04-CV-231

**Securities Industry Association**

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February 11, 2005

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: Comments to Advisory Committee on Civil Rules on Proposed Changes Regarding Electronic Discovery.

Dear Mr. McCabe:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to comment on the electronic discovery proposals of the Advisory Committee. SIA's members have extensive experience with electronic discovery in complex federal commercial litigation. Based on that experience we would like to offer the following comments on the proposed rule changes.

1. The proposed amendments to Rules 16 and 26(f) require some clarification as they pertain to preservation of electronic data to ensure that they do not result in the entry of overly broad or vague preservation orders, and do not create confusion as they interrelate with preservation obligations under other provisions of federal law.

2. The proposed amendment to Rule 37 should not exclude all violations of court preservation orders from the protections of its sanction safe harbor.

3. With regard to assertions of privilege, proposed Rule 26(f)(4) seems unnecessary, and places undue pressure on the parties to prematurely produce privileged information.

[1] The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. At its core: Commitment to Clarity, a commitment to openness and understanding as the guiding principles for all interactions between investors and the firms that serve them. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry employs 790,600 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated $213 billion in domestic revenue and an estimated $283 billion in global revenues. (More information about SIA is available at: www.sia.com.)

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4. The proposed wording of the amendment to Rule 26(b)(2) places an undue burden on the responding party to identify information that is not reasonably accessible.

**Discussion**.

*Early Discovery Planning*. While we support the proposal that the parties should discuss issues regarding electronic discovery as part of their Rule 26(f) conference and that such issues can be encompassed in a pretrial conference under Rule 16, we believe that some clarification is needed. Specifically, neither the Rule nor the accompanying Note is clear on what to do if the parties do not agree on an approach to electronic data preservation. This creates a danger that a court might feel obliged to enter a preservation order in any event, at a point in the litigation when no discovery requests may be pending, and when the court and the parties may not have enough information to calibrate an appropriate preservation order.

An overly broad or vague preservation order can create substantial burdens and risks. It can set a party up for sanctions years later, in the context of a failure to preserve some type of electronic data that with the benefit of hindsight appears to bear some relationship to the subject of the litigation.[2] Overly broad preservation orders also create potential tension with other statutory preservation requirements. For example, SIA members are frequently parties to private litigation under the Securities Act of 1933 or the Securities Exchange Act of 1934, which in the context of a statutorily mandated stay of discovery during the pendency of a motion to dismiss contain specific requirements for preservation of evidence.[3] While the statutory language is qualified with "unless otherwise ordered by the court," the clear purpose of these provisions is to reduce the discovery burden on defendants during the pendency of a motion to dismiss. While the preservation requirement under these provisions of the federal securities laws are quite broad, it is entirely possible that a very broad court preservation order entered under Rule 16 could conflict with the statutory preservation directive.[4]

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[2] *United States v. Philip Morris USA, Inc.*, 327 F.Supp.2d 21, 23 (D.D.C. 2004) (imposing sanction of $2.75 million for destruction of emails that violated a preservation order pertaining to "all documents and other records containing information which could be potentially relevant to the subject matter of this litigation.")

[3] Securities Act Section 27(b)(2), 15 U.S.C. 77z-1(b)(2), Securities Exchange Act Section 21D(b)(3)(B), 78 USC u-4(b)(3)(B).

[4] The preservation requirement under these provisions of the federal securities laws applies to "any party to the action with actual notice of the allegations contained in the complaint" and compels such party to preserve "all documents, data compilations... and tangible objects that are in the custody or control of such person and that are relevant to the allegations ...." Contrast this to the preservation order in *United States v. Philip Morris USA, Inc.*, cited in note 2 above, which applies to "information which could be potentially relevant to the subject matter of this litigation."

On this matter we would like to endorse the comments of the letter of the American Bar Association Section on Litigation ("ABA letter").[5] Specifically, we support the ABA letter's recommendation that either Rule 26(f) or its accompanying Note should make clear that "a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause," and that "preservation orders should not be routinely included in Rule 16 orders any time there is a disagreement over the proper scope of preservation. . . . The Note should discourage *ex parte* preservation orders, or the entry of broad or generalized ones, and specify that any preservation orders should be carefully tailored to specific items that can be identified with particularity."

