



Office of the Chief Legal and Governance Officer

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February 14, 2014

**VIA EMAIL, HARDCOPY TO FOLLOW**

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Suite 7-240  
One Columbus Circle, NE  
Washington, DC 20544

RE: Nationwide Mutual Insurance Company's Comments on Proposed Changes  
to the Federal Rules of Civil Procedure

Nationwide Mutual Insurance Company and its subsidiaries and affiliates ("Nationwide"), hereby submits its comments on the proposed changes to the Federal Rules of Civil Procedure ("FRCP") currently being considered by the Advisory Committee on Civil Rules ("the Committee"). Nationwide appreciates the opportunity to provide comments on the proposed changes to the FRCP and commends the Committee's effort in attempting to address issues related to preservation and discovery. As explained below, Nationwide supports most of the changes proposed to the discovery related rules with a few exceptions. Nationwide also urges the Committee to make additional changes to the FRCP that will better define the obligations of the parties in regard to preservation and discovery, which, in turn, will create greater certainty for litigants concerning their obligations and will reduce unnecessary over-preservation and excessive discovery. Such changes will bring down the costs of preservation and discovery from where they exist today and will advance the Committee's goals of just, speedy, and inexpensive resolution of disputes in federal court.

**Background**

Nationwide is a diversified insurance and financial services organization, offering a wide range of insurance, annuity, and investment products and services. Founded in 1926, Nationwide currently has over 33,000 employees and sells its products and services to members, customers, and clients in nearly every state. Nationwide Mutual Insurance Company is an operating insurance company which, along with its property and casualty insurance subsidiaries, primarily underwrites personal automobile, homeowners, and commercial insurance products. Nationwide Financial Services, Inc., a subsidiary of Nationwide Mutual, develops and sells a diverse range of products, including individual

annuities, private and public sector retirement plan products and services, life insurance, and advisory services. Nationwide Financial also provides mutual funds through the Nationwide Funds Group, and banking products and services through Nationwide Bank, a federal savings bank and member FDIC. To support this wide range of businesses, Nationwide utilizes many different systems and as a result, creates and maintains vast amounts of documents and data.

Given the nature of Nationwide's businesses, the breadth of products and services that it sells, and the geographic distribution of its businesses and customers, Nationwide is accustomed to a wide variety of litigation, in many different jurisdictions, both state and federal. Additionally, being in the insurance and financial products business, Nationwide is accustomed to dealing with regulatory bodies and their various exams, inquiries, and investigations. As a result, Nationwide routinely preserves, collects, reviews, and produces significant amounts of data and information to meet its litigation obligations and to comply with regulatory requirements and inquiries.

As a result of the vast amount of litigation and regulatory action that involves Nationwide, approximately eleven years ago, Nationwide created its own internal Discovery Management Unit in order to have a more consistent, efficient, and cost effective approach to discovery. This Unit has allowed Nationwide to save millions of dollars in preservation, collection, review, and production costs, as well as streamlining the preservation and discovery process at Nationwide. However, despite Nationwide's efforts, the costs and burdens of preservation and discovery on Nationwide have continued to grow over time. For example, in a recent case filed against Nationwide, Nationwide was required to search over 11 terabytes of data (approximately 110 million documents). From this search, Nationwide collected approximately 290,000 documents and produced approximately 224,000 documents (approximately 6.4 million pages). Although this case has yet to go to trial, this is but one of the thousands of matters in which Nationwide is involved every year. In the past few years, Nationwide has been involved in an increasing number of other similar cases that require preservation and discovery beyond what was required in the past. Much of this intensive preservation and discovery litigation is in federal court.

### **Rule 1**

Nationwide supports the proposed changes to Rule 1 that make it clear that both the courts and parties should work to secure the just, speedy and inexpensive determination of federal judicial proceedings. Nationwide believes that the changes proposed to Rule 1 by the Committee will promote cooperation among the parties and their counsel and could help to address issues related to over-preservation and abusive and excessive discovery. In Nationwide's experience, such cooperation is often essential in focusing preservation and discovery on the true needs of a case, which, in turn, allows the parties to avoid the unnecessary burden, expense, and delay of over-preservation and excessive discovery.

