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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, D.C. 20544

To: The Advisory Committee on Civil Rules

Re: Comments on the Proposed Amendments to the Federal Rules of Civil Procedure

I. About First Niagara

First Niagara Financial Group, Inc. ("First Niagara"), through its wholly owned subsidiary, First Niagara Bank, N.A., is a multi-state community-oriented bank with approximately 420 branches, $38 billion in assets, $27 billion in deposits, and approximately 5,800 employees providing financial services to individuals, families and businesses across New York, Pennsylvania, Connecticut and Massachusetts.

First Niagara recognizes that the ever-developing and expanding role of discovery in the judicial process has increasingly burdened the system with a variety of efficiency challenges, especially with regard to expediency and costs. First Niagara takes the position that the rules, as they currently stand, incentivize legal strategies which escalate a dependency on discovery demands without reasonable regard to the practical realities and fundamental issues of fairness that accompany those demands. As such, First Niagara agrees and supports the aims of the Advisory Committee on Civil Rules in revising the Federal Rules of Civil Procedure through their proposed amendments. First Niagara also submits some additional suggestions for consideration which it believes further promotes the Advisory Committee's Goals.

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II. Suggested Changes to the Proposed Amendments

A. *Rule 26(b)(1) – Scope of Discovery*

The given reasons for the proposed amendments to Rule 26(b)(1) are to (1) limit the currently overbroad scope of discovery and to (2) limit the associated costs and burdens of that overbroad scope of discovery. The proposed amendments attempt to do this through the introduction of "proportionality" language. The proposed language is as follows:

> ***Proposed Amendment for Additional Language***
>
> "…[A]nd proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

The additional language of the proposed amendment appears to achieve the goal of limiting the scope of discovery, even if it only does so to the extent that the discoverable items are "proportional to the needs of the case". First Niagara agrees that "proportionality", as suggested, should be determined by (1) the amount in controversy, (2) the importance of the issues at stake, (3) the importance of the discovery in resolving the issues, and (4) whether the burden or expense of the proposed discovery outweighs its likely benefit. However, while proposed determinations (1) through (3) speak to creating and assessing a standard of proportionality that is both clear and concise, determination (4) does not. It is difficult, if not impossible, to accurately assess whether a burden or an expense is likely to outweigh respective benefits prior to actual discovery and production because the referenced "likely benefit" is relative to outstanding and unknown information. This creates an ambiguity and inherent weakness in the proposal's test to limit the scope of discovery.

To rectify this issue, First Niagara recommends that the language of determination (4) be changed and the entire paragraph to be read as follows (changes underlined):

> "…[A]nd proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving issues, and whether the burden or expense of the proposed discovery <u>is unreasonable relative to the preceding factors</u>. Information within this scope of discovery need not be admissible in the evidence to be discoverable."

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Thus, determination (4) would instead turn on whether the request is on its face reasonable, relative to other factors which are readily identifiable and required to be considered. Furthermore, implementing this recommended change would help to ensure that the scope of discovery is limited, but in a way which preserves discretion that is used fairly and objectively.

B. ***Rule 37(e) – Failure to Preserve Discoverable Information***

The proposed amendment to Rule 37(e)(1) reads as follows:

> "(1) ***Curative measures; sanctions.*** If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:"

First Niagara would like to instead suggest the following phrasing (changes underlined):

> "(1) ***Curative measures; sanctions.*** If a party failed to preserve discoverable information that should <u>and could</u> have been preserved in the anticipation or conduct of litigation, the court may:"

First Niagara's proposed change to the proposed amendment ensures that the curative measures and sanctions section would not impose a strict liability determination with regards to the management and preservation of information. Instead, such sanctions would only apply in instances where the offending party both should have and could have preserved the information in anticipation of the conduct or litigation. In most instances where a party is contemptuously failing to preserve information, that party is more than likely to meet the threshold of "could have". By adding the "could have" language, the rule would except those extreme circumstances where the party could not have preserved the information and the cause of destruction was either unforeseeable or extraordinary.

Additionally, First Niagara takes issue with the following language of the proposed amendment of Rule 37(e)(1)(B)(i):

> "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or"

First Niagara recommends that the language of the proposed amendment be changed to read as follows (changes underlined):

> "(i) caused substantial prejudice in the litigation and were willful <u>and</u> in bad faith; or"

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By making our suggested change, the ambiguities created by the disjunctive "or" are avoided through the inclusion of the conjunctive "and". Revising the statement to make it conjunctive would both embolden and clarify the point that any actions which are willfully done in bad faith can be sanctioned. Additionally, this proposed change would further support our recommended change to the proposed amendment of Rule 37(e)(1) by shifting away from the "strict liability" tone. It is not impossible to imagine an extraordinary situation in which the rule, in its current proposed form, could be applied to an action not made in bad faith. To further create clarity, First Niagara suggests that willfulness, for the purpose of the rule, should be defined and included within the rule.

III. Conclusion

First Niagara respectfully requests your consideration of our suggested changes to the proposed amendments and reaffirms its support of the overall evaluation of the Federal Rules of Civil Procedure by the Advisory Committee. Thank you for your time.

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