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March 23, 2012

VIA ELECTRONIC SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: PROPOSED REVISIONS TO PART 2 AND 4.1(E) OF THE AGENCY'S RULES OF PRACTICE

These comments are submitted by the law firm of Kelley Drye & Warren LLP ("Kelley Drye") in response to the Federal Trade Commission's ("Commission" or "FTC") request for comments on the proposed revisions to the Agency's Rules of Practice. Kelley Drye's recommendations are informed by its significant experience representing businesses, associations, and individuals in proceedings before the Commission. For example, Kelley Drye attorneys represent clients in a dozen or more consumer protection-related investigations each year. In addition, Kelley Drye's Advertising practice group includes former attorneys of the FTC's Bureau of Consumer Protection, including two directors, an assistant director, and an attorney advisor.

Kelley Drye supports the Commission's efforts to modernize its operating rules, particularly as they relate to electronic media in document discovery. However, Kelley Drye believes that certain provisions as proposed are unreasonable and inconsistent with existing regulations. In addition, as a practical matter, Kelley Drye believes certain provisions may unduly increase the burden on respondents and materially increase the cost of document production with few, if any, benefits to the investigatory process. Kelley Drye respectfully requests that the proposed changes be reevaluated and amended to ensure the proper balance between expedited investigative procedures and the attendant burdens placed on respondents.

Kelley Drye's recommendations are set forth below in separate sections and summarized in Appendix A. In particular, Kelley Drye recommends that the Commission:

- Reconsider proposed Rule 2.9 for unreasonably and arbitrarily limiting consultation rights between counsel and their witness;

- Qualify proposed Rule 2.6 allowing Commission staff to disclose the existence of confidential investigations in accordance with the Commission's long-standing principles of strict confidentiality;

- Clarify the definition of ESI in proposed Rule 2.7, and narrowly tailor the production requirements to avoid unnecessary burdens and costs for respondents;

- Increase the word limit and extend the deadline for filing a petition to limit or quash reconvened hearings or depositions in proposed Rule 2.10. Ensure that any Commission response to such petition be served on the petitioner;

- Retain the current Rule 2.9(A) privilege log requirements;

- Ensure the decision to initiate enforcement proceedings under proposed Rule 2.13 is the product of the Commission's informed consensus, and is not delegated to the General Counsel; and

- Include a formal presumption in proposed Rule 2.14 that the investigation has closed after a year passes with no written communication from the Commission or staff.

I. CERTAIN PROVISIONS ARE UNREASONABLE AND INCONSISTENT WITH EXISTING REGULATIONS

A. *Unreasonable Limitation of Rights of Witnesses*

Current Rule 2.9 details the rights of witnesses in Commission investigations, including witnesses compelled to appear in person at an investigational hearing or deposition. The current Rule 2.9(b)(1) allows consultation in all investigational hearings "in confidence and upon the initiative of either counsel or the witness, with respect to *any question* asked of the witness."[1] The Commission seeks to materially limit this right by permitting consultation only as to questions regarding privilege. The proposed language states, in pertinent part, as follows:

> In depositions or investigational hearings conducted pursuant to section 9 of the Federal Trade Commission Act, counsel may not consult with the witness while a

[1] Current Rule 2.9(b)(1), 16 C.F.R. § 2.9(b)(1) (emphasis supplied).

> question directed to a witness is pending, except with respect to issues of privilege involving protected status.[2]

Notably, this limitation applies only to those persons providing oral testimony pursuant to a Commission subpoena. This is an arbitrary qualifier and will result in internally inconsistent procedures. The FTC Act, as amended by the FTC Improvement Act of 1980, grants counsel and their witness liberal consultation rights to any person compelled to appear under a civil investigative demand ("CID") "with respect to any question."[3] This language appears almost verbatim in the Commission's current Rule 2.9(b)(1).[4] The Commission provides no explanation as to why persons giving oral testimony pursuant to a subpoena should have fewer consultation rights than their CID counterparts.

In addition, the limitation is unreasonable. The Commission provides no cogent reason for this change, save the observation that counsel have "sometimes" taken bad faith liberties in consultations with their witness.[5] Sporadic attorney misconduct does not justify the removal of counsel's general right to confer with their witness.[6] While Kelley Drye appreciates the Commission's efforts to curb obstructionist tactics, prohibiting *all* consultations less those discussions of privilege is unreasonable and unnecessary. If the Commission seeks to reprimand counsel, the more appropriate forum is in proceedings for attorney misconduct under Rule 4.1(e).