### **Rule 16(b)(3)(B)(iii) and Rule 26(f)(3)(C)**

Nationwide agrees with the proposed changes to Rule 16(b)(3)(B)(iii) and Rule 26(f)(3)(C) where preservation of electronically stored information (ESI) will be explicitly included as a topic that can be addressed in scheduling orders and in discovery plans, respectively. Nationwide believes that preservation and discovery should be discussed by the parties and addressed by the court as early as possible in litigation. This will not only further the Committee's goal of greater cooperation, but will also help parties to come to an agreement over the scope of preservation and discovery. It will also aid in managing the parties' expectations in regard to preservation and discovery and will help define the issues that cannot be resolved by the parties and that must be resolved by the courts.

Nationwide urges the Committee to also include preservation of ESI as one of the enumerated purposes for pretrial conferences under Rule 16(a). This would be consistent with the changes proposed for Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) and would give the court additional explicit authority to deal with preservation of ESI early in litigation.

### **Rule 16(b)(3)(B)(v)**

Nationwide agrees with the proposed addition of subsection 16(b)(3)(B)(v) to Rule 16 where a party would be required to request a conference with the court before moving for an order relating to discovery. Nationwide believes that such a requirement will allow the parties and the court to discuss, address, and possibly resolve potential discovery issues prior to engaging in costly motion practice. Additionally, such a conference has the potential to aid in defining the precise issues that cannot be resolved and that would need to be addressed in the motion and response and ultimately resolved by the courts. Thus, this change could result in greater efficiency and more timely resolution of potential discovery issues.

### **Rule 26(b)(1)**

Nationwide also agrees with the changes proposed to Rule 26(b)(1) concerning the scope of discovery. In particular, Nationwide supports limiting discovery to "any nonprivileged matter that is relevant to any party's claim or defense" rather than the current standard that allows discovery of any matter "relevant to the subject matter involved in the litigation." Nationwide believes that this new proposed standard better reflects the appropriate scope of discovery by connecting discovery requests to the actual claims and defenses asserted by the parties. In Nationwide's experience, the current standard that allows parties to seek discovery on any matter that is related to the subject matter involved in the litigation is overly broad and endorses excessive discovery practices. Additionally, the current standard forces parties to preserve, collect, review, and produce documents beyond what is truly needed to support a claim or defense, thereby causing unnecessary burden and expense and ultimately delaying the resolution of the litigation. The proposed standard, however, will help limit a party's ability to use discovery as a

weapon in order to force an early settlement of a dispute just to avoid the high cost of preservation and discovery.

Similarly, Nationwide supports the proposed addition of proportionality into the scope of discovery under Rule 26(b)(1). Although the concept of proportionality already arguably exists in Rule 26(b)(2)(C)(iii), the express inclusion of language in Rule 26(b)(1) that discovery needs to be proportional to the needs of the case puts the concept front and center and will aid in addressing excessive discovery. This change will put litigating parties on notice that there are limits to discovery in some cases, even if it is relevant to a claim or defense and will provide the federal courts with greater authority in limiting discovery in appropriate cases. As with the other proposed changes discussed above, this change could result in a more efficient and timely resolution of disputes and the avoidance of unnecessary and costly discovery.

#### **Rule 26(c)(1)(B)**

Nationwide agrees with the proposed change to Rule 26(c)(1)(B) whereby protective orders are permitted to address the allocation of discovery expenses. Nationwide believes that this change, like many of the other changes discussed herein, will result in more focused and efficient discovery practices. By expressly allowing the allocation of discovery expenses to be addressed in protective orders, parties will likely take greater care and consideration in formulating discovery requests, often avoiding unnecessary and burdensome requests. Furthermore, when a requesting party fails to do so, the producing party will have greater authority to seek protection from the court, and the court will have more solid authority to require a fair and equitable distribution of costs without depriving the requesting party of information that it deems necessary to support its case. This change will also help to address the situation in some cases where discovery is used as a weapon to force an early settlement of a dispute in order to avoid the high cost of preserving, collecting, reviewing, and producing discovery.

#### **Rules 30, 31, 33, 34, and 36**

Nationwide agrees with the proposed presumptive limitations on the number and duration of both oral and written depositions and the number of interrogatories under Rules 30, 31, and 33, respectively. Nationwide also agrees with the proposed addition of presumptive limitations on requests for admissions under Rule 36. Nationwide believes that all of these proposed presumptive limitations will serve as an incentive to parties to align their discovery requests with the true needs of the case, thereby reducing unnecessary discovery and avoiding the corresponding delay and cost of such unnecessary discovery.

