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Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: *Public Comment of Allstate Insurance Company on Proposed Amendments to the Federal Rules of Civil Procedure*

Dear Members of the Committee:

Allstate Insurance Company ("Allstate") respectfully submits these comments on the discovery-related amendments to the Federal Rules of Civil Procedure proposed by the Federal Advisory Committee on Civil Rules (the Amendments). Allstate would like to thank the Committee for its hard work in developing the proposed changes and its commitment to soliciting and considering the diversity of views expressed in the comments. Allstate believes the Amendments represent a significant step toward reducing needless burdens and unproductive costs associated with discovery. Allstate agrees with, and supports, the comments submitted by the Lawyers for Civil Justice ("LCJ")[1] and appreciates the opportunity to provide additional comments in support of the proposed Amendments.

BACKGROUND REGARDING ALLSTATE

Founded in 1931, Allstate is the largest publicly held personal lines property and casualty insurer in America. It provides a range of insurance products to approximately 16 million households, including home, auto, life and retirement products. Allstate engages approximately 70,000 professionals made up of employees, agency owners and staff across all of North America. There are over 9,300 local small business owners who operate Allstate exclusive agencies in cities and towns across the country.

Like many other large companies, Allstate is frequently involved in a variety of civil disputes in state and federal courts. Some cases involve a plaintiff, individually or on behalf of a class, who challenges the application of a company policy or procedure. Other cases involve the types of litigation faced by other U.S. businesses, including contract disputes and employment litigation. Allstate is also a

[1] Lawyers for Civil Justice Public Comment to the Advisory Committee on Civil Rules (Aug. 30, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0267 ("LCJ Comment"); Lawyers for Civil Justice Supplementary Public Comment to the Advisory Committee on Civil Rules (Feb. 6, 2014), available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0540 ("LCJ Supplementary Comment").

plaintiff in litigation and consequently has evaluated the Amendments from both a plaintiff's and a defendant's perspective.

Litigation in which Allstate is a party varies in size, ranging from large multistate and single-state class actions with significant monetary amounts at issue to smaller cases brought by individual policy holders, third-party claimants, or others. In the substantial majority of Allstate's cases, we face asymmetry in the allocation of discovery obligations in that most of the discovery burden is on Allstate. The expense and the drain on company resources to meet these discovery challenges are considerable. Over the past five years, Allstate has spent over $17 million in out-of-pocket costs for electronic discovery alone, plus many individual hours of in-house legal, paralegal and support staff time.

THE NEED FOR CHANGE IS ACUTE

We welcome the Committee's efforts to provide clarity and consistency in the administration of justice. Specifically, we support the intent of the Amendments to:

- minimize unnecessary over-preservation and provide efficiencies to the judicial system;
- allow litigants to look to the allegations of the complaint, rather than speculate what ancillary information must be preserved; and
- provide much-needed guidance on the meaning of "the just, speedy, and inexpensive determination of every action and proceeding."

The current Rules create manifest uncertainty regarding the scope of discovery and the risk of serious sanctions that can befall a litigant who in hindsight is found not to have met these ill-defined discovery and document-preservation obligations. This combination of uncertainty and expansive risk has led companies like Allstate to err on the side of caution in terms of preservation and discovery that, in the end, produce no tangible benefit for the litigation process. For example, Allstate currently stores over 65 TB of ESI specifically in connection with electronic discovery. Even this amount is only a portion of Allstate's electronic discovery-related storage burden because this amount does not include the storage of data held by individual custodians or within large non-custodial data stores. Nor does this number capture the cost of retaining vast amounts of paper documents throughout the organization. Of course, only a small fraction of these amounts is subject to production, and an even smaller subset is seen by a court or a jury. Such over-preservation is caused by the continued misinterpretation of Rule 26(b)(1) by opposing parties and courts, which creates uncertainty surrounding the scope of discovery, coupled with the risk of being wrong about preservation created by current sanctions provisions under Rule 37 and the inherent powers of the court.

The over-breadth of the discovery that can be ordered under the current version of Rule 26(b)(1) can, as described by Ford Corporation in its case study on the Stokes case, lead to significant costs with no advancement of any goal of justice. (In Stokes, not a single document from the plaintiff's extensive "other lawsuit" discovery ended up being used at trial, although the production cost the company an estimated $2 million in outside legal fees alone).[2] Unfortunately, in Allstate's experience, discovery like that involved in the Stokes case is not unique. Equally consistent is the report by Microsoft Corporation

[2] Letter from Doug Lampe, Counsel, Office of the General Counsel, Ford Motor Company to Advisory Committee on Civil Rules at 6-7 (Nov. 22, 2013) (Re: Ford Motor Company Comment to Report of the Advisory Committee Civil Rules), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0343.

