation's litigation assets. Thus, demand is required.

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[124] *Aronson*, 473 A.2d at 814 (emphasis added).

[125] *See, e.g., Levine v. Smith*, 591 A.2d 194, 205-06 (Del. 1991) ("Assuming a plaintiff cannot prove that directors are interested or otherwise not capable of exercising independent business judgment, a plaintiff in a demand futility case must plead particularized facts creating a reasonable doubt as to the 'soundness' of the challenged transaction sufficient to rebut the presumption that the business judgment rule attaches to the transaction."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *C.L. Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996) (One ground for alleging with particularity that demand would be futile is that a 'reasonable doubt' exists that the board is capable of making an independent decision to assert the claim if demand were made. The basis for claiming demand excusal would normally be that . . . *the underlying transaction* is not the product of a valid exercise of business judgment." (citations omitted)), *overruled on other grounds by Brehm*, 746 A.2d at 244. *But see Kaplan*, 540 A.2d at 732 ("The demand futility test established in *Aronson* provides a standard for determining whether the directors who approved the challenged transaction are under an influence which precludes them from being 'considered the proper persons to conduct the litigation on behalf of the corporation." (quoting *Aronson*, 473 A.2d at 814)).

[126] 1995 Delaware Laws Ch. 79 (S.B. 175).

[127] *Aronson*, 473 A.2d at 814.

[128] *Id.* at 815 (emphasis added) (citing *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599 (Del. Ch. 1974), *aff'd* 316 A.2d 619; *Cottrell v. Pawcatuck, Co.*, 36 Del. Ch. 169, 128 A.2d 225 (Del. 1956)).

Although not unanimous,[129] the weight of Delaware authority since the enactment of Section 102(b)(7) supports holding that exculpated care violations do not excuse demand under *Aronson's* second prong.[130] For example, in *Lenois*, the Court of Chancery held that the second prong focuses on whether director-defendants face a substantial likelihood of liability:

> [W]here an exculpatory charter provision exists, demand is excused as futile under the second prong of *Aronson* with a showing that a majority of the board faces a substantial likelihood of liability for non-exculpated claims. That a non-exculpated claim may be brought against less than a majority **[*29]** of the board or some other individual at the company, or that the board committed exculpated duty of care violations alone, will not affect the board's right to control a company's litigation.[131]

In reaching that conclusion, *Lenois* examined several other Court of Chancery decisions holding that Section 102(b)(7) provisions are relevant when assessing whether demand should be excused under *Aronson's* second prong:

> • In *Higher Education Management Group, Inc v. Matthews*, the Court of Chancery noted that because the corporation's charter contained a Section 102(b)(7) provision, and the complaint did "not support an inference of bad faith conduct *by a majority of the Director Defendants*," demand was required because "there would be no recourse for Plaintiffs and no substantial likelihood of liability if the Director Defendants'only failing was that they had not become fully informed."[132]
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> • In *Pfeiffer v. Leedle*, the Court of Chancery held that demand was "excused under the second prong of *Aronson*" because the board committed "breaches of the duty of loyalty" that "cannot be exculpated" under the charter.[133]
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> • In *In re Goldman Sachs*, the Court of Chancery noted that where a corporation's charter contains a Section 102(b)(7) provision, **[*30]** the second prong of *Aronson* requires that the plaintiff "plead particularized facts that demonstrate that the directors acted with scienter; i.e., there was an 'intentional dereliction of duty' or a 'conscious disregard' for their responsibilities, amount to bad faith."[134] In other words, to establish that making a demand would be futile under the second prong of *Aronson* a derivative complaint would have to raise a reasonable doubt that the directors faced a substantial likelihood of liability for committing *non-exculpated* breaches of their fiduciary duties.[135]
>
> • In *In re Lear*, the Court of Chancery reached the same conclusion that where a corporation's charter has a Section 102(b)(7) provision, "the plaintiffs [must] plead particularized facts supporting an inference that the directors committed a breach of their fiduciary duty of loyalty" by "act[ing] in bad faith."[136]
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> • In *Disney I*, the Court of Chancery held that making a demand would be futile because the complaint raised a reasonable "doubt whether

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[129] *See McPadden v. Sidhu*, 964 A.2d 1262, 1271-73 (Del. Ch. 2008) (holding that exculpated breach-of-care claims can excuse demand under the second prong of the *Aronson* test).

[130] *See, e.g., Lenois*, 2017 Del. Ch. LEXIS 784, 2017 WL 5289611, at *12-14 (collecting cases).

[131] 2017 Del. Ch. LEXIS 784, [WL] at *14.

[132] 2014 Del. Ch. LEXIS 224, 2014 WL 5573325, at *11, *11 n.63 (Del. Ch. Nov. 3, 2014).

[133] 2013 Del. Ch. LEXIS 272, 2013 WL 5988416, at *9 (Del. Ch. Nov. 8, 2013).

[134] 2011 Del. Ch. LEXIS 151, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011).

[135] *See id.*

[136] 967 A.2d 640, 657 (Del. Ch. 2008).

> the board's actions were taken honestly and in good faith," exposing the directors to liability for non-exculpated breaches of their fiduciary duties.[137]

Several opinions issued after *Lenois* support the same **[*31]** analysis:[138]

> • In *Ellis v. Gonzalez*, the Court of Chancery held that because the corporation's charter contained a Section 102(b)(7) provision, "under either *Aronson* or *Rales*, the question . . . is the same: Does the Complaint adequately allege that a majority of . . . [the] board faces a substantial likelihood of liability for breaching the duty of loyalty?"[139]
>
> • In *Steinberg v. Bearden*, the Court of Chancery's demand-futility analysis focused on whether "a majority of the Board face[d] a substantial threat of personal liability . . . such that the Board could not consider a demand impartially."[140]

This Court's opinion in *In re Cornerstone Therapeutics, Inc. Stockholder Litigation*, changed the landscape even more.[141] Before *Cornerstone*, there was some uncertainty about how to apply a Section 102(b)(7) provision when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6). Some courts held that an exculpation clause could warrant dismissing a complaint alleging care claims.[142] Others, particularly where the entire fairness standard of review might apply, ruled that more factual development was needed to determine whether the director's breach would be exculpated.[143] Thus, a complaint alleging exculpated care violations *might* compromise a director's ability **[*32]** to impartially consider a litigation demand by exposing them to the distraction of protracted litigation, public scrutiny, and potential reputational harm, even if the risk was low that the director would be found liable for breaching their fiduciary duties.

Cornerstone eliminated any uncertainty and held that where a corporation's charter contains a Section 102(b)(7) provision, "[a] plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct."[144] Thus, under current law a Section 102(b)(7) provision removes the threat of liability and protracted litigation for breach of care claims. As such, *Cornerstone* eliminated "any continuing vitality from *Aronson's* use of the standard of review for the challenged transaction as a proxy for whether directors face a substantial likelihood of liability sufficient to render demand futile."[145]

Accordingly, this Court affirms the Court of

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[137] 825 A.2d 275, 286 (Del. Ch. 2003).

[138] The Court acknowledges that some of the opinions applied the *Rales* test for demand futility.

[139] 2018 Del. Ch. LEXIS 227, 2018 WL 3360816, at *6 (Del. Ch. July 10, 2018) (citations omitted).

[140] 2018 Del. Ch. LEXIS 169, 2018 WL 2434558, at *8-9 (Del. Ch. May 30, 2018).

[141] 115 A.3d 1173, 1186-87 (Del. 2015) ("[W]hen the plaintiffs have pled no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors.").

[142] *See, e.g., Pfeiffer*, 2013 Del. Ch. LEXIS 272, 2013 WL 5988416, at *9 (considering a 102(b)(7) provision when deciding to dismiss a complaint for failing to comply with Rule 23.1); *Malpiede v. Townson*, 780 A.2d 1075, 1094-96 (holding that the Court could apply a 102(b)(7) provision clause when considering a motion to dismiss a suit challenging an arm's length merger approved by disinterested stockholders).

[143] *See, e.g., Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999) (holding that a Section 102(b)(7) provision did not justify granting summary judgment because there were disputed facts about whether the directors committed non-exculpated breaches of their fiduciary duties).

[144] *See Cornerstone*, 115 A.3d at 1186-87.

[145] Op. at 885.

Chancery's holding that exculpated care claims do not satisfy *Aronson's* second prong. This Court's decisions construing *Aronson* have consistently **[*33]** focused on whether the demand board has a connection to the challenged transaction that would render it incapable of impartially considering a litigation demand.[146] When *Aronson* was decided, raising a reasonable doubt that directors breached their duty of care exposed them to a substantial likelihood of liability and protracted litigation, raising doubt as to their ability to impartially consider demand. The ground has since shifted, and exculpated breach of care claims no longer pose a threat that neutralizes director discretion. These developments must be factored into demand-futility analysis, and Tri-State has failed to provide a reasoned explanation of why rebutting the business judgment rule should automatically render directors incapable of impartially considering a litigation demand given the current landscape. For these reasons, the Court of Chancery's judgment is affirmed.

2. Tri-State's other arguments do not change the analysis

Tri-State raises a few more counterarguments that do not change the Court's analysis.

First, Tri-State argues that construing the second prong of *Aronson* to focus on whether directors face a substantial likelihood of liability **[*34]** erases any distinction between the two prongs of the *Aronson* test.[147] The argument goes like this. If directors face a substantial likelihood of liability for approving the challenged transaction, then they are interested with respect to the challenged transaction. The first prong of *Aronson* already addresses whether directors are interested in the challenged transaction. Thus, construing the second prong to require a substantial risk of liability makes it redundant.[148] This argument misconstrues *Aronson*. The first prong of *Aronson* focuses on whether the directors had a personal interest in the challenged transaction (i.e., a personal financial benefit from the challenged transaction that is not equally shared by the stockholders).[149] This is a different consideration than whether the directors face a substantial likelihood of liability for approving the challenged transaction, even if they received nothing personal from the challenged transaction. The second prong excuses demand in that circumstance. Thus, the first and second prongs of *Aronson* perform separate functions, even if those functions are complementary.

Second, Tri-State argues that this holding places an unfair burden **[*35]** on plaintiffs and will fail to deter controllers from pressuring boards to approve unfair transactions.[150] Although not entirely clear, Tri-State appears to argue that because the entire fairness standard of review applies *ab initio* to a conflicted-controller transaction,[151] demand is automatically excused under *Aronson's* second prong. As the Court of Chancery noted below, some cases have suggested that demand is automatically excused under *Aronson's* second prong if the complaint raises a reasonable doubt

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[146] *See, e.g., Levine*, 591 A.2d at 205 ("The premise of a shareholder claim of futility of demand is that a majority of the board of directors either has a financial interest in the challenged transaction or lacks independence or otherwise failed to exercise due care. On either showing, it may be inferred that the Board is *incapable* of exercising its power and authority to pursue the derivative claims directly."); *C.L. Grimes*, 673 A.2d at 1216 ("One ground for alleging with particularity that demand would be futile is that a 'reasonable doubt' exists that the board is capable of making an independent decision to assert the claim if demand were made." (quoting *Aronson*, 473 A.2d at 814)); *see also Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008) ("A stockholder may not pursue a derivative suit to assert a claim of the corporation unless the stockholder (a) [makes a demand] . . .; or (b) establishes that pre-suit demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation." (citation omitted)).

[147] *See* Opening Br. 27-28.

[148] *See id.*

[149] 473 A.2d at 814.

[150] *See* Opening Br. 35-36.

[151] *See, e.g., Kahn v. Tremont Corp.*, 694 A.2d 422, 428-29 (Del. 1997).

that the business judgment standard of review will apply, even if the business judgment rule is rebutted for a reason unrelated to the conduct or interests of a majority of the directors on the demand board.[152] The Court of Chancery's case law developed in a different direction, however, concluding that demand is not futile under the second prong of *Aronson* simply because entire fairness applies *ab initio* to a controlling stockholder transaction. As the Court of Chancery has explained, the theory that demand should be excused simply because an alleged controlling stockholder stood on both sides of the transaction is "inconsistent with Delaware Supreme Court authority that focuses the test **[*36]** for demand futility exclusively on the ability of a corporation's board of directors to impartially consider a demand to institute litigation on behalf of the corporation—including litigation implicating the interests of a controlling stockholder."[153]

Further, Tri-State's argument presumes that a stockholder has a general right to control corporate claims. Not so. The directors are tasked with managing the affairs of the corporation, including whether to file action on behalf of the corporation. A stockholder can only displace the directors if the stockholder alleges with particularity that "the directors are under an influence which sterilizes their discretion" such that "they cannot be considered proper persons to conduct litigation on behalf of the corporation."[154] As such, enforcing the demand requirement where a stockholder has only alleged exculpated conduct does not "undermine shareholder rights;" instead, it recognizes the delegation of powers outlined in the DGCL.

Finally, Tri-State's argument collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction. It is entirely possible **[*37]** that an independent and disinterested board, exercising its impartial business judgment, could decide that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed. Yet, Tri-State asks the Court to deprive directors and officers of the power to make such a decision, at least where the derivative action would challenge a conflicted-controller transaction. This rule may have its benefits, but it runs counter to the "cardinal precept" of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights.[155]

For these reasons, Tri-State cannot satisfy the demand requirement by pleading—for reasons unrelated to the conduct or interests of a majority of the directors on the demand board—that the entire fairness standard of review would apply to the Reclassification. Rather, to satisfy Rule 23.1, Tri-State must plead with particularity facts establishing that a majority of the directors on the demand board are subject to an influence that would sterilize their discretion with respect to the litigation demand.

Third, **[*38]** Tri-State argues that this holding is contrary to *Brehm v. Eisner*,[156] *H&N Management Group v. Couch*,[157] and *McPadden*.[158] This Court's opinion in *Brehm* contains language that can be read to suggest that the second prong of the *Aronson* test focuses on the propriety of the challenged transaction rather than on whether the directors face a substantial likelihood of liability for

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[152] Op. 880-882.

[153] *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 2015 WL 4192107, at *1 (Del. Ch. 2015); *see, e.g., In re BGC Partners, Inc. Derivative Litig.*, 2019 Del. Ch. LEXIS 1289, 2019 WL 4745121, at *7-9 (Del. Ch. Sept. 30, 2019) (rejecting the plaintiff's argument that demand was automatically excused under *Aronson's* second prong because the derivative complaint challenged a conflicted-controller transaction).

[154] *Aronson*, 473 A.2d at 814.

[155] *See Aronson*, 473 A.2d at 811.

[156] 746 A.2d 244 (Del. 2000).

[157] 2017 Del. Ch. LEXIS 140, 2017 WL 3500245 (Del. Ch. Aug. 1, 2017).

[158] 964 A.2d at 1262.

approving the transaction. For example, the Court's demand-futility analysis focused on duty of care violations even though the opinion was issued after the legislature adopted Section 102(b)(7) and it appears that Disney's corporate charter had an exculpation clause.[159] Nonetheless, the Court did not hold that exculpated claims can establish demand futility,[160] and on remand the plaintiff relied on *non-exculpated* claims to establish that demand was futile.[161] Thus, *Brehm* did not hold that exculpated care violations can excuse demand under *Aronson's* second prong.

H&N Management is inapposite because the corporation's charter did not exculpate directors for breaches of the duty of care.[162] Thus, the Court of Chancery did not address whether exculpated claims could excuse demand under the second prong **[*39]** of the *Aronson* test.

This leaves *McPadden*, which appears to be the only Delaware decision squarely holding that exculpated care violations can excuse demand under the second prong of *Aronson*.[163] It is understandable that the Court of Chancery reached this holding given the plain language of *Aronson*. Nonetheless, given the subsequent developments in Delaware law, it is our view that exculpated care violations no longer pose a sufficient threat to excuse demand under the second prong of the *Aronson* test. Rather, the second prong requires particularized allegations raising a reasonable doubt that a majority of the demand board is subject to a sterilizing influence because directors face a substantial likelihood of liability for engaging in the conduct that the derivative claim challenges.

3. This Court adopts the Court of Chancery's three-part test for demand futility

This issue raises one more question—whether the three-part test for demand futility the Court of Chancery applied below is consistent with *Aronson*, *Rales*, and their progeny. The Court of Chancery noted that turnover on Facebook's board, along with a director's decision to abstain from voting on the Reclassification, made **[*40]** it difficult to apply the *Aronson* test to the facts of this case:

> The composition of the Board in this case exemplifies the difficulties that the *Aronson* test struggles to overcome. The Board has nine members, six of whom served on the Board when it approved the Reclassification. Under a strict reading of *Rales*, because the Board does not have a new majority of directors, *Aronson* provides the governing test. But one of those six directors abstained from the vote on the Reclassification, meaning that the *Aronson* analysis only has traction for five of the nine. *Aronson* does not provide guidance about what to do with either the director who abstained or the two directors who joined the Board later. The director who abstained from voting on the Reclassification suffers from other conflicts that renders her incapable of considering a demand, yet a strict reading of *Aronson* only focuses on the challenged decision and therefore would not account for those conflicts. Similarly, the plaintiff alleges that one of the directors who subsequently joined the Board

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[159] *See Brehm*, 746 A.2d at 259 ("Pre-suit demand will be excused in a derivative suit only if the Court of Chancery in the first instance, and this Court in its *de novo* review, conclude that the particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decision[-]making process, *measured by concepts of gross negligence*, included consideration of all material information reasonably available."); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) (stating that Disney had an exculpation clause).

[160] *Brehm*, 746 A.2d at 262-63.

[161] *In re Walt Disney*, 825 A.2d at 289-90.

[162] 2019 Del. Ch. LEXIS 1289, 2017 WL 3500245, at *7 ("Defendants do not benefit from a provision that exculpates them for grossly negligent conduct . . . .").

[163] 964 A.2d at 1270-75 (holding that demand was excused under the second prong of *Aronson* "because plaintiff has pleaded a duty of care violation with particularity sufficient to create a reasonable doubt that the transaction at issue was the product of a valid exercise of business judgment," but dismissing the complaint as to certain directors due to a Section 102(b)(7) provision).

> has conflicts that render him incapable of considering a demand, but a strict reading of *Aronson* would not account for that either. Precedent **[*41]** thus calls for applying *Aronson*, but its analytical framework is not up to the task. The *Rales* test, by contrast, can accommodate all of these considerations.[164]

The court also suggested that in light of the developments discussed above, "*Aronson* is broken in its own right because subsequent jurisprudential developments have rendered non-viable the core premise on which *Aronson* depends—the notion that an elevated standard of review standing alone results in a substantial likelihood of liability sufficient to excuse demand. Perhaps the time has come to move on from *Aronson* entirely."[165]

To address these concerns, the Court of Chancery applied the following three-part test on a director-by-director basis to determine whether demand should be excused as futile:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
> (ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and
>
> (material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on **[*42]** any of the claims that are the subject of the litigation demand.[166]

This approach treated "*Rales* as the general demand futility test," while "draw[ing] upon *Aronson*-like principles when evaluating whether particular directors face a substantial likelihood of liability as a result of having participated in the decision to approve the Reclassification."[167]

This Court adopts the Court of Chancery's three-part test as the universal test for assessing whether demand should be excused as futile. When the Court decided *Aronson*, it made sense to use the standard of review to assess whether directors were subject to an influence that would sterilize their discretion with respect to a litigation demand. Subsequent changes in the law have eroded the ground upon which that framework rested. Those changes cannot be ignored, and it is both appropriate and necessary that the common law evolve in an orderly fashion to incorporate those developments. The Court of Chancery's three-part test achieves that important goal. Blending the *Aronson* test with the *Rales* test is appropriate because "both 'address the same question of whether the board can exercise its business judgment on the corporat[ion]'s behalf in **[*43]** considering demand";[168] and the refined test does not change the result of demand-futility analysis.[169]

Further, the refined test "refocuses the inquiry on the decision regarding the litigation demand, rather than the decision being challenged."[170] Notwithstanding text focusing on the propriety of the challenged transaction, this approach is consistent with the overarching concern that *Aronson* identified: whether the directors on the

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[164] Op. at 890.