#### **Rule 37(e)**

Nationwide disagrees with the proposed changes to Rule 37(e). These proposed changes not only do not advance the Committee's stated goal of establishing a uniform, national standard of preservation, these proposed changes would actually undermine the Committee's goal. Under the proposed changes to Rule 37(e)(1)(B), sanctions would be

appropriate if the failure to preserve relevant information is a result of conduct that is “willful or in bad faith” and causes “substantial prejudice” in the litigation. Yet, neither the Rule nor the Committee’s Note define or provide significant guidance on the meaning of “willful,” or what type of conduct would constitute “willful” conduct that would subject a party to sanctions. For example, it is unclear whether merely intentional conduct in destroying potentially relevant information that is part of a good faith document retention policy would be considered “willful” conduct under the proposed Rule. Without such definition or guidance, the term “willful” is vague, ambiguous, and susceptible to multiple interpretations. This, in turn, would create uncertainty within the rule and would facilitate differing interpretations by the various federal courts – which is directly at odds with the Committee’s goal of a uniform, national preservation standard. This uncertainty and potentially varying standards would, in turn, result in further over-preservation of documents and information as protection against possible sanctions.

Similarly, the terms “in bad faith” and “substantial prejudice” are also undefined, and neither the Rule nor the Committee’s Note provides any further guidance on the terms that would aid parties and courts in interpreting their meanings. As with the term, “willful” discussed above, this creates uncertainty and ambiguity in the rule and undermines the development of a uniform, national preservation standard. Although the Committee is also proposing under Rule 37(e)(2) the addition of factors for federal courts to consider in assessing a party’s conduct when there is a failure to preserve, as will be discussed in more detail below, these factors do not provide definitive guidance on whether conduct is “willful” or “in bad faith” and will only lead to further ancillary litigation and motion practice in the hopes of obtaining case dispositive sanctions. These factors also fail to provide any guidance to courts and parties in assessing whether “substantial prejudice” is present in the litigation.

Given the uncertainty with all three of these terms, parties like Nationwide will likely preserve greater amounts of data and information in order to avoid potential sanctions, thereby taking on the additional expense and burden associated with such over-preservation. As noted above, Nationwide has over 33,000 employees who create vast amounts of email and other electronic records and information, as well as hard copy documents of all sorts, in their day-to-day activities and functions. Also as noted above, the breadth of Nationwide’s business presence across the country subjects Nationwide to the potential of being sued in essentially every federal court jurisdiction. Thus, if Rule 37(e) as proposed is ultimately adopted, the burden and expense of over-preserving such documents and information in order to protect Nationwide from being sanctioned under such vague and ambiguous standards – standards that could be interpreted differently by each federal district and circuit – would be significant.

For similar reasons, Nationwide opposes the deletion of the language from Rule 37(e) that prohibited sanctions from being imposed on parties for “failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system” unless exceptional circumstances were present. Although the Committee indicates in its Note that such good faith operation of an electronic information system should be respected under the proposed rule, the removal of this

express language is contrary to the Committee's position as reflected in the Note. As noted above, Nationwide is engaged in a wide range of businesses, sells a wide variety of products, and serves numerous members, customers, and clients. As such, Nationwide generates vast amounts of electronic records and information on a daily basis. Thus, Nationwide relies heavily upon its good faith operation of its electronic information systems and the corresponding record retention policies and standards established for such systems in order to manage the vast amount of data and information that it creates.

Nationwide, therefore, urges the Committee to reject the proposed amendment to Rule 37(e) as currently written in this regard, and to expressly reinsert the concept in the Rule that sanctions cannot be imposed if a failure to provide electronically stored information is lost as a result of the routine, good faith operation of an electronic information system. Alternatively, Nationwide urges that Committee to clarify that a court must find that a party acted with the "specific intent" to deprive its litigation opponent of information relevant to a claim or defense of the opponent before sanctions could be imposed. It should be clear under the Rule that intentional acts carried out in good faith concerning the management of data and information without such intent to deprive a litigation opponent of relevant information should not serve as a basis for sanctions, except in very rare circumstances. Establishing such a standard for preservation would provide the federal courts with adequate flexibility to address situations where a party is indeed deprived of the ability to pursue a claim or defense, while also reducing the amount of over-preservation that exists today.

