

APPEAL TIME CLARIFICATION ACT OF 2011

SEPTEMBER 7, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,  
submitted the following

R E P O R T

[To accompany H.R. 2633]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2633) to amend title 28, United States Code, to clarify the time limits for appeals in civil cases to which United States officers or employees are parties, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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**Purpose and Summary**

The purpose of H.R. 2633 is twofold: First, the bill clarifies that the deadline for filing a civil appeal under Federal Rule of Appellate Procedure 4 is 60 days when one of the litigants is the Federal Government; a Federal Government agency; a Federal officer or

employee sued individually in an official capacity; or a current or former Federal officer or employee sued individually in an official capacity for an act or omission occurring in connection with duties performed on behalf of the United States. And second, the legislation “syncs” this clarification under 28 U.S.C. §2107 with an identical change to Appellate Rule 4 that is scheduled to take effect on December 1, 2011, pursuant to a recommendation made by the United States Judicial Conference.

### **Background and Need for the Legislation**

The Rules Enabling Act<sup>1</sup> authorizes the Judicial Conference to develop changes to existing Federal rules of procedure and evidence. The Supreme Court submits any agreed-upon amendments to Congress no later than May 1 of a given calendar year. The changes take effect on December 1, unless Congress intervenes during the interim.

In 2011, the Supreme Court submitted proposed amendments to Appellate Rules 4 and 40 that clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set by Appellate Rule 4 as well as 28 U.S.C. §2107, the Advisory Committee on Appellate Rules proposed that the Judicial Conference seek legislation to make the same clarifying change to §2107.

Appellate Rule 4 and §2107 currently provide that the time to appeal is 30 days for most civil cases, but that the appeal time for all parties is 60 days when the parties to the case include “the United States,” a United States “officer,” or a United States “agency.” Current law is not clear concerning the applicability of the longer period in cases in which the Federal party is a United States officer or employee sued in an individual capacity. The proposed amendments to Appellate Rule 4 and H.R. 2633 clarify that the longer period applies when one of the parties is the United States itself; a United States agency; a United States officer or employee sued in an official capacity; or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.

When a current or former Federal officer or employee is sued in an individual capacity for an act or omission in connection with the officer or employee’s Federal duties, the United States must decide whether to represent the officer or employee. If the United States decides to represent this defendant, then the policy arguments in favor of applying the 60-day appeal period are the same as in other cases involving Federal parties: The Department of Justice needs time to review the case, determine whether an appeal should be taken, and secure the Solicitor General’s approval for that appeal. This is true of cases in which the United States has already represented the officer or employee prior to the entry of judgment in the trial court, and it is also true of cases in which the United States has not yet represented the officer or employee but decides to do so by the time the appeal is taken.

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<sup>1</sup> 28 U.S.C §§ 2071–2077.

The proposed amendments bring Appellate Rules 4 and 40 into line with Civil Rule 12(a)(3), which gives a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties extra time to answer the complaint. Similar to Civil Rule 12(a)(3), the proposed amendments to Rules 4 and 40 and H.R. 2633 set a general principle—namely, that the longer periods apply in cases where a current or former United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

Because of special concerns relating to the significance of appeal deadlines, the proposed amendments to Appellate Rules 4 and 40 as well as H.R. 2633 also specify two safe harbors that ensure the application of the longer periods: The cases to which the extended periods will apply include all instances in which the United States represents the relevant officer or employee when the judgment or order is entered or in which the United States files the appeal for that person. The proposed amendments will bring clarity to these provisions and allow the United States (and other parties) to rely upon the longer appeal and rehearing periods in many cases where uncertainty (concerning the applicable time period) may currently exist.

The proposed amendments to Appellate Rules 4 and 40 are currently on track to take effect December 1, 2011, if Congress takes no contrary action. It is important to enact H.R. 2633 on a timetable that permits the statutory amendment to take effect December 1, 2011, at the same time as the rule amendments. H.R. 2633 provides that the amendment to §2107 “shall take effect on December 1, 2011,” which accords with the effective date provision in the Supreme Court’s order promulgating the rule amendments and covers judgments, orders, and decrees that could be timely appealed on or after December 1, 2011.