[165] *Id.* at 889-90.

[166] *Id.* at 890.

[167] *Id.*

[168] *Lenois*, 2017 Del. Ch. LEXIS 784, 2017 WL 5289611, at *9 (quoting *Kaplan*, 540 A.2d at 730).

[169] If a director is interested in the challenged transaction—or lacks independence from someone else who is interested in the transaction—then the first prong of *Aronson* excuses demand with respect to that director. *Aronson*, 473 A.2d at 814. The first and third prongs of the refined three-part test yield the same result. Op. at 890. Similarly, if the derivative litigation would expose a director to a substantial likelihood of liability, then the demand requirement is excused as futile with respect to that director under the second prong of the *Aronson* test and the second prong of the refined test. *See Aronson*, 473 A.2d at 814; Op. at 890. Thus, the refined three-part test excuses demand whenever the *Aronson* test would excuse demand.

[170] Op. at 887.

demand board "cannot be considered proper persons to conduct litigation on behalf of the corporation" because they "are under an influence which sterilizes their discretion."[171] The purpose of the demand-futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand. That is a different consideration than whether the derivative claim is strong or weak because the challenged transaction is likely to pass or fail the applicable standard of review. It is helpful to keep those inquiries separate. And the Court of Chancery's three-part test is particularly helpful where, **[*44]** like here, board turnover and director abstention make it difficult to apply the *Aronson* test as written.

Finally, because the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law.

Accordingly, from this point forward, courts should ask the following three questions on a director-by-director basis when evaluating allegations of demand futility:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

If the answer to any of the questions is "yes" for at least half of the members of the demand board, **[*45]** then demand is excused as futile. It is no longer necessary to determine whether the *Aronson* test or the *Rales* test governs a complaint's demand-futility allegations.

B. The Complaint Does Not Plead with Particularity Facts Establishing that Demand Would Be Futile

The second issue on appeal is whether Tri-State's complaint pleaded with particularity facts establishing that a litigation demand on Facebook's board would be futile. The Court resolves this issue by applying the three-part test adopted above on a director-by-director basis.

The Demand Board was composed of nine directors. Tri-State concedes on appeal that two of those directors, Chenault and Zients, could have impartially considered a litigation demand.[172] And Facebook does not argue on appeal that Zuckerberg, Sandberg, or Andreessen could have impartially considered a litigation demand.[173] Thus, in order to show that demand is futile, Tri-State must sufficiently allege that two of the following directors could not impartially consider demand: Thiel, Hastings, Bowles, and Desmond-Hellmann.

Tri-State concedes on appeal that neither Thiel, Hastings, Bowles, nor Desmond-Hellmann had a personal interest in the Reclassification. **[*46]** [174] This eliminates the possibility that demand could be excused under the first prong of the demand-

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[171] *Aronson*, 473 A.2d at 814.

[172] *Compare* Op. at 895-900 (holding that the complaint did not establish that Chenault or Zients lacked independence) *with* Opening Br. (not challenging that holding).

[173] *Compare* Op. at 893 (assuming that Zuckerberg, Sandberg, and Andreessen were incapable of impartially considering a litigation demand) *with* Answering Br. (neither conceding nor challenging that assumption for the purpose of considering the motion to dismiss).

[174] *Compare* Op. 892-901 (holding that the complaint did not allege that these directors had a personal interest); *with* Opening Br. (not contesting that holding).

futility test, as none of the remaining four directors obtained a material personal benefit from the alleged misconduct that is the subject of the litigation demand.

Similarly, there is no dispute that Facebook has a broad Section 102(b)(7) provision;[175] and Tri-State concedes on appeal that the complaint does not plead with particularity that Thiel, Hastings, Bowles, or Desmond-Hellmann committed a *non-exculpated* breach of their fiduciary duties with respect to the Reclassification.[176] This eliminates the possibility that demand could be excused under the second prong of the demand-futility test, as none of the remaining four directors would face a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand.

This leaves one unanswered question: whether the complaint pleaded with particularity facts establishing that two of the four remaining directors lacked independence from Zuckerberg.

"The primary basis upon which a director's independence must be measured is whether the director's decision is based on the corporate **[*47]** merits of the subject before the board, rather than extraneous considerations or influences."[177] Whether a director is independent "is a fact-specific determination" that depends upon "the context of a particular case."[178] To show a lack of independence, a derivative complaint must plead with particularity facts creating "a reasonable doubt that a director is . . . so 'beholden' to an interested director . . . that his or her 'discretion would be sterilized.'"[179]

"A plaintiff seeking to show that a director was not independent must satisfy a materiality standard."[180] The plaintiff must allege that "the director in question had ties to the person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties."[181] In other words, the question is "whether, applying a subjective standard, those ties were *material*, in the sense that the alleged ties could have affected the impartiality of the individual director."[182] "Our law requires that all the pled facts regarding a director's relationship to the interested party be considered in full context in making the, admittedly imprecise, pleading stage determination **[*48]** of independence."[183] And while "the plaintiff is bound to plead particularized facts in . . . a derivative complaint, so too is the court bound to draw all inferences from those particularized facts in favor of the plaintiff, not the defendant, when dismissal of a derivative complaint is sought."[184]

"A variety of motivations, including friendship,

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[175] *See, e.g.*, App. to Answering Br. 77.

[176] *Compare* Op. 892-901(holding that the complaint did not allege with particularity that these directors committed *non-exculpated* breaches of their fiduciary duties); *with* Opening Br. (not contesting that holding).

[177] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (citing *Rales*, 634 A.2d at 936); *see also Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016) ("At the pleading stage, a lack of independence turns on 'whether the plaintiffs have pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel either subject to the interested party's dominion or beholden to that interested party.'" (quoting *Del. C'ty Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1024 n.25 (Del. 2015))).

[178] *Beam*, 845 A.2d at 1049.

[179] *Id.* at 1050 (quoting *Rales*, 634 A.2d at 936).

[180] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995)); *Brehm*, 746 A.2d at 259 n.49), *overruled on other grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

[181] *Id.*

[182] *Id.* (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del.1995); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del.1993); *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996)).

[183] *Sandys*, 152 A.3d at 128 (quoting *Sanchez*, 124 A.3d at 1024 n.25).

[184] *Id.*

may influence the demand futility inquiry. But, to render a director unable to consider demand, a relationship must be of a bias-producing nature."[185] Alleging that a director had a "personal friendship" with someone else, or that a director had an "outside business relationship," are "insufficient to raise a reasonable doubt" that the director lacked independence.[186] "Consistent with [the] predicate materiality requirement, the existence of some financial ties between the interested party and the director, without more, is not disqualifying."[187]

Like the Court of Chancery below, we hold that Tri-State failed to raise a reasonable doubt that either Thiel, Hastings, or Bowles was beholden to Zuckerberg.[188]

1. Hastings

The complaint does not raise a reasonable doubt that Hastings lacked independence from Zuckerberg. According **[*49]** to the complaint, Hastings was not independent because:

> • "Netflix purchased advertisements from Facebook at relevant times," and maintains "ongoing and potential future business relationships with" Facebook.[189]
>
> • According to an article published by *The New York Times*, Facebook gave to Netflix and several other technology companies "more intrusive access to users' personal data than it ha[d] disclosed, effectively exempting those partners from privacy rules."[190]
>
> • "Hastings (as a Netflix founder) is biased in favor of founders maintaining control of their companies."[191]
>
> • "Hastings has . . . publicly supported large philanthropic donations by founders during their lifetimes. Indeed, both Hastings and Zuckerberg have been significant contributors . . . [to] a well-known foundation known for soliciting and obtaining large contributions from company founders and which manages donor funds for both Hastings . . . and Zuckerberg . . . ."[192]

These allegations do not raise a reasonable doubt that Hastings was beholden to Zuckerberg. Even if Netflix purchased advertisements from Facebook, the complaint does not allege that those purchases were material to Netflix or that Netflix received anything other **[*50]** than arm's length terms under those agreements. Similarly, the complaint does not make any particularized allegations explaining how obtaining special access to Facebook user data was material to Netflix's business interests, or that Netflix used its special access to user data to obtain any concrete benefits in its own business.

Further, having a bias in favor of founder-control does not mean that Hastings lacks independence from Zuckerberg. Hastings might have a good-faith belief that founder control maximizes a corporation's value over the long-haul. If so, that good-faith belief would play a valid role in Hasting's exercise of his impartial business judgment.[193]

Finally, alleging that Hastings and Zuckerberg have

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[185] *Beam*, 845 A.2d at 1050.

[186] *Id.*

[187] *M&F Worldwide*, 88 A.3d at 649.

[188] Because the complaint failed to raise a reasonable doubt that Hastings, Thiel, or Bowles were not independent, this Opinion need not address whether Desmond-Hellmann was beholden to Zuckerberg.

[189] A60.

[190] A61.

[191] A60.

