

**COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Appellate Procedure. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The Association’s Committee on Federal Courts (the “Federal Courts Committee” or “Committee”) is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the proposed amendments.

**I. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF APPELLATE
PROCEDURE 3(C)**

The Advisory Committee on Appellate Rules (“Advisory Committee”) has proposed revisions to Rule 3 of the Federal Rules of Appellate Procedure (“Rule 3”) to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal. The Advisory Committee proposed re-styling Rule 3 to clarify that a notice of appeal must designate the judgment or appealable order that serves as the basis for the court’s appellate jurisdiction and from which time limits are calculated, but that designation does not displace the general merger principle which confers appellate jurisdiction over interlocutory orders that merge into the designated judgment or order. The proposed revisions call attention to the merger principle in the text of Rule 3(c)(4), but still permit an appellant to designate only part of a judgment or appealable order for appeal by expressly stating that the appeal is so limited in the notice of appeal pursuant to Rule 3(c)(6).

We support these changes, but recommend a minor edit to the proposed text of Rule 3(c)(4) to clarify that the application of the merger principle set forth in that subpart is subject to the exception set forth in Rule 3(c)(6), as follows.

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a. Proposed Further Edit To The Proposed Revisions To Rule 3(C).

Federal Rule of Appellate Procedure 3
(c) Contents of the Notice of Appeal.
(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;

(B) designate the judgment,—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) **Except as otherwise provided pursuant to Rule (3)(c)(6),** the notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

II. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF APPELLATE PROCEDURE 42

The Advisory Committee has proposed to amend Rule 42 to include the following added provision:

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an

action of the district court or an administrative agency, or remanding the case to either of them.

We propose that the language be modified to conform with the authorizing statute and to avoid suggesting a substantive entitlement to remand that may or not be authorized by law, as follows:

- (3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court, **setting aside or enforcing an administrative agency order**, or remanding the case to either of them, **if provided by applicable statute**.

The reason for this proposed modification is that there is a substantive legal question regarding whether a Circuit Court is authorized to “remand” a matter to an administrative agency. For example, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court found an SEC administrative proceeding to be invalid because the SEC ALJ who presided over the hearing was not properly appointed as required by the Appointments Clause of Article II of the Constitution, and remanded the matter to the United States Court of Appeals for the D.C. Circuit. *Id.* at 2050-51, 2055-56. Mr. Lucia requested that his petition be granted and that the Commission’s order be “set aside”; the SEC agreed but also requested that the matter be “remanded” to the Commission. *Lucia v. SEC*, Docket No. 15-1345, document 1741942 (D.C. Cir. July 23, 2018) (Lucia’s motion); *id.* document 1742549 (D.C. Cir. July 25, 2018) (SEC’s request for remand). Other litigants have similarly disputed the proper remedy—remand or setting aside—for unconstitutional agency orders. *See Harding Advisory v. SEC*, Docket No. 17-1070, document 1741454 (D.C. Cir. July 19, 2019) (SEC’s motion to remand); *Harding Advisory v. SEC*, Docket No. 17-1070, document 1741988 (D.C. Cir. July 23, 2019) (Harding’s opposition; arguing that the Securities Laws do not include “remand” to the Commission as an available remedy except when additional development of the record is required to facilitate review). The D.C. Circuit rejected these arguments and ordered a “remand” to the Commission. *Harding Advisory v. SEC*, Docket No. 17-1070, document 1751503 (D.C. Circuit Sept. 19, 2019).

Although the arguments referenced above were unsuccessful, these cases illustrate that the issues concerning remands are not just procedural matters, but could involve disputes in substantive law, and should not be prejudged in a Rules amendment. The Rules should not take a position, one way or the other, on the substantive question. Under the Rules Enabling Act, 28 U.S.C. § 2072:

- (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
- (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(emphasis added). The proposed modification ensures that the amendment does not run afoul of subsection b of the Act by “abridg[ing], enlarg[ing] or modify[ing] any substantive right.”

The proposed modification is similar to the language of Rule 15 (“Review or Enforcement of an Agency Order—How Obtained; Intervention”), which is drafted in recognition that review or enforcement of an administrative agency order may be governed by a variety of statutes, depending on the agency involved. Thus, the definitional provisions of Rule 15 provide that “(4) In this rule “agency” includes an agency, board, commission, or officer; “petition for review” includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.” Fed. R. App. P. 15 (emphasis added). Likewise, the provision requiring that the petition name the agency involved recognizes that certain applicable statutes may have an additional requirement not reflected in the Rule: “The petition must ... name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute).” Fed. R. App. P. Rule 15(a)(2)(B). (emphasis added).

Respectfully submitted,

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* The Committee’s members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated.