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cc: <lee\_rosenthal@txs.uscourts.gov>, "Stanton III, Edward (Ed) L."  
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04/09/2004 05:16 PM Subject: Comments on proposed rules regarding E-discovery

Dear Mr. McCabe:

We are in-house attorneys for Federal Express Corporation ("FedEx"). It is our understanding that the Civil Rules Advisory Committee of the Committee on Rules of Practice and Procedure will be considering proposed amendments to the Federal Rules of Civil Procedure regarding discovery of electronically stored information in the near future. We would like to provide the committee with several comments on the proposed changes from our perspective, which we request that you forward to the full committee.

As an initial matter, we would like to thank the committee for addressing this important issue. Our company depends on a variety of computer systems in its daily operations, and it generates an incredible amount of electronic data. For example, one of the unique services that FedEx offers to its customers is the ability to track their shipments online. By going to the fedex.com website and typing in the "FedEx tracking number" for a package, a customer can determine the location and delivery status of a package in our network. In order to enable our customers to have access to this information, FedEx scans the bar-codes on packages over 62.4 million times each day. With the amount of electronic data generated by FedEx on a daily basis, discovery requests for electronic data have imposed a burden on our company, which is likely to continue to increase in the future.

Many of our concerns about the burden and manner of production of electronic discovery are addressed in the proposed amendments to Rules 26, 34 and 37. However, we ask that the committee include a rule allowing for allocation of costs to the requesting party when the request exceeds the scope of records that are kept in the ordinary course of business.

FedEx is currently defending a putative class action that provides an example of the need for such a rule. In that case, the attorneys for the putative class have requested electronic data from four different databases that are kept on a number of different computer platforms. The requests seek to have FedEx retrieve and merge certain data regarding shipments across a three year time period. Moreover, the requests seek information in formats that FedEx does not use to store or maintain its data in its ordinary course of business. With the volume of data that FedEx processes on daily basis, responding to this request would impose a tremendous burden and expense on FedEx. We suggest that the rules prevent such abuses by prohibiting the discovery of electronic records that are not kept in the ordinary course of business, and providing that costs will be shifted to the requesting party who requires extraordinary efforts to retrieve and assimilate data.

We are in favor of Rules 34(b)(2)(B) and 45(d)(1)(B) specifically providing that when the requesting party does not specify the form of production, the producing party has the option to select the form. However, we suggest that the word "must" be changed to "may" in order to emphasize the fact the choice belongs to the producing party. In addition, if the request is narrowly tailored, it is sometimes more practical to just print out the information and produce it as part of a traditional document production. We would like to have that option.

We also are in favor of a "safe harbor" provision in Rule 37 that prevents courts from imposing discovery sanctions against a company for failing to preserve electronic records when the failure results from the normal operation of the company's computer system. However, we are concerned that the proposed rule would create problems with its requirement to preserve information that is "reasonably likely to be discoverable in reasonably foreseeable litigation." FedEx is served with lawsuits on a daily basis, so it is arguably foreseeable that every record we generate could become discoverable. This requirement could paralyze the normal operation of our computer systems and destroy the intended benefits of the safe harbor provision. We are in the business of shipping packages, not defending lawsuits, and it would be unreasonable for us to shut down the computer networks that are the lifeblood of our business based upon the chance that a plaintiff will find some of our data to be useful. Therefore, we suggest that the committee adopt the second proposed alternative Rule 37(f), but that it delete the proposed subsection 37(f)(1) regarding information that is "reasonably likely to be discoverable in reasonably foreseeable litigation."

Finally, the proposed amendment to rule 26(f) would require the parties to discuss electronic discovery issues and preservation of electronic evidence during their discovery planning conference. We would suggest that this discussion be made optional, and that it be mentioned in the notes to the rule rather than the rule itself.

While such a discussion would be helpful in some cases, we still have many simpler cases in which electronic discovery and preservation of electronic evidence does not become a major issue. We are concerned that a mandated discussion of electronic discovery and preservation of electronic evidence in such cases would merely encourage the opposing side to attempt an unnecessary fishing expedition into various electronic databases, or to attempt to impose expensive electronic record preservation obligations, even though electronic data is not

relevant or significant in that case.

Thank you for your attention to this matter. Please feel free to contact us if you have any questions.

Sincerely,

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c: Hon. Lee H. Rosenthal