[192] *Id.*

[193] *See generally Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 Del. Ch. LEXIS 67 , 2017 WL 1437308, at *18 (Del. Ch. Apr. 14, 2017) ("[T]he fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment." (citation omitted)).

a track record of donating to similar causes falls short of showing that Hastings is beholden to Zuckerberg. As the Court of Chancery noted below, "[t]here is no logical reason to think that a shared interest in philanthropy would undercut Hastings' independence. Nor is it apparent how donating to the same charitable fund would result in Hastings feeling obligated to serve Zuckerberg's interests."[194] Accordingly, the Court affirms the Court of Chancery's holding **[*51]** that the complaint does not raise a reasonable doubt about Hastings's independence.

2. Thiel

The complaint does not raise a reasonable doubt that Thiel lacked independence from Zuckerberg. According to the complaint, Thiel was not independent because:

- "Thiel was one of the early investors in Facebook," is "its longest-tenured board member besides Zuckerberg," and "has . . . been instrumental to Facebook's business strategy and direction over the years."[195]
- "Thiel has a personal bias in favor of keeping founders in control of the companies they created . . . ."[196]
- The venture capital firm at which Thiel is a partner, Founders Fund, "gets 'good deal flow'" from its "high-profile association with Facebook."[197]
- "According to Facebook's 2018 Proxy Statement, the Facebook shares owned by the Founders Fund (*i.e.*, by Thiel and Andreessen) will be released from escrow in connection with" an acquisition.[198]
- "Thiel is Zuckerberg's close friend and mentor."[199]
- In October 2016, Thiel made a $1 million donation to an "organization that paid [a substantial sum to] Cambridge Analytica" and "cofounded the Cambridge Analytica-linked data firm Palantir."[200] Even though "[t]he Cambridge Analytica scandal has exposed **[*52]** Facebook to regulatory investigations"[201] and litigation, Zuckerberg did not try to remove Thiel from the board.
- Similarly, Thiel's "acknowledge[ment] that he secretly funded various lawsuits aimed at bankrupting [the] news website Gawker Media" lead to "widespread calls for Zuckerberg to remove Thiel from Facebook's Board given Thiel's apparent antagonism toward a free press."[202] Zuckerberg ignored those calls and did not seek to remove Thiel from Facebook's board.

These allegations do not raise a reasonable doubt that Thiel is beholden to Zuckerberg. The complaint does not explain why Thiel's status as a long-serving board member, early investor, or his contributions to Facebook's business strategy make him beholden to Zuckerberg. And for the same reasons provided above, a director's good faith belief that founder controller maximizes value does not raise a reasonable doubt that the director lacks independence from a corporation's founder.

While the complaint alleges that Founders Fund "gets 'good deal flow'" from Thiel's "high-profile association with Facebook,"[203] the complaint does not identify a single deal that flowed to—or is expected to flow to—Founders Fund through this **[*53]** association, let alone any deals that would be material to Thiel's interests. The

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[194] Op. at 896.

[195] A57-58.

[196] A58.

[197] *Id.*

[198] *Id.*

[199] A57.

[200] A59.

[201] *Id.*

[202] *Id.*

[203] A58.

complaint also fails to draw any connection between Thiel's continued status as a director and the vesting of Facebook stock related to the acquisition. And alleging that Thiel is a personal friend of Zuckerberg is insufficient to establish a lack of independence.[204]

The final pair of allegations suggest that because "Zuckerberg stood by Thiel" in the face of public scandals, "Thiel feels a sense of obligation to Zuckerberg."[205] These allegations can only raise a reasonable doubt about Thiel's independence if remaining a Facebook director was financially or personally material to Thiel. As the Court of Chancery noted below, given Thiel's wealth and stature, "[t]he complaint does not support an inference that Thiel's service on the Board is financially material to him. Nor does the complaint sufficiently allege that serving as a Facebook director confers such cachet that Thiel's independence is compromised."[206] Accordingly, this Court affirms the Court of Chancery's holding that the complaint does not raise a reasonable doubt about Thiel's independence.

3. Bowles

The complaint does not raise a reasonable **[*54]** doubt that Bowles lacked independence from Zuckerberg. According to the complaint, Thiel was not independent because:

> • "Bowles is beholden to the entire board" because it granted "a waiver of the mandatory retirement age for directors set forth in Facebook's Corporate Governance Guidelines," allowing "Bowles to stand for reelection despite having reached 70 years old before" the May 2018 annual meeting.[207]
> • "Morgan Stanley—a company for which [Bowles] . . . served as a longstanding board member at the time (2005-2017)—directly benefited by receiving over $2 million in fees for its work . . . in connection with the Reclassification . . . ."[208]
> • Bowles "ensured that Evercore and his close friend Altman financially benefitted from the Special Committee's engagement" without properly vetting Evercore's competency or considering alternatives.[209]

These allegations do not raise a reasonable doubt that Bowles is beholden to Zuckerberg or the other members of the Demand Board. The complaint does not make any particularized allegation explaining why the board's decision to grant Bowles a waiver from the mandatory retirement age would compromise his ability to impartially consider a litigation demand **[*55]** or engender a sense of debt to the other directors. For example, the complaint does not allege that Bowles was expected to do anything in exchange for the waiver, or that remaining a director was financially or personally material to Bowles.

The complaint's allegations regarding Bowles's links to financial advisors are similarly ill-supported. None of these allegations suggest that Bowles received a personal benefit from the Reclassification, or that Bowles's ties to these advisors made him beholden to Zuckerberg as a condition of sending business to Morgan Stanley, Evercore, or his "close friend Altman."[210] Accordingly, this Court affirms the Court of Chancery's holding that the complaint does not raise a reasonable doubt about Bowles's independence.[211]

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[204] *See, e.g., Beam*, 845 A.2d at 1050.

[205] Op. at 898.

[206] *Id.* at 898-99.

[207] A56-57.

[208] A57.

[209] *Id.*

[210] *Id.*

[211] The factual section of the complaint also alleges that "Bowles privately told Zuckerberg" that Bowles was "proud to be a small part of [Zuckerberg's] life" after learning about Zuckerberg's plan to make accelerated donations to fulfill his pledge. *See* A33. Tri-State

IV. CONCLUSION

For the reasons provided above, the Court of Chancery's judgment is affirmed.

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did not repeat this allegation in the portion of the complaint addressing demand futility. *See* A56-57. It is therefore unclear whether the complaint relies on this assertion to establish that Bowles lacks independence. Nonetheless, Tri-State has argued below and on appeal that Bowles's expression of gratitude is "hardly a sign of director independence" and is "a harbinger of [his] flawed tenure on the Special Committee." Opening Br. 43. To the extent Tri-State intended to rely on this allegation to help establish that demand is futile, this Court agrees entirely with the Court of Chancery's analysis. "These allegations suggest that Zuckerberg and **[*56]** Bowles had a collegial relationship, which is not sufficient to compromise Bowles's independence." 250 A.3d at 899; *see also Beam*, 845 A.2d at 1050 (noting that the existence of a "personal friendship" is insufficient to establish that a director is not independent).

Neutral
As of: November 30, 2021 7:48 PM Z

DR Distribs., LLC v. 21 Century Smoking, Inc.

United States District Court for the Northern District of Illinois, Western Division

January 19, 2021, Decided; January 19, 2021, Filed

No. 12 CV 50324

Reporter
2021 U.S. Dist. LEXIS 9041 *; 2021 WL 168964

DR Distributors, LLC, Plaintiff-Counterdefendant, v. 21 Century Smoking, Inc, and Brent Duke, Defendants-Counterclaimants, v. CB Distributors, Inc., and Carlos Bengoa, Counterdefendants.

Prior History: DR Distribs., LLC v. 21 Century Smoking, Inc, 2013 U.S. Dist. LEXIS 36315 (N.D. Ill., Mar. 14, 2013)

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For CB Distributors, Inc., Counter Claimant: Brian M Gaynor, LEAD ATTORNEY, Nicoll Davis & Spinella Llp, Paramus, NJ.

For Carlos Bengoa, Counter Claimant: Brian M Gaynor, LEAD ATTORNEY, Nicoll Davis & Spinella Llp, Paramus, NJ; Thomas R. Leavens, LEAD ATTORNEY, Mandell Menkes LLC, Chicago, IL; Peter J. Strand, Mandell Menkes LLC, UNITED STA, Chicago, IL; Travis W Life, Swanson Martin & Bell, LLP, Chicago, IL.

For Carlos Bengoa, Counter Defendant: Travis W Life, Swanson Martin & Bell, LLP, Chicago, IL.

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Judges: Iain D. Johnston, United States District Judge.

Opinion by: Iain D. Johnston

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' first motion to reopen the evidentiary hearing ("Motion") **[*3]** [370] on Plaintiff's motion for sanctions [294], [395]. For the following reasons, the Motion is denied.

