NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

# MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on a New Commercial Division Rule Requiring a Nongovernmental Corporate Party to File a Disclosure Statement Identifying Any Parent Corporation and Any Publicly Held Corporation Owning 10% or More of Its Stock, or State That There Is No Such Corporate Ownership

Date: December 23, 2020

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council ("CDAC"), to promulgate a new Commercial Division Rule that will require a "non-governmental corporate party and a non-governmental corporation that seeks to intervene [in a proceeding or case to] file a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation." (Exhibit A). The CDAC relays that corporate disclosure statements exist "to assist . . . judges in determining whether they might have a financial interest in a corporate entity that is related to a corporate party in a case before them and therefore requires their recusal." (Ex. A, p. 3, quoting Wright & Miller, Fed. Prac. & Proc. Civ. § 1197). Though Section 100.3(E)(1)(c) of the Rules of Judicial Conduct states that a judge shall disqualify himself or herself in a proceeding if the judge or a fiduciary has an economic interest in the subject matter, there is no corresponding rule in the Commercial Division that requires parties to disclose financial information that would allow judges to know fully whether they do have a financial interest in the case (Ex. A, p. 1).

The Federal Rule of Civil Procedure 7.1 and the Federal Rule of Appellate Procedure 26.1 do have disclosure statement requirements for parties before the court, and they provide the model for the present proposed rule. The CDAC states that disclosure of a party's parent corporation is necessary because an adverse ruling against the subsidiary may affect the parent. A judgment against a party may also affect a publicly held corporation that owns 10% or more of the stock in the party. The 10% threshold is set so that the corporation would be sufficiently

invested in the party, that it would have an impact on the investing corporation. The proposed rule does not cover all conceivable circumstances that may call for disqualification under a financial interest standard. The disclosures are calculated to reach the majority of circumstances that are likely to call for disqualifications based on financial information that the judge may not be aware of (Ex. A, p. 2). The proposed rule also requires parties to file supplemental disclosure statements whenever there is a change in the information which the rule requires parties to disclose.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than February 22, 2021.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

# EXHIBIT A

**TO:** Commercial Division Advisory Council

**FROM:** Subcommittee on Procedural Rules to Promote Efficient Case Resolution

**DATE**: September 30, 2020

**RE**: Proposal for New Commercial Division Rule Requiring a Nongovernmental Corporate Party to File A Disclosure Statement Identifying Any Parent Corporation and any publicly held corporation owning 10% or more of stock or state there is no such corporation

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## PROPOSED NEW RULE

Rule _____ Disclosure Statement

(A) Who Must File: Contents. A non-governmental corporate party and a non-governmental corporation that seeks to intervene must file a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(B) Time to File: Supplemental Filing. A party or a proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

## DISCUSSION

Section 100.3(E)(1)(c) of the Rules of Judicial Conduct states a judge shall disqualify himself or herself in a proceeding where the judge knows that he or she individually or as a fiduciary "has an economic interest in the subject matter in controversy or in a party to the proceeding." The Commercial Division does not have any rule that requires parties to set forth minimum financial disclosure that would enable the Commercial Division Justice to ascertain whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Federal Rule of Civil Procedure 7.1 and the Federal Rule of Appellate Procedure Rule 26.1 both have similar Disclosure Statement requirements for parties in cases before the court. The Committee Notes to the Federal Rules are instructive as to why the disclosure information is important to the Court and the litigants and much of their guidance is set forth below. They explain the rationale for the Rule. The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the case. Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, could have an interest in litigation involving the subsidiary.

The Proposed Rule like the Federal disclosure rules contains the requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party could have an interest in the outcome of the litigation. A judge owning stock in a corporate party may often recuse himself or herself. The requirement of listing a parent takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock.

The Proposed Rule does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. The information required to be disclosed does not cover all the circumstances that may call for disqualification under a financial interest standard. The Proposed Rule requires minimal financial information, but which helps protect the judge and the parties from litigating a case where the judge has or could be accused of having an improper interest or bias. The disclosure statement provides the judge with information as to whether the judge should remove himself or herself from the case. It allows the Justice to determine if he or she would be in violation of ethical rules regarding financial interests of judges in cases. The disclosures are calculated to reach the majority of the circumstances that are likely to call for disqualifications based on financial information that a judge may not know or remember.

The information required by the Proposed Rule reflects the same "financial interest" standard used in the federal rules of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This standard in the Proposed Rule is consistent with ethical rules and codes of conduct applicable to New York State Judges. It does not cover all of the circumstances that may call for disqualification under the financial interest standard and does not deal at all with other circumstances that may call for disqualification.

As the Committee Notes to the comparable Federal Disclosure Rules state, framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It is not practicable to dictate more detailed disclosure requirements for the Proposed Rule.

The Proposed Rule requires that nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation nevertheless must so state affirmatively. This places the party on record. Otherwise, if a party does not inform the court of that fact, courts do not know whether it has not been filed because there was nothing to report. a party failed to ascertain the information, or the party was ignorant of the rule's compulsory requirements.

The Proposed Rule requires parties to file supplemental disclosure statements whenever there is a change in the information which the rule requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party must file a supplemental statement identifying that publicly held corporation. This is consistent with the purpose of the rule.

Court decisions where filings under the federal disclosure rule requirement was challenged, a party sought to avoid public disclosure of the information, or a party sought sealing of the information have emphasized that the public interest in disclosure of such information was paramount.

Corporate disclosure statements exist "to assist district judges in determining whether they might have a financial interest in a corporate entity that is related to a corporate party in a case before them and therefore requires their recusal." 5 Wright & Miller, Fed. Prac. & Proc. Civ. § 1197 (3d ed. 2010). Recusal issues involve "[t]he operations of the courts and the judicial conduct of judges," and thus are "matters of utmost public concern." *Bradley*, 2007 WL 1703232, (S.D.Ga.2007) at * 1 (quoting *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir.2007)).

As an illustration: a contractor was required to disclose the identity of its corporate parent in a subcontractor's breach of contract suit against it, despite the contractor's contention that revealing the identity of its parent would allow other companies access to capital sufficient to enter the international steel market and in doing would reduce its market share. The court held that the corporate disclosure statement would assist the district court in determining whether it might have a conflict of interest and the contractor did not provide any explanation as to why its interest exceeded the public's interest in disclosure. *Steel Erectors, Inc. v. AIM Steel International, Inc.,* 312 F.R.D. 673 (S.D.Ga.2016).

Also of interest is what is not required or included in the Proposed Rule. As noted above, the Proposed Rule requires minimal information like comparable federal rules to assist judges in deciding whether they have interests in any of a party's related corporate entities that would disqualify the judges from hearing the case.

It does not require, for example, that a corporate party identify subsidiaries and affiliates that have issued shares to the public. This is not believed necessary although several circuit rules require identification of such entities.

The Subcommittee recommends adoption of the new Proposed Commercial Division Rule set forth above mandating the filing by nongovernmental parties of a Corporate Disclosure Statement containing the information required by the Proposed Rule.