Further, the Commission suggests that the Federal Rules allow this sweeping limitation under the rubric of "general attorney regulation."[7] At best, the Federal rules are silent on the matter. The Federal Rules of Civil Procedure Rule 30 relating to depositions limits objections made by counsel and counsel's ability to instruct a witness not to answer.[8] The Federal Rules do not address counsel's general right to confer with their witness off the record.

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[2] 77 Fed. Reg. 3191, 3197-98 (January 23, 2012) (to be codified at 16 C.F.R. § 2.9(b)(1)).

[3] Pub. L. No. 96-252, 94 Stat. 374 (codified at 15 U.S.C. § 57b-1(c)(14)(D)(i)).

[4] 16 C.F.R. § 2.9(b)(1).

[5] *See* 77 Fed. Reg. 3191, 3192.

[6] *Hall v. Clifton Precision,* 150 F.R.D. 525, 528 (E.D. Pa. 1993), the primary case that the FTC cites in support of proposed 2.9(b)(1), moves well beyond what Congress has indicated as its intent for witnesses before the FTC. *Hall* barred *any* private conferences between witness and counsel during a deposition, including during breaks and recesses. *See* 150 F.R.D. at 528. Consequently, *Hall* has been criticized as violating defendants' right to counsel. *See, e.g., In re: Stratosphere Corp. Sec. Litig.*, 182 F.R.D 614, 620-621 (D. Nev. 1998).

[7] 77 Fed. Reg. 3191, 3193.

[8] *Id.* (citing Fed. R. Civ. P. 30 Advisory Committee's note (1993 amendments). In an attempt to limit "lengthy objections and colloquy," Federal Rule 30 requires that the objection be made in a "nonargumentative and nonsuggestive" manner and that it be limited to grounds "that might be immediately obviated, removed or cured,

For these reasons, Kelley Drye asks that the Commission strike this provision as unreasonable and inconsistent with existing regulations, and revert to the rule as currently written.

B. *The Commission's Expanded Disclosure Provision Undermines Longstanding Principles of Strict Confidentiality*

The Commission seeks to allow Commission staff to disclose the existence of confidential investigations to "potential witnesses or other third parties to the extent necessary to advance its investigation."[9] The proposed language is potentially overbroad and unreasonably expands the scope of authorized disclosures under the FTC Act. In addition, it undermines the Commission's longstanding principles of strict confidentiality during the investigative process.

Kelley Drye acknowledges that the Commission's enabling statute allows the disclosure of nonpublic information for law enforcement purposes, particularly in cases where disclosure would further a Commission investigation or enforcement proceeding.[10] Kelley Drye appreciates the Commission's need to disclose the existence of an investigation for this purpose.[11] However, Congress added important qualifiers to the disclosure provisions in the FTC Act. Under the Act, the Commission is statutorily authorized to disclose nonpublic information only with the recipient's certification or agreement that the information be maintained in confidence and used for official law enforcement purposes.[12] In contrast, the proposed rule ostensibly permits the unconditional disclosure of nonpublic information to indiscriminate third parties.[13] The FTC Act does not confer such blanket authority.

Kelley Drye respectfully asks that all third parties with access to nonpublic information be required to certify the material will be maintained in confidence and used only for official law

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such as to the form of a question or the responsiveness of an answer." Fed. R. Civ. Pro. Rule 30(c)(1). *See* Advisory Committee's note (1993 amendments)).

[9] *Id.* at 3196 (to be codified at 16 C.F.R. § 2.6).

[10] 15 U.S.C. §57B-2(b)(6)(B)(ii).

[11] For example, Kelley Drye is aware the Commission recently signed a Memorandum of Understanding with the Consumer Financial Protection Bureau to share investigation activity so as to avoid duplicative or conflicting law enforcement proceedings.

[12] 15 U.S.C. §57B-2(b)(6).

[13] 77 Fed. Reg. at 3192. In the FTC's *Federal Register* notice, the Commission defines this amorphous group to include "potential witnesses, informants, or other non-law enforcement groups."

enforcement purposes.[14] This added protection would appropriately qualify the scope of disclosure and advance Congressional intent in confidential investigations.