BACKGROUND

Plaintiff filed a motion for sanctions on March 25, 2019. Dkts. 294, 395.[1] In the 75-page motion, plaintiff accused defendants and their former counsel of various discovery abuses. Between October 28, 2019 and November 19, 2019, the Court held five days of evidentiary hearings on the motion for sanctions.[2]

During the third day of testimony on November 7, 2019, former defense counsel Thomas Leavens testified regarding his firm's statement of work agreement with his firm's e-discovery vendor in the case, 4Discovery ("4D"), as well as his conversations with defendant Brent Duke regarding the extent of his electronic data. *See* Evid. Hr'g Tr. at 790-833. Mr. Leavens confirmed that 4D provided his firm with a written report for the work it did for his firm for the case in late 2014 and that it probably existed in his firm's files. *Id.* at 821. Plaintiff's counsel asked that that document be produced because it was never produced to them and was relevant to the questions raised by the motion for sanctions (specifically that electronically stored information ("ESI") was spoliated or withheld **[*4]** in the case). Mr. Leavens agreed to look for it. *Id.* Mr. Leavens' counsel, Colin Smith, suggested that he would have sent discovery requests earlier if he had known that discovery was permitted. *Id.* The following exchange occurred between the Court and Mr. Smith:

> THE COURT: Well, it is November 7th, 2019. The motion for sanctions was filed a long time ago. We knew about these hearing dates. We knew 4Discovery was involved. We have a contract with 4Discovery. We have a letter from 4Discovery. I'm -- I think the legal word is -- "flabbergasted" that if 4Discovery completed a report pursuant to the statement of work that that document hasn't been produced to counsel, all counsel, and to me, quite honestly, at this point.
> MR. SMITH: I don't want anybody to get -- and I'm not sure what the state of my knowledge is, but I think what it is is a hit report. It is not a written report.
>
> THE COURT: And I understand that, and I assume you and I are on the same wavelength that their "report" would have been, and their "analysis," produce resultant data to client, which shows the documents where the search terms were hit. If there is that document, I still think it would have been produced somewhere **[*5]** in this litigation. If there is something beyond that, I would think it is relevant to what we are talking about here. The statement of work is informative not only in what it says, but also in what it doesn't say. There are fancy little arrows here. It says: "Identify, Collect, Analyze, Report." "Phase 1: Remote Forensic of Imaging." That's just collection. There is no identify. That's where this whole thing goes sideways. So if there is a report that talks about what we have just --what the testimony is, it would behoove everybody to see that report. Now, if it is a hit report, that shouldn't be hard to find.
> MR. SMITH: Your Honor, we will take a look and see what they are asking.
> THE COURT: And I don't know if it exists.
> MR. SMITH: I don't want to be wrong about

[1] The motion for sanctions was refiled for administrative purposes on March 10, 2020. Dkts. 394, 395.

[2] The Court originally allotted two days for the hearing, but at the parties' request allowed for a total of five days of testimony. Dkts. 334, 358.

> this, but my recollection is that that's all there is, and we will look, and we will be happy to -
> THE COURT: That's fine. And I understand your thought that a report would just be a hit report, but if there is something else out there, it would probably be helpful to know.

Id. at 822-23. Mr. Smith produced 4D's 2015 hit report to plaintiff's counsel on November 11, 2019. *Id.* at 861-62. This was the first time plaintiff's counsel had seen this document. **[*6]** *Id.* Plaintiff's counsel continued questioning Mr. Leavens on November 15, 2019 and briefly focused on the newly tendered 4D hit report. *Id.* at 862-66. The hit report is a spreadsheet detailing the hits from running the parties' 20 agreed search terms against the documents on Mr. Duke's four hard drives during the discovery process in late 2014 and early 2015. *See* Pl. Ex. 91. According to the report, the 20 agreed search terms hit 84,522 unique documents within the subset of electronic data on Mr. Duke's four hard drives after the files were deduplicated[3] and de-nisted.[4] Plaintiff's counsel asked Mr. Leavens why, despite the search terms hitting 84,522 discrete *documents*, former defense counsel tendered a total of approximately 50,000 *pages* of discovery materials to plaintiff in February 2015. Evid. Hr'g Tr. at 863-64. Plaintiff's counsel also asked if Mr. Leavens knew whether anyone on the defense team "culled" the approximately 34,000 apparently missing documents from the production before tendering the materials to plaintiff. Mr. Leavens did not know whether there was a technical explanation or if there was some other discrepancy and then played hot potato by suggesting former counsel Travis Life **[*7]** might know more. *Id.* at 865-66.

Mr. Life also testified on November 15, 2019 regarding his part in the ESI discovery process. Specifically, he testified that when 4D gave him the documents from its ESI search, he only reviewed them for privilege before tendering the production to plaintiff. *Id.* at 1213, 1243-46. That same day, 4D's owner Chad Gough testified that based on the hit report, the total number of hits including "family member"[5] documents was 93,335, but that this total would likely include privileged documents and other unresponsive spam documents that happen to also contain one of the 20 search terms. *Id.* at 1438-43. However, contrary to Mr. Life's testimony, defendants' privilege log reveals that former defense counsel withheld only 838 *pages* of privileged material. *See* Pl. Ex. 56. Therefore, assuming each document represents at least one page and that the hit report is accurate, former defense counsel received tens of thousands more pages of responsive documents than the approximately 50,000 pages they eventually turned over to plaintiff's counsel in 2015. The hearing concluded on November 19, 2019. Dkt. 363. Before concluding the hearing, the **[*8]** Court asked all parties if there was additional evidence to present. All parties, including defendants, said there was no further evidence to add. Tr. 1554.

As is endemic in this litigation, after being on notice of the Court's desire to hold an evidentiary hearing on the motion for sanctions for months, the Court extending the length of the hearing from two to five days of testimony at the parties' request, and ultimately closing the hearing without objection from any participant, defendants filed the instant Motion on January 16, 2019 asking to reopen the

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[3] Deduplication is "[a] method of replacing multiple identical copies of a Document by a single instance of that document." Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 85, 92 (2014).

[4] De-nisting is "[t]he use of an automated filter program that screens files against the NIST list [ ] to remove files that are generally accepted to be system generated and have no substantive value in most instances." Maura R. Grossman & Gordon V. Cormack, *Comments on "*The Implications of Rule 26(g) on the Use of Technology-Assisted Review,*"* 7 FED. CTS. L. REV. 285, 288 n. 12 (2014) (internal citation and quotation omitted).

[5] As Mr. Gough explained at the hearing, a family document is one that is related to a document with a search term but that may not itself contain a search term. He gave the example of an email containing a search term that also had two attachments. The email with the search term is considered the "parent," the attachments "children," and taken together they are considered a "family." Evid. Hr'g Tr. 1441-42.

hearing for an opportunity to explain away this evidence and the document discrepancy it seemingly revealed.[6] Dkts. 368, 370.

MOTION TO REOPEN

According to the Motion and associated status report to the Court, current defense counsel reviewed the evidentiary hearing transcript, 4D's hit report, and other associated documents. This review established the following: 84,522 documents hit at least one of plaintiff's 20 search terms. After it analyzed the data on Mr. Duke's four hard drives, 4D eventually provided 11,540 documents totaling 55,601 pages of material to former defense counsel. However, former defense counsel only produced **[*9]** 45,280 pages of documents to plaintiff on February 25, 2015. Mr. Life's testimony that he produced all nonprivileged documents to plaintiff does not explain this page discrepancy because he only withheld 838 pages on privilege grounds. *See* Dkts. 368 (January 15, 2020 status report), 370 (Motion). To summarize, there are two page discrepancies: first, between the 84,522 ***documents*** that hit the parties' search terms according to the 2015 hit report and the 55,601 ***pages*** 4D turned over to former defense counsel; second, between the 55,601 pages former defense counsel received from 4D and the 45,280 pages they ultimately disclosed to plaintiff's counsel. Even after accounting for the 838 pages Mr. Life withheld from the production on privilege grounds, there are 9,438 "missing" pages from former defense counsels' production to plaintiff.

These facts "caused Defendants' [new] counsel to investigate these matters even further" after the hearing concluded, despite agreeing the proofs were closed. Dkt. 370 at 2; Tr. 1554.. As part of this new investigation, defendants reviewed 4D's response to their evidentiary hearing subpoena, which included emails between 4D employees Phil Knox and Jarred **[*10]** Sikorski. According to an email chain from January 2015, Mr. Sikorski told Mr. Knox that "we" removed "irrelevant"[7] documents from the production they tendered to former defense counsel. Dkt. 368 Ex. 4. Current defense counsel also conducted more interviews with Mr. Life and Mr. Gough after the evidentiary hearings concluded. Mr. Gough stated in these interviews that the 2015 "hit report" was a snapshot of the document production during the middle of the ESI evaluation process and was not a final report, he was only peripherally involved in this process, that Mr. Sikorski performed the document filtering by adding industry standard automated filters after the 2015 hit report was generated and before documents were given to former defense counsel, but that he did not know which specific filters Mr. Sikorski applied. Mr. Gough also confirmed that 4D ultimately tendered 11,540 documents totaling 55,601 pages of material to former defense counsel.[8] Dkt. 370 at 3-5. Mr. Life also provided new information to defendants that contradicts his prior hearing testimony. Specifically, for the first time, Mr. Life explained that in addition to privileged materials, he removed documents that did not **[*11]** contain any of plaintiff's search terms from the document set he received from 4D. *Id.* at 5-6. How documents produced by applying search terms to the data produced documents not containing any search terms was not fully and clearly explained. And no "final report" (a reasonable inference is that a "final report" exists) was provided. So, once again, despite a court order to produce the report for the hearing, the "final report" was not produced. It must be said that counsel for the former defense

[6] Defendants later filed a *second* motion to reopen to explain away other evidence elicited during the evidentiary hearing. *See* Dkt. 384.

[7] There were references that one of the search terms in this trademark case was "trademark." That might explain why "irrelevant" documents were captured and then removed. But again, the testimony on this point was hazy.

[8] To support their theory, defendants later filed an unrequested status report containing an expert opinion from their new e-discovery expert Yaniv Schiff on January 21, 2020. In his attached opinion, Schiff opined that Sikorski used filters to remove "non-user generated" files as is industry practice, and that a drop from 55,601 to 11,540 file counts thereafter is "reasonable." Dkt. 372 at 3-7.

counsel should be given substantial slack in this regard. But they may now have a better appreciation for what the Court and plaintiff's counsel have been subjected to in this case.

Notably, defendants cite no authority to support their Motion. Instead, defendants simply conclude the Motion by reiterating that this new information from Mr. Gough and Mr. Life "is directly relevant to the issues before this Court," and that the hearing "should be reopened" to allow the parties to further question Mr. Gough and Mr. Life. Dkt. 370 at 5-6. The Court ordered defendants to file offers of proof if the parties could not agree to stipulate to any of these new facts in lieu of reopening an evidentiary hearing that **[*12]** had already eaten up an inordinate share of the Court's time. Dkt. 377.

