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Inside the Courts
An Update From Skadden Securities Litigators

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Sweeping Changes Proposed to the Federal Rules of Civil Procedure

Significant amendments to the Federal Rules of Civil Procedure submitted to Congress in April 2015 could change discovery practices in securities litigation before the end of this year. Absent legislation to reject, modify or defer them, amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55 and 88 will become effective December 1, 2015. These amendments focus on encouraging early and expeditious case management, proportionality in discovery, and preservation of electronically stored information. In the context of securities litigation, where corporate litigants often bear the burden of responding to discovery requests on multiple fronts, the amendments altering the scope, timing and responses to discovery requests — as well as those addressing preservation — are the most critical changes. Set forth below is a brief summary of what to expect in December, absent congressional action, with respect to these matters. We will provide an update regarding significant changes, if any, in the final implemented rules.

Scope of Discovery

The amended version of Rule 26(b)(1) deletes the provision permitting discovery of information "reasonably calculated to lead to the discovery of admissible evidence." Instead of this language, which was often quoted by parties who sought to limit overbroad discovery requests, the proposed rule offers a new standard for limiting the scope of discovery: proportionality.

Revised Rule 26(b)(1) limits the scope of discovery based on whether it is "proportional to the needs of the case," as determined by considerations of: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

These proportionality considerations, which currently only come into play when a party seeks a protective order under Rule 26(b)(2)(C), would now define the scope of discovery and obligate the parties to consider these factors in making discovery requests, responses or objections.

Timing of Discovery

The amended version of Rule 26(d) advances the time a party may send requests for production, but does not advance the time for a party to respond to those requests

for production. Under the current rule, a party may not seek discovery until after the Rule 26(f) conference. Under the amended rules, requests for production may be delivered 22 days after service of the complaint and summons — in other words, before a Rule 26(f) conference may have occurred. The requests, however, will be considered to have been served at the Rule 26(f) conference, and the time for responding will not begin to run until the Rule 26(f) conference occurs.

Responses to Discovery Requests

The proposed amendments to Rule 34 also significantly alter the obligations of parties responding to requests for production. First, the amended version of Rule 34(b)(2)(B) requires that objections be made with specificity. The use of boilerplate objections will not suffice.

Second, the amended version of Rule 34(b)(2)(C) provides that an objection must state whether any responsive materials are being withheld on the basis of that objection. Under the current rule, confusion frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain as to whether information has been withheld based on those objections. The new obligation can be satisfied by identifying a limited search for responsive and relevant documents that will be conducted.

Third, the amended version of Rule 34(b)(2)(B) requires that any production of documents in response to a request for inspection be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. This amendment reflects the common practice of producing documents rather than permitting inspection. Under the old rule, a response often would indicate that document productions would occur on a rolling basis and not specify an end date. Under the new rule, and as clarified in the committee notes, when it is necessary to make the production in stages, the response should specify the beginning and end dates of the production.

Preservation of Electronically Stored Information

Proposed changes to Rule 37 settle a circuit split regarding the sanctions available for the loss of electronically stored information. The amended version of Rule 37(e)(1) permits the most serious sanctions — an adverse inference, dismissal of the action or a default judgment — only where a party acted with the intent to deprive the other party of the electronically stored information's use in the litigation. This new rule applies only to electronically stored information, and only if the lost information should have been preserved in the anticipation of litigation and the party failed to take reasonable steps to preserve it.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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