ASSURANT

Fax

One Chase Manhattan Plz
New York, NY 10005

www.assurant.com

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Attention:	Peter G. McCabe	**From:**	Katherine Greenzang
Fax Number:	(202) 502-1766	**Sender's Phone:**	(212) 859-7021
Company:	Committee on Rules on Practice & Procedures Judicial Conference of the United States	**Sender's Fax:**	(212) 859-7034
Copy:		**Department:**	Legal
Regarding:	Comments to Proposed Amendments to the Federal Rules of Civil Procedure regarding Electronic Discovery by Assurant, Inc. ("Assurant") and its subsidiaries		

Notes:

Please see the attached.

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Peter G. McCabe, Secretary
Committee on Rules on Practice & Procedures
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments to Proposed Amendments to the Federal Rules of Civil Procedure regarding Electronic Discovery by Assurant, Inc. ("Assurant") and its subsidiaries

Dear Mr. McCabe:

Computers have revolutionized American society and business over the last several decades. Computers and other electronic technology devices have allowed innovations which were never thought possible in the past. In the dawn of e-mail, the Internet, paperless offices, and electronic document retention, it is important that the laws encourage this continued innovation. Assurant and its subsidiaries value the efforts of the Committee on Rules of Practice and Procedure to address the need to update the federal rules to reflect the reality that much of the information used in corporate environments is created or stored electronically. We appreciate the opportunity to respond to your request for comments on the proposed amendments to the Federal Rules of Civil Procedure regarding electronic discovery.

Assurant is a publicly traded company, whose member companies provide specialty insurance products and related services. Assurant's four key businesses are Assurant Employee Benefits, Assurant Health, Assurant Solutions, and Assurant Preneed. Assurant Employee Benefits provides employer-sponsored benefits programs and also offers employee-paid insurance products and services. Assurant Health is a leading health insurance provider to more than one million individuals and small businesses nationwide. Assurant Solutions develops, underwrites and markets specialty insurance, membership and extended service programs through partnerships with major financial and retail institutions. Assurant Preneed is a leading provider of prefunded funeral insurance primarily distributed through a network of 3,000 funeral firms in the United States and Canada.

As a provider of specialty insurance products and services, our business relies on cutting edge technology to effectively service our customers and compete in nationwide and international markets. As any sizeable American corporation, we have made a strong commitment to the use of computer systems, applications and electronic communications. Moreover, like any sizeable American corporation, we are engaged on a daily basis in

In New York state, Assurant, Inc. does business under the name Assurant Group.

prosecuting and defending many lawsuits. The information that we create and store in our computer systems is often the subject of discovery.

We would ask that the Panel take the opportunity in crafting the amendments to the Federal Rules of Civil Procedure to balance the need for preservation of evidence for litigation with the need to avoid the inefficiencies and expense of preserving information which is never going to be of any further business use and is unlikely to ever be the subject of discoverable evidence in litigation.

With this context in view, Assurant respectfully requests that this Committee address the following issues.

Proposed Amendment to Rule 37: The Safe Harbor

We concur with the Committee's assessment that a safe harbor amendment is necessary in the context of electronic discovery. We appreciate that the Committee memorializes that there are legitimate and important reasons why companies need to maintain a routine records retention program in order to avoid the cost and inefficiency of maintaining volumes of electronic information.

First, we urge the Committee to require a heightened standard for determining whether the safe-harbor applies and whether an action is outside the safe-harbor provisions. The proposed negligence-based or recklessness-based standard does not adequately address the real world situation faced by most businesses. For example, many companies like Assurant have a variety of businesses operating in many locations and using multiple computer systems. It is strong medicine to take the company out of the safe-harbor protections simply because an employee at a remote location unknowingly or unwittingly deletes electronic information in the face of a litigation hold. For that reason, we urge the Committee to revise Rule 37 to provide for sanctions only in the event of willful and intentional destruction of what is deemed by the court to be relevant information.

Moreover, this Committee should consider requiring a showing of malice before sanctions could be imposed. A requesting party can always argue that any data destroyed based on an established computerized records retention program constitutes willful destruction. Requiring a showing of maliciousness prior to the loss of safe harbor protections and the imposition of sanctions cuts to the real issue of whether a party destroyed evidence with less than legitimate reasons.

Second, we ask the Committee to consider providing express guidance within the rules regarding what it considers to be a reasonable length of time for a company to recycle electronic information pursuant to an electronic records retention policy. In consideration of the volume of e-mails and spam, the enormous file sizes of certain records, and the daily creation of electronic notes and tasks, Assurant suggests that a forty-five day retention timeline is reasonable and appropriate based on the daily operations of larger corporate systems. Otherwise, the volumes of electronic e-mails, data and back up tapes can quickly slow down the companies' computer systems and exponentially increase its IT storage budget.

Definition of Reasonably Accessible Information Under Proposed Rule 26(b)(2)

The proposed amendment to Fed. R. Civ. Proc. 26 (b)(2) provides in pertinent part that "a party need not provide discovery of electronically stored information that the party identifies is not reasonably accessible." The proposed rule then provides that, on motion of the requesting party, the burden is on the responding party to establish that the information is not reasonably accessible. At this juncture, a court can only order discovery of such information for "good cause."

While this framework appears on its face to strike a balance between the interests of the parties to the litigation, we believe it could be clarified to provide more guidance. The language as drafted shifts the burden in discovery to the producing party to show that information is not reasonably accessible. We believe that as drafted, the rule will increase dramatically the number of discovery disputes, as the parties will now be litigating in every case over what is "reasonably accessible" and what is "good cause" to require the production of such inaccessible information.

If the primary intention of the rule is to permit the requesting party to engage in expensive discovery of back-up information only in unusual circumstances, then we would ask that the Committee maintain the present standard of requiring the producing party to undertake a search of inaccessible data only upon a showing of "good cause" by the requesting party.

We suggest that the Committee consider providing a thorough description of the term "reasonably accessible." "Reasonably accessible" should be limited to information accessed within the daily and routine operations of the business. For further clarification,

it would be helpful if the definition included certain types of data that are typically involved in the daily and routine operations of the business. Additionally, the definition should specifically exclude certain information and storage devices from the definition of reasonably accessible, such as disaster recovery tapes, certain back-up tapes, encrypted data, and deleted and fragmented data.

Finally, the term "good cause" is ambiguous in the context of electronic discovery. The language provided does not explain what level of need must be shown by the moving party in order to force a company to expend significant resources to access and search information that is not reasonably accessible. Before a party is forced to expend significant resources—quite possibly hundreds of thousands of dollars—to conduct a more detailed and often fruitless search, the requesting party should be required to provide both a sufficiently detailed and compelling reason and to establish that similar or equivalent information is not available from other readily accessible sources, including, but not limited to, other electronic information, documents and depositions.

Cost Shifting

We recognize that cost-shifting has always had a place in the discovery process under the Rules. In the past, it has been very unusual for courts to order cost-shifting in the context of traditional paper discovery. In contrast, the costs of responding to electronic discovery requests can be enormous, not only in terms of money, but in terms of employee time. Electronic discovery frequently diverts many employees from their normal job functions. An explicit reference in the Rules, however, would best address the compounding problem of discovery abuses.

If a party is aware that cost-shifting may occur depending on the scope of discovery requests, then that party will conduct some background work and appropriately tailor its discovery requests rather than serving a laundry list of unfocused electronic discovery requests.

Thank you for the opportunity to provide comments to this Committee on behalf of Assurant and its subsidiaries.

Very truly yours,

Katherine Greenzang
Senior Vice President, General Counsel & Secretary
Assurant, Inc.