As is also endemic in this litigation, the parties could not agree to a stipulation and defendants filed an offer of proof as to Mr. Gough's and Mr. Life's proposed testimony on March 6, 2020. Dkts. 391, 392. Former defense counsel's counsel also filed an offer of proof, but only as to Mr. Life's proposed testimony, and it is identical to defendants' offer of Mr. Life's proposed testimony. *See* Dkts. 392, 393 at 3-8. Mr. Gough's and Mr. Life's testimony relating to the page discrepancy in the offers of proof is nearly identical to the representations made in the motion to reopen as discussed above. *See* Dkts. 370, 393. In sum, according to the offers of proof, Mr. Gough would testify that as is standard in his industry, his then-employee Mr. Sikorksi filtered documents from the 84,522 documents mentioned in the 2015 hit report before 4D handed over documents to former defense counsel in 2015, but that he doesn't know which filters were applied. Dkt. 393 at 1-3. Mr. Life would testify that he did not focus on the hit report before his testimony, but after the evidentiary hearing and upon further reflection he realized **[*13]** he removed privileged documents *and* documents that did not hit any search terms and were otherwise "irrelevant" from the document set defendants received from 4D in 2015 before disclosing the production to plaintiff. *Id.* at 3-8. Plaintiff characteristically and vigorously objects to the offers of proof. Dkts. 397, 398.

ANALYSIS

The Court's decision to limit the evidentiary hearing to five days of testimony is an interlocutory order because the Court is not dismissing this case as a sanction. However, the Court may in its discretion re-visit non-final rulings at any time before final judgment. *Mintz v. Caterpillar, Inc.*, 788 F.3d 673, 679 (7th Cir. 2015).

In an exercise of that discretion, the Court denies the Motion for one main reason: The Court is not currently imposing sanctions based on this page discrepancy. As detailed in this Court's order on the sanctions motion, the Court finds sanctions warranted for the conduct described therein, none of which is based on this discrepancy. As things stand, there is plenty of other conduct that is sanctionable. The page discrepancy has no bearing on those sanctions. Therefore, the Court need not reopen the evidentiary hearing to hear more testimony from Mr. Gough or Mr. Life, or to allow defendants to subpoena **[*14]** Mr. Sikorski.

But there are many other reasons to deny to the Motion. For months, defendants were aware of an impending evidentiary hearing focused on their ESI production in this case. *See* Dkt. 267 at 63-64 (August 18, 2018 hearing transcript where the Court warned that it would likely "have an evidentiary hearing" to "get to the bottom of this stuff," and that "facts going to intent are key . . . ."). Current defense counsel appeared in this case for defendants over two months before the evidentiary hearing was held, though at least one current defense counsel was aware of the morass of discovery issues in the case before filing an appearance. *See* Dkts. 315, 316, 317, 334. 4D's 2015 hit report is relevant to the scope and nature of defendants' electronic discovery in the case, which was the focus of plaintiff's motion for sanctions and the evidentiary hearing. Defendants agree in both their Motion and offer of proof that this document and possible testimony related to it is

(and presumably *always was*) relevant to sanctions issues. *See* Dkts. 386 at 7, 371 at 5-6. When plaintiff first learned of and questioned Mr. Leavens about the 2015 hit report during the hearing testimony on November **[*15]** 7, 2019, prior defense counsel's counsel Mr. Smith seemed to recognize what Mr. Leavens was referring to, indicating that at least prior counsel was aware of the report's existence. Evid. Hr'g Tr. at 822-23. The hit report is defendants' document and was produced by their own e-discovery vendor. For some reason, the document was never tendered to plaintiff or to the Court before the evidentiary hearing. How defendants might be surprised by their own discovery vendor's document given the time these issues have been percolating before the Court, and their suggestion that this issue "unexpectedly arose" at the evidentiary hearing, is mind-boggling. If anything, that this document (or some other report from 4D detailing the electronic discovery process) was not provided to the Court and all participants well before the evidentiary hearing further evidences a general disregard of the serious nature of the discovery issues in this case. The same can be said of Mr. Life's sudden recall. Plaintiff is the only hearing participant that may credibly or reasonably claim to have been surprised by the hit report because it is not plaintiff's document and plaintiff first became aware of its existence **[*16]** during the third day of hearing testimony.

Assuming defendants were surprised by the contents of their own e-discovery vendor's hit report that existed in former counsel's files from early 2015 onward, regardless of whether it is a final or preliminary hit report, defendants had ample occasion and opportunity to question Mr. Gough and Mr. Life at the hearing on these issues. Both witnesses gave testimony describing their understanding of the hit report and their relative roles in the discovery process as discussed above. If the Court accepted Mr. Gough's and Mr. Life's proposed testimony at face value, a discrepancy between what 4D provided to former defense counsel and what former defense counsel tendered to plaintiff would still exist, and the Court would be forced to choose between two directly conflicting explanations from Mr. Life as to why there is a discrepancy. Defendants cite no authority to support their Motion, aside from stating that Mr. Life's and Mr. Gough's proposed testimony is "relevant." That the testimony from the hearing raised more questions and the specter of yet another discovery problem in this case, or that current defense counsel thought of more or different **[*17]** questions to ask these witnesses upon further reflection after the fact, is not cause to again seek more time and testimony to explain discrepancies in their own documents. The Court closed the evidentiary hearing without objection from any party. Former and current defense counsel have had repeated opportunities to explain defendants' discovery procedures in this case. The Court will not humor yet another request for another opportunity to do so.

CONCLUSION

For those reasons, the Motion [370] is denied.

Entered: January 19, 2021

By: /s/ Iain D. Johnston

Iain D. Johnston

U.S. District Judge

Torgersen v. Siemens Bldg. Tech., Inc.

United States District Court for the Northern District of Illinois, Eastern Division

May 24, 2021, Decided; May 24, 2021, Filed

Case No. 19-cv-4975

Reporter
2021 U.S. Dist. LEXIS 98024 *; 2021 WL 2072151

PAUL TORGERSEN, Plaintiff, v. SIEMENS BUILDING TECHNOLOGY, INC.; SIEMENS INDUSTRY, INC.; SIEMENS CORPORATION; and SIEMENS ENERGY & AUTOMATION, INC., Defendants.SIEMENS INDUSTRY, INC., Third-Party Plaintiff, v. LLD ELECTRIC CO., Third-Party Defendant.

Counsel: [*1] For Paul Torgersen, Plaintiff: Daniel Herbert Streckert, LEAD ATTORNEY, Goldberg Weisman Cairo, Chicago, IL.

For Siemens Building Technology, Inc., Siemens Industry, Inc., Siemens Corporation, Siemens Energy & Automation, Inc., Defendants: Thomas Frank Cameli, LEAD ATTORNEY, Alan J. Brinkmeier, Cameli & Hoag, P.C., Chicago, IL.

For Siemens Industry, Inc., ThirdParty Plaintiff: Thomas Frank Cameli, LEAD ATTORNEY, Cameli & Hoag, P.C., Chicago, IL.

For LLD Electric Co., Third Party Defendant: Michael Allen Schlechtweg, LEAD ATTORNEY, Joseph J. Klocke, SmithAmundsen LLC, Chicago, IL.

Judges: Susan E. Cox, United States Magistrate Judge.

Opinion by: Susan E. Cox

Opinion

MEMORANDUM OPINION AND ORDER

On April 1, 2021, Siemens Industry, Inc.[1] and Third-Party Defendant LLD Electric Company ("LLD") filed what was essentially a motion to compel and for sanctions, styled Defendants' Motion for Evidentiary Hearing Regarding Discovery Violations and Spoliation of Evidence. [Dkt. 77.] On April 13, 2021, the Court held a motion hearing on Defendants' motion, where the motion was granted in part and taken under advisement in part. [Dkt. 81.] The Court also set a briefing schedule related to the facts and circumstances surrounding the **[*2]** deletion of Plaintiff's Facebook page because Defendants had articulated a credible allegation with respect to the spoliation of that evidence. *Id.* Briefing is now complete on that issue, and the remainder of Defendants' motion is ripe for disposition.

This case involves an alleged construction site fall accident that occurred June 14, 2017, at Adlai E. Stevenson High School in Illinois. [Dkt. 1-1 at ¶ 1.] Plaintiff is seeking damages for personal injury and past and future lost earnings and wages. [Dkt. 1-1 at ¶ 10.] Plaintiff alleges an electrocution and fall, resulting in a left shoulder injury. [Dkt. 77 at ¶ 1.] At issue in the instant motion is Plaintiff's Facebook account, which Defendants contend "demonstrated recreational activities, golf trips, and other physical activities [which] would tend to show that the Plaintiff had not lost a normal life, and contrary to his claims was capable of using his

[1] Siemens Industry Inc. has represented it is the successor by merger to Siemens Building Technology, Inc.; Siemens Energy & Automation, Inc.; and Siemens Corporation. [Dkt. 77, p. 1.]

shoulder and potentially returning to work." [Dkt 87, p. 4.]