*Safe Harbor from Sanctions.* SIA applauds the creation of a safe harbor for failure to produce certain types of electronically stored information proposed in the amendment to Rule 37. Our only suggestion for improvement is that the safe harbor should not be withheld solely because a party violated a court's preservation order. A party should not be exposed to sanctions for violating a court's protective order if the violation occurred despite conscientious efforts to comply with the order. SIA recommends modifying the language of the amendment so that only recklessly or intentionally violating a preservation order results in exclusion from the safe harbor. The accompanying Note should then discuss some of the factors that the court should consider in determining whether or not the standard of care has been met.

If the Committee is not willing to make the recommended change, then we recommend as an alternative that the exclusion from the safe harbor for violations of court orders should only apply in situations where the court order was specifically directed at the information that was lost or destroyed. Without this clarification, parties will be encouraged to pursue unduly broad preservation orders in the hope of creating the trap for the unwary described above.

*Inadvertent Production of Privileged Information.* SIA supports proposed new Rule 26(b)(5)(B), which deals effectively with the issue of inadvertent production of privileged information. Since this provision addresses inadvertent production comprehensively, we do not see the value of proposed Rule 26(f)(4), requiring the parties to discuss whether the court should enter an order protecting a post-production right to assert privilege. This provision seems redundant at best, and a source of pressure to prematurely produce privileged information at worst. We recommend its deletion, but if 26(f)(4) is retained, we suggest that the Note should make clear that the Rule is not intended to restrict a party from raising a privilege if an order cannot be agreed upon. The Note should also clarify that the reference in proposed Rule 26(f)(3) to discussion of "any issues relating to

[5] Letter from Jeffrey J. Greenbaum, American Bar Association Section on Litigation, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, January 24, 2005, at 4-5.

disclosure or discovery of electronically stored information" is not intended to require that post-production assertions of privilege be discussed.

*Identification of Inaccessible Information.* SIA supports the concept of a "two-tiered" approach to discovery for electronic information. However, Proposed Rule 26(b)(2) appears to place an unwarranted burden on the responding party to identify information that is not reasonably accessible. The responding party may often not know of all sources of information that are not reasonably accessible. The rule as proposed seems to invite responding parties to produce generic lists of every potential type of inaccessible source that can be thought of, regardless of whether that source actually exists, or is likely to have any relevant information.

This problem could be particularly acute for broker-dealers, which are subject to an SEC record-storage rule, Rule 17a-4(f), permitting them to store records in "electronic storage media" only if, *inter alia*, they use a form of technology known as "write once, read many" ("WORM"). One significant difficulty with this regulatory technological requirement is that WORM storage systems are highly inefficient from the standpoint of archiving speed (transfer rates), searchability, and retrievability. This regulatory requirement, coupled with Rule 17a-4(b)(4), which requires broker-dealers to preserve for at least three years all communications relating to "its business as such," results in broker-dealers having to maintain enormous amounts of information that is extremely difficult to search or retrieve.[6] It is impractical, given these restrictions, to place the burden on counsel for a broker-dealer to identify in the first instance all the sources of information within the firm that are not reasonably accessible.

We believe that a better approach would be to change the wording of 26(b)(2) to read "Electronically stored information that is not reasonably accessible need not be produced except on a showing of good cause." The accompanying Note should also clarify a party's good faith duty to identify inaccessible sources of relevant information of which it is specifically aware.

[6] For more information on the recordkeeping challenges posed by the "WORM" and "Business as Such" requirements, *see* letter from Stuart J. Kaswell to Annette Nazareth, SEC Director of Market Regulation, February 21, 2003, at 6, available at http://www.sia.com/2003_comment_letters/pdf/SEC2-21-03.pdf.

**Conclusion**.

Thank you for giving SIA the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure on electronic discovery. If you have any questions about the recommendations in this letter, please contact me at 202-216-2000, or by email at gkramer@sia.com.

Sincerely,

George Kramer

George R. Kramer
Deputy General Counsel