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## Federal Rules Update: How Rules Are Made: A Brief Review

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## How Rules Are Made— A Brief Review

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees, that draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States they are forwarded to the U.S. Supreme Court, which reviews the rules, makes any appropriate changes, and in turn forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years.

### Federal Rules of Criminal Procedure pending public comment

In June 2007, the Standing Committee on the Rules authorized publication for comment on a number of rules of criminal procedure. The comment period for these proposed amendments ended February 15, 2008. More information about filing those comments is available at <http://www.uscourts.gov/rules>.

**Criminal Rule 7. The Indictment and the Information.** The proposed amendment to Rule 7 would delete subdivision (c)(2)—which requires that the indictment include notice that the defendant has an interest in forfeitable property—because it is covered in Rule 32.2(a).

**Criminal Rule 32. Sentencing and Judgment.** The proposed change to Rule 32(d)(2) would provide that the presentence report should state whether the government is seeking forfeiture of property. The purpose of the amendment is to promote timely consideration of forfeiture issues during sentencing.



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### Criminal Rule 32.2. Criminal Forfeiture.

There are a number of proposed changes to this rule. First, amended Rule 32.2(a) would provide that general notice of forfeiture is sufficient and that it would not be necessary to identify the specific money judgment or property subject to forfeiture. Second, amended Rule 32.2(b)(1) would clarify the court's ability to consider additional evidence in making its forfeiture determination and would require the court to hold a hearing, if requested. Third, Rule 32.2(b)(2) would require the court to enter its preliminary forfeiture order in advance of sentencing; that change would also authorize the court to enter a general forfeiture order. Fourth, an amendment to Rule 32.2(b)(3) and (4) would clarify when the forfeiture order becomes final as to the defendant and what the district court must do at sentencing. Fifth, amended Rule 32.2(b)(5) would require the government to submit a special verdict form. Finally, proposed changes to Rule 32.2(b)(6) and (7) would address technical changes modifying the notice, publication, and interlocutory sale of forfeitable property. These proposed amendments were the result of a report of a subcommittee of the advisory committee, which was assisted by forfeiture experts in the Department of Justice and a representative of the National Association of Criminal Defense Lawyers. The committee believes that the amendments reflect current practice, as it has developed following the amendments to the forfeiture rules in 2000.

**Criminal Rule 41. Search and Seizure.** The proposed changes to Rule 41 would create a two-stepped process for seizing and reviewing electronic storage media and would provide that any inventory of that data may be limited to a description of the physical storage media.

**Rules Governing § 2254 Proceedings, Rule 11. Certificate of Appealability.** This is a new rule, which would make the requirements concerning certificates of appealability more prominent by adding and consolidating them in this rule. The proposed amendments would also require the district judge to grant or deny the certificate when a final order is issued.

**Rules Governing § 2254 Proceedings, Rule 12. Applicability of the Federal Rules of Civil Procedure.** This rule, which is current Rule 11,

would be renumbered, assuming that new Rule 11, above, is adopted.

**Rules Governing § 2255 Proceedings, Rule 11. Certificate of Appealability; Time to Appeal.** As with proposed new Rule 11 for § 2254 Proceedings, above, this new rule would make the requirements concerning certificates of appealability more prominent by adding and consolidating them in a single rule. The proposed new rule would require the district judge to grant or deny the certificate when a final order is issued.

**Proposed Time-Computation Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure.** At its June 2007 meeting, the Standing Committee on Rules of Practice and Procedure considered a report of a special subcommittee that had been tasked in 2005 with studying all of the time computation problems in the Federal Rules of Procedure and the Rules of Evidence. The subcommittee reported that the study was “launched in response to frequent complaints by practitioners about the time, energy and nervous anxiety expended in calculating time periods, and to comments by judges about the anomalous results of the current computation system.” (Report of Subcommittee, Time-Computation Project, June 29, 2007 *available at* <http://www.uscourts.gov/rules>.) Each of the advisory committees—with the exception of the Evidence Committee—has recommended uniform changes to its own set of rules, using the template recommended by the subcommittee. That template uses what the subcommittee referred to as a “days-are-days” approach to counting all time periods, including short periods, and sets out standard provisions for determining issues such as

when to start and end the counting. In the case of the Criminal Rules of Procedure, Rule 45(a) has been completely revised to now reflect that template. The proposed amendments are intended to clarify how time periods are calculated.

Additionally, there are proposed amendments to the following criminal rules. A brief summary of the proposed change in times is noted parenthetically for each rule:

**Rule 5.1.** Preliminary Hearing (time change for scheduling in 5.1(c)); **Rule 7.** The Indictment and the Information (time increased from 10 to 14 days for filing bill of particulars); **Rule 12.1.** Notice of an Alibi Defense (10-day limits increased to 14 days); **Rule 12.3.** Notice of a Public-Authority Defense (10-day limits increased to 14 days and 20-day limits increase to 21 days); **Rule 29.** Motion for a Judgment of Acquittal (time for filing motion increased from seven to 14 days); **Rule 33.** New Trial (time for filing motion increased from seven to 14 days); **Rule 34.** Arresting Judgment (time for filing increased from seven to 14 days); **Rule 35.** Correcting or Reducing a Sentence (time increased from seven to 14 days); **Rule 41.** Search and Seizure (time for executing warrant increased from seven to 14 days); **Rule 45.** Computing and Extending Time (completely revised); **Rule 47.** Motions and Supporting Affidavits (time of motion increased from five to 10 days); **Rule 58.** Petty Offenses and Other Misdemeanors (10-day periods increased to 14 days); **Rule 59.** Matters Before a Magistrate Judge (10-day periods increased to 14 days); **§ 2254 Rule 8.** Evidentiary Hearing (10-day period increased to 14 days); and **§ 2255 Rule 8.** Evidentiary Hearing (10-day period increased to 14 days). ■

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