At some point, Plaintiff Paul Torgersen had a publicly viewable Facebook page. [Dkt. 77, ¶¶ 13, 15.] Upon discovering the page, on July 13, 2020, Third-Party Defendant LLD served written discovery on Plaintiff asking about **[*3]** social media accounts including, specifically, the Facebook account. [Dkt. 77, ¶ 14.; Dkt. 87-7.] On or about August 31, 2020, Plaintiff deleted his Facebook account. [Dkt. 83, ¶ 1.] At some point between July 13, 2020 (the day Defendants' interrogatories were served) and August 31, 2020 (the day of deletion), Plaintiff's counsel communicated with Plaintiff not to delete his Facebook page. [Dkt. 83, ¶ 1.] Plaintiff claims he did not remember this directive at the time he deleted his account. *Id.* Facebook's policies state that a deleted Facebook page is permanently deleted after only 30 days. [Dkt. 87-4.] Facebook also takes the position that the Stored Communications Act, 18 U.S.C. 2701 exempts Facebook from a civil subpoena. [Dkt. 87-5.] Therefore, it appears the information contained on Plaintiff's Facebook page cannot be recovered for purposes of this litigation.[2]

Three months after service of LLD's discovery, Plaintiff finally answered the discovery, objecting that a disclosure of the once publicly viewable Facebook page "[u]nnecessarily invades Plaintiff's privacy." [Dkt. 77, ¶ 15.] As an initial matter, the Court overrules this objection.[3] While a person generally has a reasonable expectation of privacy in the contents **[*4]** of their own computer, there is no such expectation "when a computer user disseminates information to the public through a website," such as Plaintiff did on his Facebook page. *Palmieri v. United States*, 72 F. Supp. 3d 191, 210 (D.D.C. 2014). Plaintiff has knowingly exposed this information to the public by posting it to Facebook.

Defendants have also moved for sanctions under Federal Rule of Civil Procedure 37(e). [Dkt. 77.] Federal Rule of Civil Procedure 37(e) provides the following:

> **(e) Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > **(A)** presume that the lost information was unfavorable to the party;
> > >
> > > **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > **(C)** dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e). When determining whether to impose **[*5]** sanctions for spoliation of evidence,

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[2] Plaintiff has since opened a new Facebook page [dkt. 83, ¶ 14], but this new page would not have the relevant historical information sought by Defendants. The Court considers Plaintiff's new Facebook page irrelevant for purposes of the instant motion. Unless otherwise noted, whenever the Court refers to Plaintiff's Facebook page, it is to the Facebook page Plaintiff deleted on or about August 31, 2020 (Plaintiffs have identified the subject Facebook page as https://www.facebook.com/paul.torgersen.9 [Dkt. 77, ¶ 13]).

[3] Plaintiff also objects that the request is overly broad. The Court finds LLD's request to be narrowly tailored in that it only sought information since the date of the occurrence. [Dkt. 77-1, p. 21.] This objection is also overruled. Likewise, the Court also overrules the fact that "Plaintiff objects to giving restricted access to his social media accounts," as this is not a legally cognizable objection (and it is nonsensical). *Id.*

"Rule 37(e) provides the sole source to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party." *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 2021 U.S. Dist. LEXIS 9513, 2021 WL 185082, at *75 (N.D. Ill. Jan. 19, 2021) (citing *Snider v. Danfoss, LLC*, 2017 U.S. Dist. LEXIS 107591, 2017 WL 2973464, at *3-4 (N.D. Ill. July 12, 2017)). Federal Rule of Civil Procedure 37(e) contemplates the following: that the lost information (1) must be electronically stored information ("ESI"), (2) existing during anticipated or actual litigation, (3) which "should have been preserved" because it is relevant; (4) was "lost because [] a party failed to take [] reasonable steps to preserve it" and (5) cannot be restored or replaced through additional discovery. Moreover, "[i]f any of these five prerequisites are not met, the court's analysis stops, and sanctions cannot be imposed under Rule 37(e)." *Snider*, 2017 U.S. Dist. LEXIS 107591, 2017 WL 2973464 at 4. A "decision tree" of this Rule 37(e) analysis can be visualized as follows:

DR Distributors, 2021 U.S. Dist. LEXIS 9513, 2021 WL 185082, at *75 (citing Hon. Iain D. Johnston & Thomas Y. Allman, *What Are the Consequences for Failing to Preserve ESI: My Friend Wants to Know*, Circuit Rider 57-58 (2019)).

In the instant matter, **(1)** the Court finds Plaintiff's Facebook page constitutes ESI. Next, **(2)** the Court finds Plaintiff had a specific duty to preserve this information (*i.e.*, the Facebook page) from the moment it was **[*6]** sought by LLD on July 13, 2020. [Dkt. 87-7.] He obviously knew this information was sought when he discussed the discovery requests with his counsel, and has admitted as much ("Plaintiff acknowledges receiving a communication from the Law Firm of GWC Injury Lawyers regarding not deleting social media account..."). [Dkt. 83, ¶ 2.] Even if he hadn't specifically been on notice, Plaintiff had a duty to preserve this information in anticipation of litigation even before it was sought by Defendants. This court has stated that the anticipation of litigation means "a substantial and significant threat of litigation," not just the expectation that a suit is likely to be filed. *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84, 87 (N.D.Ill.1992). This suit was filed on June 12, 2019 [dkt 1-1], and the Court can reasonably infer that Plaintiff anticipated doing so at least some months prior to that point. Therefore, Plaintiff's Facebook page should have been preserved as early as 2019.

Next, **(3)** Plaintiff made no relevancy objection to the request for his Facebook page. Nor would have such an objection been sustained. The relevance standard is extremely broad; Federal Rule of Civil Procedure 26 allows for discovery of "any nonprivileged matter that is relevant to any party's claim or defense **[*7]** and proportional to the needs of the case," and Federal Rule of Evidence 401(a) states that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." "The scope of relevance for discovery purposes is far broader than for evidentiary purposes." *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D. Ill. 1972). It seems undeniable to the Court that evidence known to Plaintiff at the time he filed his complaint (*i.e.*, his Facebook page) that supports or refutes his factual allegations would have a tendency to make those facts more or less probable. The Court agrees with Defendant's articulation of the Facebook page's relevance:

> The Facebook page, which demonstrated recreational activities, golf trips, and other physical activities would tend to show that the Plaintiff had not lost a normal life, and contrary to his claims was capable of using his shoulder and potentially returning to work. The Facebook page would have made the claims of damage less probable than without the evidence.

[Dkt. 87, p. 4.] Thus, the Court finds Plaintiff's Facebook page to be relevant.

Under the next step, the Court asks whether the Facebook page was lost because Plaintiff failed to take reasonable steps to preserve it. Plaintiff has admitted **[*8]** to the spoliation of his Facebook page: "Plaintiff acknowledges deleting his Facebook account," and he did not consult with his counsel concerning his intent to delete the page. [Dkt. 83, ¶¶ 1, 5.] Therefore, **(4)** Plaintiff not only failed to preserve this information, but he affirmatively caused its spoliation (tangentially close to the time it was requested by Defendants).

According to Facebook's own policies, there seems to be no way to recover this information for purposes of the instant civil suit. *See*, p. 2, *supra*. Plaintiff has offered access to his new Facebook page in lieu of the old one, but the Court has already addressed the fact that this new page would have none of the relevant information sought by Defendants. *See* fn. 2, *supra*. Plaintiff has also provided Defendants with a download of all the photographs within his cell phone/Android ("a scattershot of six hundred some photographs," according to Defendants [dkt. 87, p. 7]) because when he made a Facebook post, "it would have been a photo/image in his cell phone/Android." [Dkt. 83, ¶ 11.] However, this PDF dump is not the panacea Plaintiff hopes. These undated photographs depict vacations, golf trips, motorcycle riding, **[*9]** and physical activities. [Dkt 87, p. 7.] Yet, the information and comments surrounding these nondigital "posts" cannot be retrieved; Plaintiff has not provided any metadata associated with these images because they were provided as PDFs rather than in their native format. [Dkt. 87, p. 8.] Moreover, apparently Plaintiff has produced what he claims is a sampling of photographs that were on his phone, with no indication which of these photographs were actually posted on Facebook or when.[4] *Id.* In their native Facebook format, not only would the photographs show a date and potentially a geolocation tag, but captions, comments, and tags of the individuals in the photos can (and often do) accompany the images.[5] The PDF images are devoid of this additional informational content. Therefore, the PDF production is not an acceptable substitute for Plaintiff's Facebook page.[6] Thus, the Court finds **(5)** the destroyed ESI cannot be restored or replaced through additional discovery.

Now the Court must turn its attention to the issue of intent to deprive. Defendants need only demonstrate intent by a preponderance of the evidence. *Williams v. Am. Coll. of Educ., Inc.*, 2019 U.S. Dist. LEXIS 157447, 2019 WL 4412801, at 11 (N.D. Ill. Sept. 16, 2019) ("To prevail under Rule 37(e)(2) or the court's inherent authority, [movant] must **[*10]** show by a preponderance of the evidence that [destroying party] engaged in spoliation with the requisite intent."). "Intentional destruction and bad faith may be proved inferentially and with circumstantial evidence, and this Court need not leave experience and commonsense at the courthouse door when making its determination." *Sonrai Systems, LLC v. Anthony Romano, et al.*, 2021 U.S. Dist. LEXIS 72444, 2021 WL 1418405, at 13 (N.D. Ill. Jan. 20, 2021) (citations and signals omitted).

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[4] Plaintiff claims he produced all the photographs on his cell phone [dkt. 83, ¶ 11], but Defendants maintain Plaintiff produced a sampling of the photographs [dkt. 87, p. 8]. The Court has no way to reconcile this discrepancy at the current juncture, but it is not germane to the rulings made herein.

[5] Alarmingly to the Court, several of these PDF photographs allegedly show the subject VAV box involved in the occurrence, which had apparently never been produced prior to this PDF dump. [Dkt. 87, p. 8.] If these VAV photos were indeed posted to Plaintiff's Facebook page, not only would the contemporaneous data accompanying them be invaluable to Defendants, but these posts likely would have constituted a statement/admission by a party opponent (which has now been deleted). *United States v. McGee*, 189 F.3d 626, 632 (7th Cir. 1999) (holding that admissions by party-opponents under Federal Rule of Evidence 801 need not be inculpatory: "[a]dmissions by a party-opponent are usually contrary to a position that the declarant is taking at the trial in which it is introduced....The party's statement need not have been against interest when made....") (citation omitted).

