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

Re: Proposed Amendments to the Civil Rules of Procedure

Dear Mr. McCabe:

BP America Inc. ("BP") supports amending the Federal Rules of Civil Procedure to provide more specific guidance on discovery of electronically stored information. E-discovery has become a significant component of most civil litigation. The burdens and costs of preserving and reviewing electronic data can easily exceed the amount in controversy in small to modest size cases, and can be disproportionate even in more significant disputes. E-discovery should be conducted in the spirit of Fed. R. Civ. P. 1, which requires that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Large companies such as BP face unique difficulties in e-discovery posed by the size, variety, and complexity of their operations, the number of employees, and the different technology systems used in hundreds of different locations and diverse business units. An additional complication is the number of pending cases typically facing large companies like BP, numbering in the thousands or tens of thousands. Certainly the obligation to take reasonable efforts to preserve and produce relevant evidence is a given. However, companies must be able to continue business operations without undue interruption and burden that could be caused by unreasonable e-discovery demands and obligations. Those burdens arise mainly from the unimaginable volume of information that may have to be secured, reviewed, and produced in response to discovery requests. In some cases it takes many months and hundreds of thousands of dollars to process and review the volumes of data typically being sought in litigation today.

There are a few areas of the proposed amendments on which BP would like to focus its comments.

1. **The Two-Tier Approach and the Not Reasonably Accessible Concept.**

BP supports the two-tiered approach contained in the proposed amendment to Rule 26(b)(2), which states that a producing party "need not provide discovery of

electronically stored information that the party identifies as not reasonably accessible" absent a court order based on a showing of good cause. In particular, BP supports the balancing approach suggested by the *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, wherein data such as that found on disaster recovery devices would not be deemed reasonably accessible and would require a showing of need and relevance that outweighs the cost and burden of retrieving and processing such data.

However, the obligation to identify information that is not reasonably accessible should not become an obligation that is itself unreasonable. This is especially important for large organizations with complex data environments. To have to specifically identify all electronically stored information that is not reasonably accessible would impose the very type of burden that this approach is designed to avoid. As the Committee Note states, it should be sufficient to generally identify types of inaccessible data such as disaster recovery systems and legacy data. It should be sufficient to address the identification issue in the Note rather than in the text of the rule.

Just as important, the presumption that information not reasonably accessible need not be produced will have little meaning if it is not made clear that preservation of such data is not required without a showing that the need and relevance outweighs the burden and expense. Given the huge amounts of data already available in reasonably accessible data, there is very little realistic risk that relevant information will not be produced in the normal course of discovery. To require preservation of information that is not presumptively producible would rob the two-tier concept of any meaning.

BP suggests a clarification to the Committee Note at page 13, which states: "But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information." Presumably this is intended to refer to situations where the producing party actually accessed the information in response to a discovery request, notwithstanding the extraordinary expense. It should not be read to mean that any past access of such information requires a later production. For example, the loss of a computer server might require the expense of restoring it from a disaster recovery system, which is the reason for having such backup systems. The fact that on occasion such disaster recovery processes might be necessary should not mean that the backup would then be treated as reasonably accessible in future litigation.

2. **Cost Allocation**

Rule 26(b)(2) should contain an express presumption of cost-sharing when information that is not reasonably accessible is required to be produced. The cost and burden of preserving, reviewing, and producing such inaccessible data is typically very significant. This is especially true given that in the normal case there is voluminous relevant information that is reasonably accessible on which considerable resources are already being spent. Absent a showing that the producing party deliberately failed to properly preserve and produce reasonably accessible information, the requesting party should be required to bear some or all of the extraordinary costs incurred by going after data that is not reasonably accessible.

3. **Form of Production**

Proposed Rule 34(b)(ii) sets the default form of production of electronically stored information as "a form in which it is ordinarily maintained, or in an electronically searchable form." BP agrees with other comments that have suggested instead using the phrase "in a reasonably useable form." This more general formulation is more appropriate in light of changing technology and technology limitations. Not all electronically stored information is searchable in a useable sense, and some data, such as contained in certain proprietary or highly technical databases, cannot practically be produced as they are ordinarily maintained. The general language would better address the issue, which is to give reasonable access to the produced data under the circumstances of each case.

4. **Safe Harbor**

To avoid e-discovery being used as a tactical weapon rather than a reasonable effort to obtain relevant information, the Rules should contain an explicit safe harbor. BP supports the intentional or reckless failure standard in the footnote version of proposed Rule 37(f), (page 33), which would allow sanctions for failure to provide electronically stored information deleted or lost due to routine operation of systems only if a court order were violated or the producing party intentionally or recklessly failed to preserve the information. Furthermore, BP urges consideration of Sedona Principle 14, which provides that sanctions are appropriate only if there is a showing of a reasonable probability that the loss of the evidence materially prejudiced the requesting party. Sanctions should be reserved for the unusual case where intentional or reckless conduct has caused real prejudice. Too often the time and resources of the parties and the courts are diverted to these sanctions battles rather than focusing on the abundant relevant evidence and the merits of the dispute.

BP appreciates the opportunity to submit these comments and the Committee's time and effort spent on considering them.

Respectfully submitted,

BP America Inc.