Finally, the Committee notes that the proposed amendments to Appellate Rule 4, as proffered by the Judicial Conference under the Rules Enabling Act, as well as the contents of H.R. 2633 apply to members of both houses of Congress and their staffs. In other words, members of the United States House of Representatives, the United States Senate, and their staffs are considered United States officers or employees under Appellate Rule 4 and 28 U.S.C. §2107. As argued by Professor Catherine T. Struve,

the typical instance of representation by the United States involves representation by the Department of Justice. However, the legislative branch obviously is as much a part of the United States government as the executive branch. Representation by [Senate Legal Counsel, or the “SLC”] or [the House Office of General Counsel, or “OGC”]—i.e., by the government counsel designated by statute (or by House rule) as the official legal representative for the relevant legislative house and its members, officers, and employees—proceeds under the direct control of one of the Houses of Congress. Thus, unless one is willing to assert that the legislative branch is less eligible than the executive branch for recognition as “the United

States,” representation by SLC or OGC should count as representation by the United States.<sup>2</sup>

### **Hearings**

The Committee on the Judiciary held no hearings on H.R. 2633.

### **Committee Consideration**

On July 28, 2011, the Committee met in open session and ordered the bill H.R. 2633 favorably reported without amendment, by voice vote, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee’s consideration of H.R. 2633.

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### **Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2633, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 4, 2011.*

Hon. LAMAR SMITH, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2633, the “Appeal Time Clarification Act of 2011.”

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<sup>2</sup>Memorandum from Catherine T. Struve to Judge Lee H. Rosenthal, Judge Jeffrey S. Sutton, Professor Daniel R. Coquillette, and Andrea L. Kuperman, Chief Counsel to the Judicial Counsel’s Rules Committee, regarding “Proposed legislation amending 28 U.S.C. §2107” (Feb. 20, 2011), in the files of the Committee on the Judiciary.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

*H.R. 2633—Appeal Time Clarification Act of 2011.*

H.R. 2633 would codify a recent amendment to the Federal Rules of Appellate Procedure. Current law allows 60 days to file a notice of appeal for civil cases if the United States or a Federal officer is a party; however, it is unclear whether this time period applies if current or former Federal employees are sued in an individual capacity in connection to their Federal employment. This legislation would clarify that it does.

Based on information from the Administrative Office of the United States Courts, CBO estimates that H.R. 2633 would have no significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2633 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2633 clarifies the fair treatment of litigants under the Federal Rules of Appellate Procedure and assists the Federal courts in correctly interpreting those rules.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2633 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short Title.* This Act may be cited as the “Appeal Time Clarification Act of 2011.”

*Sec. 2. Time for Appeals in Certain Cases.* Section 2 makes three edits to punctuation in existing subsection (a) of § 2107.

Section 2 also rewrites existing subsection (b) of § 2107 as follows: In any civil action, suit, or proceeding, the time for all parties to appeal shall be 60 days from the entry of judgment, order, or decree, if one of the parties is—

- the United States;
- an agency of the United States;
- an officer or an employee of the United States who is sued in an official capacity; or
- a current or former officer or employee of the United States who is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including any instance in which the United States represents that person when the judgment, order, or decree is entered or files the appeal for that person.

*Sec. 3. Effective Date.* The amendments made by this Act shall take effect on December 1, 2011.

## Agency Views

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544**

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CHAIR

PETER G. McCABE  
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CRIMINAL RULES

SIDNEY A. FITZWATER  
EVIDENCE RULES

July 26, 2011

Honorable Lamar S. Smith  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Appellate Procedure, we write to urge your support of the Appeal Time Clarification Act of 2011 (H.R. 2633). The Act would amend 28 U.S.C. § 2107 to conform to proposed amendments to Federal Rules of Appellate Procedure 4 and 40 that have been approved by the Judicial Conference of the United States and the Supreme Court, and are currently pending before Congress. The proposed amendments, which are noncontroversial and strongly supported by the Department of Justice, are scheduled to take effect on December 1, 2011, absent congressional action to the contrary. To avoid confusion that could imperil appellate rights of federal officers and employees sued in civil cases, the closely related legislative amendment should take effect on the same date.