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that, in 2011, the amount of ESI data it preserved was vastly out of proportion (by a ratio of 340,000 to 1) to the amount of information that was ever used in litigation (that ratio has since widened), and the report by Bayer Corporation that in its cases of "moderate size," on average just 0.1% of the pages produced in discovery were used as trial exhibits.[3] Survey data submitted to the 2010 Conference on Civil Litigation (the "Duke Conference") indicates that the metrics reported by Ford, Microsoft and Bayer are representative of the wider condition.[4]

Allstate believes the Amendments represent considerable progress toward curtailing wasteful discovery, easing the burden associated with discovery, and refocusing litigation on the merits of the dispute. As the General Electric Company noted in its comment on the proposed rules changes, money currently spent on discovery (including the significant costs associated with over-preservation) could be redirected to far more productive purposes, including business development or returns to shareholders.[5]

In addition, the Committee can expect that benefits extending from the Amendments if adopted will reach far beyond the federal system to our state courts because some states adopt all or part of the Federal Rules of Civil Procedure, and accord deference and respect to the federal courts' leadership in this area. As of February 2012, approximately 30 states modeled their e-discovery rules in whole or in part on the Federal Rules. For example, in 2008, Indiana amended its Rules of Trial Procedure in a manner that largely tracked the 2006 Amendments to the Federal Rules. Michigan, Minnesota, and North Dakota similarly adopted rules based on the 2006 Amendments. Even where states have not formally adopted the Federal Rules, many state courts look to the Federal Rules for guidance and are influenced by changes to those rules.[6] As of 2012, at least six states had made rule changes that addressed the expanding realm of e-discovery in some way. Thus, the Amendments' reforms will likely reach beyond the federal forum to help foster a more uniform and efficient judicial system throughout the United States.

COMMENTS ON SPECIFIC RULES

Rule 26

The proposed Amendment's emphasis that "relevant" information is that which is "relevant to any party's claim or defense," is a welcome and much-needed clarification. When determining what needs to be preserved, litigants need to be able to look to the allegations of the complaint rather than speculating about what ancillary information may need to be preserved for future unforeseen and unanticipated requests. Allstate also supports the LCJ proposal that a materiality standard should be added to support "relevan[ce]" -- that the rule should define discoverable material as "any non-privileged matter that is

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[3] LCJ Comment at 3 n.10; Comment of Bayer Corporation ("Bayer Comment"), October 25, 2013 at 2; other reports helpfully summarized in LCJ Supplementary Public Comment at 2-3)

[4] Litigation Cost Survey of Major Companies (May, 2010) at 3 ("The ratio of pages discovered to pages entered as exhibits is as high as 1000/1.") *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[5] Letter from Bradford A. Berenson, Vice President and Senior Counsel, Litigation and Public Policy, to Committee on Rules of Practice and Procedure, at 6 (Feb. 7, 2014) (Re: Response by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0599 (in case in which 340,000 unique documents/over 6 million pages were produced, 194 documents marked at trial as exhibits).

[6] See Allman, T., *E-Discovery Standards in Federal and State Courts,* at 4*, available at* http://www.law.uc.edu/sites/default/files/2012FedStateEDiscoveryRules(Jan22).pdf .

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relevant and material to any party's claim or defense . . ." -- to further "signal[] the end to expansive interpretations of scope and relevance" and support proportionality.[7]

Another example of how the Amendments deliver needed clarity can be found in the discussion of the phrase "reasonably calculated to lead to discovery of admissible evidence." The Advisory Committee on Civil Rules has previously stated that this language was never intended to expand the scope of discoverable information but instead was intended to address discoverable but inadmissible information like hearsay. Specifically, "the purpose of the [current] amendment is to carry through the purpose underlying the 2000 amendment with the hope that this further change will at last overcome the inertia that has thwarted its purpose."[8]

The Advisory Committee's emphasis on proportionality is very much needed to curb unnecessary and wasteful discovery that, as discussed above, is imposing significant burden without corresponding social benefit. In Allstate's experience, issues relating to the scope of discovery become untethered from the merits of the case, and the current rules are interpreted -- incorrectly -- to allow "free looks"[9] into issues that go well beyond what is relevant or necessary to the claims and defenses alleged in a case. The proportionality standards incorporated into proposed Rule 26(b)(1) will not only provide much-needed guidance, they are also practical means of giving substance to the mandate of existing (as well as proposed revised) Rule 1, that the rules are directed at "the just, speedy, and inexpensive determination of every action and proceeding." In short, the proposed Amendments to Rule 26(b)(1) are needed to check unnecessary and inefficient costs and burdens to the parties and the system that results when discovery is allowed to extend beyond a case's claims and defenses.

For the same reasons, Allstate supports the proposed amendment to Rule 26(c)(1)(B) permitting the entry of a protective order providing for the "allocation of expenses" of discovery. Particularly where ESI is involved, the ability to allocate expenses of overbroad discovery requests to the requesting party would advance the goal of creating incentives to limit discovery to matters truly at stake in the litigation and create disincentives to wasteful discovery tactics.

Rule 37

Last month's decision in *In re: Actos (Pioglitazone) Products Liability Litig.*, 2014 U.S. Dist. LEXIS (W.D. La. Jan. 27, 2014) provides a further illustration of the need for clarity that the Amendments will provide to litigants. In *Actos*, faced with uncertainty as to whether the current Rules apply to pre-litigation conduct, the Court concluded it had to resort to its "inherent power" instead of relying upon Rule 37 to decide whether to impose what was in effect a request for a significant discovery sanction. The Amendments expressly eliminate the need to resort to inherent powers, and thereby in turn eliminate the risk of judicially-created inconsistent standards for discovery sanctions.

THE RULES AMENDMENTS ADDRESS REAL-WORLD PROBLEMS

Some who have commented in opposition to the Amendments attack the reliability of numerous studies showing that litigation costs have spiraled out of control as a result, in particular, of ESI

[7] LCJ Comments at 19.
[8] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Aug. 15, 2013) ("Preliminary Draft") at 272.
[9] The looks are, of course, "free" only to the requesting party; the producing party bears the majority of the burden and expense.

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discovery,[10] but the findings of these studies are completely consistent with Allstate's experience. The exponential increase in the number of e-discovery and document review companies also supports the findings of the studies.[11] Even some lawyers who primarily represent plaintiffs and oppose the Amendments candidly admit that the costs of ESI discovery are "significant," that "receiving and hosting electronic discovery . . . costs significant money," and that reviewing such documents "requires significant time."[12] Moreover, the current rules all too often lend themselves to strategic gamesmanship, where some litigants -- be they plaintiffs or defendants -- pursue expensive and wasteful discovery not for legitimate and reasonable litigation purposes, but rather in the hopes of catching their adversary in a misstep.

Comments in opposition to the proposed Amendments have also expressed concern about an inability to determine "relevance" under the amended rule.[13] Such concerns ignore hundreds of years of experience applying a common sense concept. Worries that changing the definition of discoverable information will limit access to information necessary to meet the burden of proof[14] are similarly misplaced. If information is needed by either a plaintiff or a defendant to meet a particular proof burden in the case, it is difficult to see how any rational court would find that the information is not "relevant to [its] claim or defense." Further, Allstate respectfully disagrees with comments that have criticized the Amendments because they might disable a plaintiff from finding additional claims beyond those contained in its pleadings.[15] As the Eleventh Circuit recently observed, this is not an entitlement under the Rule even as it currently exists.[16]

[10] Comment of the American Association for Justice ("AAJ Comment"), December 19, 2013, at 27-30, available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0372 .
[11] See, e.g. Comments of Tom Olofson, Chmn & CEO and Betsy Braham, Exec. V.P. & CFO of EPIQ Systems Inc. at Needham Growth Conf. (Jan. 16, 2014), Westlaw, INVESTEXT-CURRENT 23201535 (estimating market for e-discovery services at $2 billion to $3 billion and projecting double-digit annual growth).
[12] Letter from R. Joseph Barton, Partner, Cohen Milstein Sellers & Toll PLLC (March 1, 2013) available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0204 .
[13] AAJ Comment at 6.
[14] *Id*.
[15] Letter from/Joint Comments by Professors Helen Herskoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure to Committee on Rules of Practice and Procedure at 6-7 (Feb. 5, 2014), available at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0622 .
[16] *Liese v. Indian River County Hospital Dist.*, 701 F.3d 334, 355 (11th Cir. 2012).

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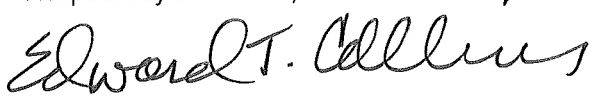
Conclusion

The Amendments will improve the efficiency, delivery and administration of justice both in the federal system and beyond by providing litigants with concrete guidance and meaningful discovery limitations. Without improvements and reasonable limitations such as those contained in the Amendments, some litigants will continue to abuse discovery, and particularly e-discovery, as a tactic that imposes excessive cost and burden on other litigants. Modernizing the federal discovery rules and improving the discovery process will help improve the nation's judicial system and ultimately benefit consumers and the entire economy.

Respectfully submitted,



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