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USE CAUTION IN RELYING ON THE "SAFE HARBOR" PROVISION OF NEW RULE 37(f) OF THE FEDERAL RULES

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THE DEVELOPMENT

On April 12, 2006, the U.S. Supreme Court approved an amendment to Rule 37 of the Federal Rules of Civil Procedure that creates a "safe harbor" from spoliation charges where electronically stored information is lost or destroyed due to the "routine, good faith operation of an electronic information system." The amended rule goes into effect on December 1, 2006, and on that date will apply to all cases then pending "to the extent practicable."

BACKGROUND

Under the Federal Rules of Civil Procedure, a party is required to take reasonable steps to preserve all relevant information—including that stored in electronic media—when the party knows or reasonably should know that an action has been filed or is likely to be filed. In recent years, failure to preserve electronic records has been sanctioned with increasing frequency—not merely when records have been destroyed intentionally, but also when the very existence of pertinent electronic records has been overlooked. New Rule 37(f) offers a "safe harbor" from sanctions for the failure to preserve certain electronic records:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

According to the Advisory Committee responsible for drafting this amendment, Rule 37(f) is intended to apply to the "routine modification, overwriting, and deletion of information that attends normal use" and protects a party from sanctions for failure "to provide electronically stored information in discovery when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith." The new rule is intended to protect a party from sanctions when electronically stored information is lost because, among other things, a computer system

automatically deletes older e-mails, a retrieval system overwrites metadata when a document is accessed, or backup tapes are recycled. But, as the Advisory Committee warns: "good-faith" does not mean that a party can "exploit the routine operation of an information to thwart discovery obligations…"

WHY IT IS IMPORTANT

Parties should proceed carefully in relying solely on the new, safe-harbor provision. First, the new Rule 37(f), by its terms, applies only to information lost or deleted due to the "routine" operation of an information system. An opposing party may argue that Rule 37(f) does not apply where the accidental loss of electronic information is due in part to human intervention.

Additionally, the new rule and the commentary does not offer detailed guidance on the meaning of the term "good-faith" or on the nature of the "exceptional circumstances" that might give rise to sanctions despite apparent good faith. As the Committee Note explains: "good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation." Thus, a party is not permitted "to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."

The new rule also does not address whether a court can order sanctions under the court's inherent powers as opposed to the sanctions provisions in Rule 37. Thus, it is possible that the new rule may require courts to balance the Rule 37(f) factors against other facts and circumstances when considering whether—and what—sanctions are warranted, depending on the factual circumstances of a particular case.

Finally, the new rule does not address the issue of when the duty to preserve attaches; nor does it necessarily insulate a party from the obligation to preserve data that is housed on old media, hardware no longer in use, or other systems that are considered "not reasonably accessible" under new Rule 26(b)(2). These issues will continue to be analyzed under the rules that courts have fashioned concerning when a duty to preserve evidence attaches.

In sum, while Rule 37(f) provides a safe harbor from sanctions for a failure to preserve electronically-stored information in certain circumstances, the rule defers many issues to the discretion of future courts. Accordingly, companies should proceed carefully in applying the new rules in pending or anticipated litigation.

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