The proposed amendments to Appellate Rules 4 and 40 clarify the deadline for any party to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4, but also by 28 U.S.C. § 2107, the Judicial Conference has requested legislation to make the same clarifying change to Section 2107. Appellate Rule 4 and Section 2107 currently provide that the time to appeal is 30 days for most civil cases, but that the appeal time (for all parties) is 60 days when the parties to the

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case include “the United States,” a United States “officer,” or a United States “agency.” Current law is not clear that this longer period applies when a United States officer or employee is sued in an individual capacity. The proposed amendments will clarify that the longer period applies when one of the parties is the United States itself; a United States agency; a United States officer or employee sued in an official capacity; or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.

When a current or former federal officer or employee is sued in an individual capacity for an act or omission in connection with the officer or employee’s federal duties, the United States must decide whether to represent the officer or employee. The policy arguments in favor of applying the 60-day appeal period are the same as in other cases involving federal parties: the Department of Justice needs time to review the case, determine whether an appeal should be taken, and secure the Solicitor General’s approval for that appeal. This is true of cases in which the United States has already represented the officer or employee before the entry of judgment in the trial court, and it is also true of cases in which the United States has not yet represented the officer or employee but decides to do so when the appeal is taken.

The proposed amendments bring Appellate Rules 4 and 40 in line with Federal Rule of Civil Procedure 12(a)(3), which gives a federal officer or employee sued in an individual capacity for an act or omission occurring in connection with federal duties extra time to answer the complaint. Similar to Civil Rule 12(a)(3), the proposed amendments to Rules 4 and 40, and the proposed legislation to amend Section 2107, follow the general rule that the longer periods apply when a current or former United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf. Because appeal deadlines are so significant, the proposed amendments to Appellate Rules 4 and 40 and the proposed legislation to amend Section 2107 also specify two safe harbors in which the longer periods apply. The safe harbors make it clear that the longer appeal deadline applies to cases in which the United States represents the officer or employee when the judgment or order is entered or in which the United States files the appeal for that person. The proposed amendments will bring clarity to these provisions and allow the United States (and other parties) to rely on the longer appeal and rehearing periods in many cases where uncertainty currently exists.

The proposed amendments to Appellate Rules 4 and 40 were approved by the Supreme Court in April 2011, after the careful review by the Rules Committees under the Rules Enabling Act, 28 U.S.C. §§ 2072–2074. The proposed amendments will take effect December 1, 2011, if Congress takes no contrary action. It is crucial that the amendment to Section 2107 take effect on December 1, 2011, at the same time as the rule amendments, to avoid confusion on a matter that affects the courts’ jurisdiction and the parties’ appellate rights.

We greatly appreciate your consideration of the Rules Committees’ views. We look forward to continuing to work together to ensure that our civil justice system is working well. If you or your

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staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,



Lee H. Rosenthal  
United States District Judge  
Southern District of Texas  
Chair, Committee on Rules  
of Practice and Procedure



Jeffrey S. Sutton  
United States Circuit Judge  
Sixth Circuit  
Chair, Advisory Committee  
on Appellate Rules

Identical letter sent to: Honorable John Conyers, Jr.

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### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**SECTION 2107 OF TITLE 28, UNITED STATES CODE**

**§ 2107. Time for appeal to court of appeals**

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, ~~order or decree~~*order, or decree* in an action, ~~suit or proceeding~~*suit, or proceeding* of a civil nature before a court of appeals for review unless notice of appeal is ~~filed, within thirty~~*filed within 30* days after the entry of such judgment, ~~order or decree~~*order, or decree*.

~~[(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.]~~

*(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—*

*(1) the United States;*

*(2) an agency of the United States;*

*(3) an officer or employee of the United States who is sued in an official capacity; or*

*(4) a current or former officer or employee of the United States who is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including any instance in which the United States represents that person when the judgment, order, or decree is entered or files the appeal for that person.*

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