[6] The Court does not believe producing these images in their native format would be an acceptable substitute either, as they would still be devoid of the additional information that accompanies them when they get posted to Facebook (*e.g.*, date, geolocation tag, captions, comments, and tags of the individuals in the photos).

Plaintiff's destruction of his Facebook was intentional and occurred while on notice to preserve the same. Plaintiff's explanation for what happened here is balderdash. Plaintiff allegedly "deleted his account solely for reasons related to ever increasing online threats and intimidating communications including threats of physical violence related to his political expressions that he posted on the subject Facebook account." [Dkt. 83, ¶ 3.] The Court has been provided no details of these alleged threats and has no way to verify the veracity of this statement. However, as the Court noted, during the April 13, 2021 hearing on this matter, "...if he wanted to delete political posts, he could have done that. You don't have to take your whole Facebook page down to do that. People delete stuff all the time. Instead, what he did was he **[*11]** took the whole thing down, and he was on notice that it had been requested of him." [Dkt. 87-1, 18:18-22.] Not only that, if Plaintiff felt physically threatened or intimidated on Facebook, Facebook gives specific instructions on how to handle such harassment: "If you see something that goes against the Facebook Community Standards, please let us know. You can also unfriend or block someone if they're bothering you." [Dkt. 87, p. 5; https://www.facebook.com/help/592679377575472.] Additionally, Facebook allows a user to implement certain privacy settings (*i.e.*, a variety of options for who can see what on a user's page), which Defendant alleges Plaintiff has taken advantage of on both his newest and prior Facebook pages. [Dkt. 87, p. 5.] At any point, Plaintiff could have simply blocked or restricted the politically topical content from the alleged harasser(s), leaving the remainder of the requested content accessible. Essentially, Plaintiff claims that in August 2020 he was the target of online harassment and threats to his safety, yet by March 2021, approximately seven months later, those threats had apparently abated to the point where he no longer felt in any danger, so he made **[*12]** a new Facebook page. The Court finds this claim incredible.

Further casting doubt on the veracity of Plaintiff's tale of online harassment are (1) the shifting explanations about whether and when Plaintiff's counsel notified Plaintiff his social media accounts were being sought and to preserve the same (including his Facebook page); (2) the tangential timing of Plaintiff's deletion of his Facebook page so soon after LLD's request for the same; and (3) Plaintiff's evasion in answering the discovery after his page had been deleted. The objective evidence reveals that on July 13, 2020, Third-Party Defendant LLD served written discovery on Plaintiff requesting information about his Facebook page. [Dkt. 77, ¶ 14; Dkt. 87-7.] At some point between July 13, 2020 and August 31, 2020, Plaintiff's counsel communicated with Plaintiff not to delete his Facebook account.[7] [Dkt. 83, ¶ 1-2.] Nonetheless, at some point less than 49 days after Defendant requested it, Plaintiff deleted his Facebook account anyway. [Dkt. 83, ¶ 1.] Plaintiff claims not to remember this directive at the time he deleted his account. [Dkt. 83, ¶ 2.] Compounding this error, approximately 43 days after deleting his Facebook **[*13]** page, Plaintiff refused to disclose the page at all. [Dkt. 77-1, p. 21.]

At this point, under the Rule 37(e) decision tree, the Court need not address the issue of prejudice because it has determined Plaintiff's conduct to be an intentional act designed to deprive Defendants of relevant ESI. However, as Defendants have articulated, without the deleted Facebook page, they will be unable to "thoroughly investigate claims of nature and extent of [Plaintiff's] claimed injury, loss of normal life, and permanent disability." [Dkt. 87, p. 2.] The Court agrees and finds Defendants have indeed been prejudiced by the destruction of Plaintiff's Facebook page.

In light of these facts, the Court will not leave

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[7] Casting further doubt on the veracity of this entire tale is Plaintiff's counsel's representation in open Court that he never told Plaintiff that Defendants had requested his Facebook information. [Dkt. 87-1, p. 20:2-5; *see also* 21:16-22:2 (Court comments about how incredulous this is); 23:11-15 (same).] This representation conflicts with Plaintiff's later assertion he was told to preserve his Facebook page. [Dkt. 83, ¶ 2.]

experience and commonsense at the courthouse door. *Sonrai Systems*, 2021 U.S. Dist. LEXIS 72444, 2021 WL 1418405, at 13. The objective evidence in this case leads the Court to conclude Plaintiff's deletion of his Facebook page was in response to Defendant LLD's discovery request for the same so that Defendants would not be able to access any posts which could potentially cast doubt on the seriousness of his claimed physical injuries related to the instant lawsuit. The Court agrees with Defendants that when "[t]aken as a whole, the conduct of the Plaintiff far **[*14]** exceeds inadvertence or mistake and demonstrates disrespect for the Court and an intentional abuse of the discovery process." [Dkt. 87, p. 12.] This is more than a preponderance of evidence. *Williams*, 2019 U.S. Dist. LEXIS 157447, 2019 WL 4412801, at 11. Moreover, the Court does not find Plaintiff's explanation of his conduct to be "substantially justified." Fed. R. Civ. P. 37(c) (courts need not impose sanctions if, in addition to the non-compliant party's position being "substantially justified," the violation was "harmless.") Thus, sanctions are appropriate.

"In determining the appropriate sanctions to impose, 'the district court should consider the egregiousness of the conduct in question in relation to all aspects of the judicial process.'" *Fuery v. City of Chicago*, 2016 U.S. Dist. LEXIS 135086, 2016 WL 5719442, at *2 (N.D. Ill. Sept. 29, 2016) (quoting *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003)). While Defendants urge dismissal as the appropriate sanction here, dismissal of this matter is not an appropriate remedy in the Court's mind. While a reasonable jurist could rightfully impose that sanction, "there are certainly less drastic sanctions available that will remedy the prejudice to [Defendants] and allow the case to be heard on the respective merits." *DR Distributors*, 2021 U.S. Dist. LEXIS 9513, 2021 WL 185082, at *97. In this case, the sanctions the Court has fashioned are tailored toward Plaintiff's discovery violations because the Court finds the spoliated information, **[*15]** while relevant to damages, does not go to the question of negligence which is the main question the finder of fact will be asked to resolve. *Id.* ("Court must also explain, even briefly, why it chose not to impose certain sanctions in its discretion.") Much like *DR Distributors*, "[t]he Court's decision not to default [Plaintiff] and dismiss [his claims] was not made lightly. Instead, the decision was discretionary based on all the facts of the case." *Id.*

Rather than dismissal as a sanction for his conduct, the Court believes jury instructions are the appropriate remedy here in response to Plaintiff's intentional act. The Court will instruct the jury that it can consider the evidence of Plaintiff's behavior resulting in the loss of the Facebook ESI along with all the other evidence in making its decision. Fed. R. Civ. P. 37(e)(1). The jury will be instructed that Defendant LLD requested the spoliated Facebook page; that the spoliated Facebook page contained information and images relevant to the claims and damages in the case; that Plaintiff had a duty to preserve the spoliated Facebook page; that Plaintiff was told to preserve his Facebook page by his attorneys once it was sought by Defendant LLD; that Plaintiff **[*16]** affirmatively deleted his Facebook page shortly after it was requested by Defendant LLD in connection with this lawsuit; and that the information on the spoliated Facebook page cannot be recovered. *Id.* Plaintiff will also be precluded from asserting that he deleted his Facebook page for political reasons. Finally, the Court will issue an adverse inference instruction to the jury, whereunder the jury must presume the information contained on Plaintiff's Facebook page (*i.e.*, the spoliated ESI) was unfavorable to Plaintiff's claims in the instant lawsuit.[8],[9] Fed. R.

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[8] The Court will craft the appropriate verbiage of these instructions closer to the pretrial conference in this matter, but the Court anticipates they will be substantially similar to what has been laid out in this paragraph.

[9] The Court is also mindful of Defendants' concern that Plaintiff not be able to craft answers to minimize or thwart any adverse inference instruction. [Dkt. 87, p. 13.] To that end, Defendants implore that "Plaintiff should not be allowed to explain away the photographs that depict him performing various activities contrary to his injury claims when he is responsible for deleting the information that would

Civ. P. 37(e)(2)(B). These remedies are not only proper in response to Plaintiff's intentional ESI destruction, but they attempt to alleviate the harm Defendants incurred because of the destruction of Plaintiff's Facebook page.

In conclusion, the remainder of Defendants' Motion for Evidentiary Hearing Regarding Discovery Violations and Spoliation of Evidence [dkt. 77] is GRANTED to the extent specified herein. The parties failed to file an updated joint status report on 5/17/2021 as ordered. [Dkt. 75.] Therefore, the parties are to file an updated joint status report on 5/31/2021 detailing the discovery that remains to be completed before the 10/29/2021 **[*17]** fact discovery deadline. *Id.* The parties should also specify whether they are interested in a settlement conference, keeping in mind that the Court will not hold a settlement conference (or recruit a colleague to hold such a conference) if not all parties want to participate in the settlement process. The Court again reminds the parties that no further extensions of the fact discovery deadline will be granted. *Id.*

ENTERED: 5/24/2021

/s/ Susan E. Cox

Susan E. Cox,

United States Magistrate Judge

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contradict any future explanations that he might provide in discovery or before a jury." *Id.* The Court agrees and will also take appropriate steps to ensure the jury does not hear from Plaintiff any benign explanations (rather than facts) that would minimize the extent of the activities depicted in any photographs. To this end, Defendants may consider asking Plaintiff questions about relevant photographs during his deposition so everyone involved will have a preview of what Plaintiff's trial testimony is likely to be, and Defendants can notify the Court of any potential issues ahead of time rather than conduct a trial by surprise.