Likewise, Nationwide opposes the proposed addition of the language to Rule 37(e)(1)(B)(ii) that would permit sanctions to be imposed when a party is "irreparably deprived of any meaningful opportunity to present a claim or defense" by a failure to preserve potentially relevant information. Again, Nationwide believes that sanctions should only be permitted when there is "specific intent" to deprive its litigation opponent of information relevant to a claim or defense of the opponent as well as evidence of a party's failure to act in good faith concerning the preservation of potentially relevant information unless there are exceptional circumstances present that would justify such sanctions. Intentional acts carried out in good faith concerning the management of data and information that result in a failure to preserve potentially relevant information without a specific intent to deprive a litigation opponent of information relevant to a claim or defense of the opponent -- even if that opponent is irreparably deprived of a meaningful opportunity to present a claim or defense as a result of the failure to preserve -- should not serve as a basis for sanctions.

Additionally, this new, proposed standard for sanctions is vague, ambiguous, and susceptible to multiple and inconsistent interpretations. As such, this new, proposed standard will result in interpretations that could vary from judge to judge and court to court, thereby undercutting the Committee's stated goal of establishing a uniform, national preservation standard. Additionally, this new, proposed standard for sanctions will do nothing to address over-preservation. Instead, parties will likely over-preserve documents and information in order to protect themselves from possible sanctions based upon subjective interpretations that a party was "irreparably deprived" of any



“meaningful” opportunity to present a claim or defense. Thus, parties like Nationwide will continue to shoulder the expense and burden of preserving vast amounts of documents and information that are ultimately unnecessary in litigation in order to avoid the possibility of sanctions in the multiple jurisdictions where Nationwide could be a litigant.

As noted by the Lawyers for Civil Justice, this new “irreparably deprived” standard would essentially create a negligence-based cause of action for spoliation, a tort that many states have rejected due to the potential confusion and interpretations involved. If this standard is adopted by the Committee, parties will be incentivized to engage in ancillary litigation that could result in case dispositive sanctions, without any showing of the specific intent to deprive an opponent of information and documents that would support the opponent’s case. This would be inequitable, unfair, and would lead to further over-preservation of information just to avoid this possibility, along with the burdens and expenses of such unnecessary over-preservation.

Although the Committee is proposing to add factors in Rule 37(e)(2) for federal courts to consider when assessing a party’s conduct when a failure to preserve occurs, Nationwide believes that these factors would only encourage additional, ancillary litigation and motion practice and will also undermine the Committee’s goal of establishing a uniform, national preservation standard. Like the proposed irreparably deprived, willful, in bad faith, and substantial prejudice standards discussed above, these factors are susceptible to varying interpretations and will consequently lead to standards that may vary from judge to judge and court to court. Parties like Nationwide will continue to over-preserve information in order to avoid the possibility of sanctions under these uncertain and potentially varying standards and will have to absorb the costs and burdens of such over-preservation.

Furthermore, given the uncertainty inherent in the meaning of “willful” as discussed above, litigants and federal courts need clear and express guidance to adequately interpret “willful” conduct that could subject a party to harsh sanctions. These proposed factors, however, do not provide such guidance, nor do they shed any light on the culpability or prejudice that should be present before sanctions are imposed. These proposed factors instead could be used to justify harsh sanctions when a party’s good faith conduct results in inadequate preservation. Nationwide encourages the Committee to remove these factors from the Rule or, alternatively, to provide clear and express guidance that despite these factors, sanctions should not be imposed except in rare circumstances if preservation efforts fail despite a party’s good faith operation of its electronic information systems and the corresponding record retention policies and standards associated with such systems.

Should the Committee elect to move forward with the proposed Rule 37(e) as currently drafted, Nationwide joins in the comments of the Sedona Conference that the Committee should include a requirement in the Rule that courts must impose the least severe curative measure or sanction necessary to address the preservation failure. In other words, federal courts should be required to ensure that any sanction or curative measure imposed in

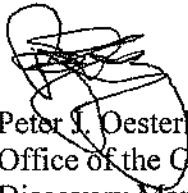
litigation is proportional to the preservation failure that occurred and the amount of prejudice that a party will suffer as a result of the preservation failure. Additionally, the Committee should include express guidance that the harshest and case-dispositive sanctions should only be imposed when the party's conduct in failing to preserve information is egregious.

As highlighted above in all of our comments on the proposed FRCP changes, Nationwide is mostly in favor of the changes; but only to the extent that they clarify standards that will prevent the costly over-retention of needless information and not punish organizations for the good faith operation or well thought out record retention practices. Nationwide hopes that the Committee will find these comments helpful in assessing whether the proposed changes to the FRCP should be implemented and looks forward to seeing the final Rules.

Thank you for your consideration.

Sincerely,

**Nationwide Mutual Insurance Company**



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