II. CERTAIN PROPOSED REVISIONS ARE NOT FEASIBLE AND ARE BURDENSOME AND UNREASONABLE

Kelley Drye applauds the Commission's efforts to streamline its procedures and reduce the burden for all parties. In practical application, however, Kelley Drye believes certain provisions are likely to unduly increase the burdens on respondents and materially increase the cost of document production. Kelley Drye appreciates the opportunity to address its concerns regarding the following topics: (A) production of electronically stored information ("ESI"); (B) pre-filing meet and confer; (C) petitions to quash; (D) withholding of requested material; (E) noncompliance with compulsory process; and (F) disposition.

A. *ESI*

Kelley Drye agrees with the Commission's statement that "[d]ocument discovery today is markedly different than it was only a decade ago,"[15] especially as it applies to the storage and use of information in electronic format. It is understood that the Commission's rules should be revised over time to capture changes in business information practices and the Commission's desire for additional information as part of the investigatory process. Yet the Commission's proposed revisions to the rules, especially with regard to ESI, do not exist within a vacuum. The proposed changes should be evaluated to ensure consistency among the rules and the actual practices in an investigation and balance between the procedures for collecting information requested by the Commission and the burdens placed on respondents. Accordingly, Kelley Drye asks that the Commission: (1) clarify the definition of ESI with regard to metadata and "necessary" formats; (2) modify production requirements as they relate to privileged documents; and (3) narrowly tailor the production requirements to avoid unnecessary burdens and costs for respondents.

i. Definition of ESI

The Commission acknowledges that modern document retention and production practices incorporate new (and ever-evolving) technologies. In response, the Commission noted that it purposefully used the term "electronic media," which is not a legal term of art, as it "does not

[14] Other provisions in the Commission's Rules allow the disclosure of nonpublic information only with the consent of the producing party *and* with the written agreement by the consultant or contractor retained by the Commission not to disclose the information. *See e.g.* 16 C.F.R. §§ 4.10(d) and (e).

[15] *Id.* at 3191 (to be codified at 16 C.F.R. pt. 2 and 4).

want any single technological advance in data storage or production to render a rule provision obsolete."[16] To effectuate this recommendation, the Commission has proposed the following definition for electronic stored information:

> Electronically stored information ("ESI") means any writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.[17]

With regard to electronic media, Kelley Drye conceptually agrees that any revisions to the rules should not be technology or media-specific. However, the definition of ESI should be clarified to address (1) whether metadata is included, and (2) whether production of three unique electronic formats is required.

(a) *Metadata*

In practice, over the past few years the Commission has requested increasing amounts of metadata as part of the investigatory process pursuant to a CID or an access letter.[18] This has led to inconsistent definitions of ESI and confusion as to the Commission's production expectations. Kelley Drye therefore asks that the Commission clarify whether metadata is included in the definition of ESI and consistently apply that definition to all investigative proceedings.

(b) *"Necessary" Formats*

The proposed definition of ESI is limited to data "stored in any electronic medium from which information can be obtained either directly or, *if necessary*, after translation by the responding

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[16] *Id.* at 3192, n.3.

[17] *Id.* at 3196 (to be codified at 16 C.F.R. § 2.7(a)(1)).

[18] For example, a recent CID defined ESI as follows:

> "Electronically Stored Information" or "ESI" shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any information created, manipulated, communicated, stored, or utilized in digital form, requiring the use of computer hardware or software. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence . . . word processing files, spreadsheets, databases, and video and sound recordings, . . . cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media. "ESI" also includes such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

party into a reasonably usable form."[19] Further, as proposed, the revised rule states: "When Commission compulsory process requires the production of ESI, it shall be produced in accordance with the instructions provided by Commission staff regarding the manner and form of production."[20] In practice, requests for ESI pursuant to a CID or access letter do not limit application of the translation requirement to instances when *necessary*. Instead, as a matter of course, respondents must provide each document in multiple formats:

- In the native electronic format, for example, a letter in Microsoft Word file (.doc), an email message in Microsoft Outlook format (.msg), or a signed contract in portable document format (.pdf);
- As a text-only file based on either the extracted text or Optical Character Recognition ("OCR") and all related metadata;[21] and
- As a single-page Tagged Image File Format ("TIFF") image or color JPEG images (where color is necessary to interpret the contents).[22]

In addition to the concerns raised by these multiple format requirements (as discussed below), production of these formats requires translation of the original responsive document into additional documents. Therefore, Kelly Drye requests that the definition of ESI be revised to limit application of the translation requirement to instances when reasonably *necessary* to further the FTC's investigation.

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[19] *Id.* at 3196 (to be codified at 16 C.F.R. § 2.7(a)(1)) (emphasis added).

[20] *Id.* (to be codified at 16 C.F.R. § 2.7(j)).

[21] Notably, "all related metadata" for each document electronically submitted to the Commission includes a lengthy list of metadata fields based on the type of document at issue. *See* discussion, *infra* Section (II)(A)(iii)(a).

[22] Previously, CIDs and access letters permitted respondents to provide documents as multi-page TIFF files. For example, a five (5) page letter would be Bates stamped on each page and submitted electronically as a single file named "Respondent-FTC-000001" or similar. The next responsive document would be named "Respondent-FTC-000006" as it corresponds to the first Bates number of the document. Further, each multi-page document would exist as a separate electronic file – a relatively logical approach. Now, based on a recent FTC investigation handled by Kelley Drye, CIDs and access letters are requiring single-page TIFF files. Each page of a document must be produced as an individual electronic file. This process requires a greater reliance on litigation management tools to clearly distinguish the pages that correspond to make a single document. That is, a reviewer would not know that the first document was five (5) pages long simply by opening the TIFF file and seeing a five (5) page document. The reviewer would only know that Respondent-FTC-000001 through 000005 belong to the same document by getting this information through the litigation management tool. This method lacks the logical correlation of pages within a single document that is available by using multi-page TIFF files even without litigation management tools.

ii. Limited Ability to Protect Privileged or Sensitive Information

As noted, current practices have evolved to require a respondent to provide ESI in at least three unique formats plus metadata. In most instances, requiring a respondent to provide the document in native electronic format precludes the ability to protect privileged or sensitive information in that document. CIDs and access letters generally direct that if some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. When submitting TIFF images, respondents are able to use litigation management tools, such as IPro or similar technology, to redact privileged portions of a responsive document as well as sensitive, but extraneous, information, such as Social Security numbers or financial account numbers.[23] Yet, when respondents are required to submit the document in native electronic format, there is no ability to redact privileged or sensitive portions of the document. Respondents should not be required to produce privileged information simply due to technology limitations inherent in the file format for ESI requested pursuant to a CID or access letter.[24]

Further, when submitting ESI in native electronic format, respondents are not readily able to include a Bates or reference number on the document. Currently, the primary alternative is to rename the document with the applicable Bates or reference number. But this alternative also has several limitations. First, it requires intentional manipulation or alteration of the file name that is otherwise requested within the metadata. Second, a single Bates or reference number is applied to the entire document. This does not permit the tagging of individual pages in a multi-page document. This limits the ability to effectively manage responsive documents and direct attention to specific documents or pages within a document when referencing the document in a written response. Given these limitations, Kelley Drye asks that the Commission exclude from production privileged information contained in native electronic format, provided that non-privileged information is produced in another format.

iii. Unnecessarily Burdensome Costs and Unreasonable Time Constraints

(a) *Costs*

If the Commission defines ESI in line with its current production practices, that is to say, to require metadata and at least three unique formats, this could result in unduly burdensome costs for respondents. The costs are exacerbated by the requirement that the document production comply with the Bureau of Consumer Protection ("BCP") Production Guide, which sets forth

[23] Privileged or sensitive information also can be redacted when submitting text files provided that the text extraction or OCR occurs after redaction of the TIFF image.

[24] *See also* discussion, *infra* Section II(D).

different metadata fields to be produced.[25] Requiring the documents in three formats as well as this large amount of metadata increases a respondent's production costs, as it frequently necessitates the use of a third-party service provider. Most respondents and outside counsel are simply not equipped to extract this level of metadata from ESI with commonly used litigation management tools and process the documents in three formats.

Further, to process this amount of ESI and metadata in the limited amount of time permitted by a CID or access letter, a respondent generally has little choice but to turn to a third-party service provider. As a result, the respondent must incur a great deal of expense simply to respond to the compulsory process. This may include rush ESI processing, potential re-processing costs (and time) depending on whether the CID or access letter sufficiently identifies the various metadata fields requested by the Commission, and legal fees associated with the review of ESI. These are costs that a respondent must bear simply to cooperate with the FTC and comply with the CID or access letter; they are not based on an actual finding that the respondent has failed to comply with applicable law or regulation or a settlement regarding the same. These are also challenges and burdens that are unlikely to become apparent until well after the initial meet-and-confer with FTC staff, and which further exacerbate the proposed time constraints as discussed in more detail below.

Additionally, if relying on or otherwise incorporating the definition of ESI from a CID or access letter, which includes metadata, respondents will face unnecessarily burdensome costs associated with collecting, reviewing, and producing multiple copies of otherwise duplicate documents. For example, a document stored on ten different computers likely will have different metadata for the custodian and location or "path" of the document, even though the document itself is identical. If documents are defined at the metadata level, it is likely that every copy of every document is unique and would be subject to production. As a result of the production of essentially duplicate documents, respondent will incur increased costs for processing all of the ESI and increased costs for legal review of the otherwise duplicate documents. Similarly, the Commission also will receive, and have to review, all of the duplicate documents. In a large production, this could result in tens of thousands of otherwise duplicate documents being produced to the Commission.

To demonstrate, the average cost for two recent document productions in response to Commission CIDs was $69,475.28. This comprises costs for Kelley Drye's litigation technical support staff and third-party vendors. Notably, this figure excludes fees billed to clients for legal review of documents for responsiveness and privilege. Kelley Drye anticipates these costs will

[25] Duplicative metadata fields are requested for various types of ESI, including, but not limited to the following: electronic mail; their attachments; their attachments; loose electronic documents; imaged hard copy documents, beginning Bates or unique document identification number; ending Bates or unique document identification number; location or "Path" of document; custodian; etc.

increase exponentially with the implementation of these heightened electronic production requirements.

(b) *Time Constraints*

In addition to exorbitant costs, time extensions that are conditioned on satisfactory progress toward compliance may not be feasible or fair. The practical effect of this unreasonable time constraint is that respondents perform a "data dump" to ensure timely compliance. Alternatively, respondents may resort to compliance by providing access onsite to systems which could result in additional Commission burdens, delay, and costs for FTC staff to obtain and review relevant documents as part of its investigations.

The proposed rule conditions time extensions for compliance with a CID or access letter on "demonstrated satisfactory progress toward compliance."[26] Especially with regard to ESI, and the numerous steps that must be taken to properly search for, review, and produce ESI, this conditional extension of time is likely to be unfair to many respondents. Throughout much of the process there may be no material progress updates other than that the organization (and its counsel) are continuing to review ESI for responsive material. The Commission itself noted that "even when investigations are conducted cooperatively, and are both well organized and well-managed, there remains a substantial risk that mistakes and delays will occur as the responding party collects responsive materials, analyzes them for relevance and privilege, and prepares them for production."[27] Such mistakes and delays should not penalize the respondent.

Further, the mere receipt of a CID or access letter may overwhelm certain respondents. If not familiar with the Commission or its procedures, compliance with a twenty page (or longer) government request can be daunting, especially given the breadth and depth of the requests for ESI. As a result, and given the expected costs to be incurred by a respondent to comply with the compulsory process, some respondents may avail themselves of the option to make responsive materials available for inspection and copying at their principal place of business. Others may elect to send responsive materials to the Commission, but instead of neatly packaging up responsive materials to correspond with specific requests or interrogatories, the material may be provided in bulk, so as to limit costs associated with review and response. This potential behavior by respondents, especially in light of the time required and costs incurred to respond to compulsory process, underscores the need to take a balanced approach.

Therefore, consistent with the specific recommendations above, Kelley Drye asks that the Commission narrowly tailor its production requirements, particularly as they relate to metadata

[26] 77 Fed. Reg. 3191, 3196 (to be codified at 16 C.F.R. § 2.7(l)).

[27] *Id.* at 3191.

and duplicative electronic formats, to avoid unnecessarily burdensome cost for respondents. Further, Kelley Drye asks that the Commission: (1) indicate that time extensions will be reasonably granted (and not necessarily withheld) based on a respondent's written acknowledgment that it is taking steps to comply with the FTC's request; and (2) not condition time extensions on satisfactory progress toward compliance.

B. *Pre-Filing "Meet and Confer"*

Kelley Drye appreciates the Commission's efforts to expedite investigations and facilitate document production with a mandatory "meet and confer" between parties. Under the proposed rules, a respondent will be required to meet and confer with Commission staff to discuss and attempt to resolve compliance issues within 10 days of receipt of compulsory process.[28] Kelley Drye respectfully submits that, for the reasons provided below, the 10-day timeframe is not feasible and may be unduly burdensome. In light of the practical problems associated with this expedited timeframe, the Commission's proposal to condition its review of petitions to limit or quash on compliance with the meet and confer requirement should be reconsidered.

i Business or Calendar Days

The 10-day deadline does not account for weekends and holidays. For example, it is possible that a petitioner receives compulsory process on the Wednesday before Thanksgiving. In that situation, the respondent would effectively have one business week in which to retain counsel, institute a litigation hold, undertake at least a limited inventory of responsive documents, and prepare for the meet and confer. Similar issues arise with respect to other holidays and weekends. Thus, at a minimum, the deadline should be clarified to refer to "*business* days."

ii. ESI

Potential issues related to ESI cannot readily be discovered within this short time frame. It is not reasonable for a respondent to conduct a proper search for documents, review documents for responsiveness and privilege, or to fully understand the burdens presented by the production within 10 days of receipt of compulsory process. Depending on the size of respondent's organization, the number of individual stakeholders that are involved in responding to the CID or access letter, and the amount of ESI stored by the respondent, it often will take more than 10 days to meaningfully identify the parameters of the requests and to begin the ESI search. This does not account for time to actually conduct the search and review the findings, let alone address issues and burdens that arise during the search process, or the time that may be required to enlist third-party service providers to assist with the document production. As the Commission

[28] *Id.* at 3197 (to be codified at 16 C.F.R. § 2.7(k)).

itself notes, "While searchers must still reach into file cabinets and desk drawers, they must also – and primarily – seek and retrieve information from mainframe computers, shared servers, computers, cell phones, smart phones, portable devices, and other media, as well as from third-party service providers."[29] It is unreasonable for the potential issues associated with this admittedly burdensome process to be anticipated and understood within such a short period of time.

Further, as a practical matter, the meet and confer process often requires several meetings and substantial negotiations between the respondent and Commission staff to agree on matters involving ESI, such as identifying the search terms or strings, limiting the ESI searches to specific individuals, computer system servers, and/or email folders, and the timing of the document production(s) to minimize the administrative and financial burdens on the petitioner while, at the same time, ensuring the comprehensive production of documents. For example, in conjunction with a recent FTC investigation, the meet and confer process between Kelley Drye and FTC staff to reach an agreement on the electronic document search, review, and production schedule took nearly three months. Ten days is simply not a feasible timeframe in this regard.

iii. Privilege

The Commission's proposed Rule 2.11 requires that, during the meet and confer process, the parties "discuss and attempt to resolve any issues associated with the manner and form in which privilege or protection claims will be asserted. The participants in the meet and confer session may agree to modify the logging requirements set forth in paragraph (a) [of Rule 2.11]."[30]

Ten days does not provide respondents with enough time to identify all issues associated with withholding privileged or protected material. The respondent would have to be sufficiently familiar with the universe of potentially responsive material – a process that could feasibly take weeks or even months. Therefore, respondents making a good faith effort to timely comply with the CID should not be penalized due to the practical limitations associated with this request.

iv. Conditioned Review

In proposed Rule 2.7(k), the Commission seeks to condition its review of petitions to quash or limit on respondents' compliance with the pre-filing meet and confer requirement. In essence, proposed Rule 2.7(k) imposes two conditions. First, the Commission will not consider *in toto* a petition to quash or limit absent a pre-filing meet and confer.[31] Second, it will limit its review to

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[29] *Id.* at 3191.

[30] *Id.* at 3197 (to be codified at 16 C.F.R. 2.7(k)).

[31] *Id.*

only those issues raised during the meet and confer process.[32] The Commission fails to explain or justify this provision in its *Federal Register* notice, citing only its expectation for substantially expedited proceedings.[33] This goal is laudable. However, the proposed rule, for all practical purposes, would require that the respondent identify and articulate all issues to be raised in its petition within 10 days of receiving compulsory process. Given the feasibility problems addressed above, this would be a patently unfair result and would undermine respondents' ability to file a motion to quash or limit in a timely manner.

For the foregoing reasons, Kelley Drye requests that the deadline by when respondents must meet and confer with Commission staff be extended to anytime before the deadline for filing the motion to quash or limit. At a minimum, the deadline should be extended to "10 *business* days." Further, due to the feasibility problems associated with the expedited timeframe, Kelley Drye asks that the Commission not condition its review of petitions to limit or quash on compliance with the pre-filing meet and confer requirement.

C. *Petitions to Quash or Limit*

Kelley Drye supports the Commission's proposal to consolidate the various provisions governing petitions to limit or quash, which currently are set forth in a number of different provisions of the Agency's Rules of Practice, into a single, re-designated Rule 2.10. However, as discussed below, Kelley Drye has concerns regarding several provisions of proposed Rule 2.10.

i. Proposed Word Limit

Proposed Rule 2.10(a)(1) limits a petition to quash to 3,750 words, excluding affidavits or other supporting material.[34] This is an arbitrary cap set by the Commission to facilitate expedited review. Kelley Drye believes this word cap is severely limiting and would result in numerous requests for page extensions. To preempt the influx of such requests, Kelley Drye asks that the word cap be increased, at a minimum, to 5,000 words.

ii. 5-Day Deadline for Petitions to Limit or Quash Reconvened Hearings or Depositions

Proposed Rule 2.10(a)(3) permits the filing of a petition to limit or quash the reconvening of an investigational hearing or deposition within 5 days after the petitioner receives written notice from the Commission of the reconvened hearing, irrespective of the date when the hearing

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[32] *Id.*

[33] *Id.* at 3192.

[34] *Id.* at 3198 (to be codified at 16 C.F.R. 2.10(a)(1)).

actually will be reconvened.[35] The petition must set forth "all assertions of privilege or other factual and legal objections to the reconvening of the hearing or deposition, including all appropriate arguments, affidavits, and other supporting documentation . . . ."[36] A 5-day deadline to file a petition to limit or quash the reconvening of a hearing is simply not feasible, especially considering that the proposed subsection requires that all affidavits and other documentation supporting the petition be filed within that same short timeframe.

As a preliminary point, although not binding on the Commission, the Commission regularly looks to similar Federal Rules of Civil Procedure when interpreting and applying its Rules of Practice.[37] Similarly, Fed. R. Civ. P. 45, which governs, among other things, subpoenas commanding attendance at depositions, requires that a motion to quash be "timely filed." A motion to quash a deposition is timely under both Rules 26(c) and 45 of the Federal Rules of Civil Procedure if it is filed before the date of deposition.[38]

Proposed Rule 2.10(a)(3)'s 5-day requirement for petitions to limit or quash, measured from the date that written notice of the reconvened hearing is provided to the petitioner, is at odds with the well-established precedent in the civil context that a motion to quash need only be filed before the date of deposition. There does not appear to be any rational basis for the proposed rule and, moreover, there are considerations that make its application onerous as a practical matter. First, the "five day" deadline does not account for weekends and holidays. Thus, rather than a rigid 5-day deadline, the Commission should adopt a flexible "within a reasonable time" standard consistent with the Federal Rules of Civil Procedure. Alternatively, at a minimum, the "five days" deadline should be clarified to refer to "five *business* days."

Further, the deadline for a petition to limit or quash a reconvened hearing should be measured from the date of the hearing, rather than the date of the petitioner's receipt of written notice. That is how motions to quash in the civil context are evaluated for timeliness – *i.e.*, timeliness depends on whether the motion to quash was filed before the deposition (or hearing) date. The

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[35] *Id.*

[36] *Id.*

[37] *See In re POM Wonderful LLC*, FTC No. 9344, 2011 FTC Lexis 42, at *9 n.3 (FTC Mar. 16, 2011) (citing FTC cases). Fed. R. Civ. P. 26(c) governs motions for protection or to quash depositions, and "[s]uch motions . . . must be served before the date of [discovery compliance]." *United States v. Int'l Bus. Machs., Corp.*, 70 F.R.D. 700, 701 (S.D.N.Y. 1976) (Edelstein, C.J.).

[38] *See Int'l Bus. Machs.*, 70 F.R.D. at 701; *Advanced Portfolio Techs., Inc. v. Stroyny*, No. 06-MISC-065, 2006 WL 3761330, at *2 (E.D. Wisc. Dec. 18, 2006) (Randa, C.J.) ("In general courts have read 'timely' to mean within the time set in the subpoena for compliance."); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (motion to quash should be brought before the date of deposition commanded by the subpoena); *Nova Biomedical Corp. v. i-Stat Corp.*, 182 F.R.D. 419, 422 (S.D.N.Y. 1998) (motion to quash served by hand two days before compliance was timely).

Commission has not provided any explanation for its proposal that the trigger date for the petition deadline be the date of receipt of written notice, rather than measured by the date of the actual reconvened hearing. Kelley Drye respectfully requests that the deadline by when a petition to limit or quash a reconvened deposition or hearing must be filed be determined with reference to the date of the reconvened deposition or hearing, rather than by the date of receipt of written notice.

iii. The Secret Briefing Permitted Is At Odds With the FTC's Commitment to Transparency

Proposed Rule 2.10(a)(4) states that, the "Commission staff may, ***without serving the petitioner***, provide the Commission a statement that shall set forth any factual and legal response to the petition to limit or quash."[39] In other words, the Commission staff may secretly respond to or oppose a petition to limit or quash. Such a clandestine approach contradicts the FTC's previous acknowledgment that:

> Government policy is more effective when the enforcement regime is transparent, because the economy benefits from the resulting reduction in transactions costs. The Federal Trade Commission has long worked to promote transparency through a number of formal and informal programs.[40]

President Obama similarly has advised government agencies that "[his] Administration is committed to creating an unprecedented level of openness in Government" and that the agencies should "ensure the public trust and establish a system of transparancy."[41]

The FTC's commitment to transparancy is at odds with proposed subsection (a)(4) as drafted because that provision would provide the FTC staff with the right to oppose a petition to limit or quash compulsory process without serving a copy of that response on the petitioner. There is no explanation for such provision within the *Federal Register* notice, nor is there a good reason why a petitioner should not be permitted to review the FTC staff's response to its petition.

Accordingly, Kelley Drye respectfully requests that proposed Rule 2.10(a)(4) be revised to require that any FTC staff response or opposition to a petition to limit or quash be served on the

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[39] 77 Fed. Reg. at 3198 (emphasis added).

[40] Malcolm B. Coate and Shawn W. Ulrick, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, 1 (Feb. 2005) (*available at* www.ftc.gov/os/2005/02/0502economicissues.pdf).

[41] Memorandum for the Heads of Executive Department and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009).

petitioner. Further, that proposed rule should include a deadline for the FTC staff's response or opposition that is consistent with the time by when a petition to limit or quash must be filed.

D. *Withholding Requested Material*

Rule 2.8(A) currently governs the circumstances and procedures under which parties may withhold material requested pursuant to a nonadjudicatory investigation based on a claim that the material is privileged or subject to another legal protection. As described below, the changes to withholding procedures that are proposed under new Rule 2.11 are unduly burdensome, unnecessary, and will not advance the Commission's ability to assess the validity of a party's claim that requested material is privileged or subject to another type of protection. Current Rule 2.8A states as follows:

> Any person withholding material responsive to an investigational subpoena or civil investigative demand . . . shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, *a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.*[42]

The FTC has proposed replacing Rule 2.8A with a new rule under Rule 2.11 that will substantially increase the burden of complying with privilege log requirements. In addition to the information described above, proposed Rule 2.11 would require parties to provide the following information for material that a party withholds pursuant to a claim of privilege or other protection: (1) the full title (if the withheld material is a document) and file name (if in electronic form); (2) the date material was sent to each recipient (if different from the date the material was created or prepared); (3) additional information about authors and recipients, such as email addresses; (4) the number of pages or bytes (if in electronic form) that are being withheld; and (5) any other pertinent information necessary to support the assertion of privilege, work product, or other protected status.[43]

The purpose of a privilege log is to provide the other party with sufficient information to assess a claim of privilege.[44] The FTC's current Rule 2.8A privilege log requirements are similar to the

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[42] 16 C.F.R § 2.8(A) (emphasis added).

[43] 77 Fed. Reg. 3191, 3199 (to be codified at 16 C.F.R. § 2.11).

[44] *See, e.g.,* Fed. R. Civ. P. Rule 26(b)(5)(A).

type of information that courts generally have agreed is sufficient under the Federal Rules of Civil Procedure to assess a claim of privilege.[45] By modeling the FTC privilege log requirements on the federal standard, the FTC ensured that the agency would be provided sufficient information to assess a claim of privilege – and would receive the same amount and type of information it would be entitled to receive under the federal rules – without imposing undue burdens on parties subject to an FTC investigation. That is the very purpose of a privilege log.

In contrast, the new rules go well beyond what a party would be entitled to receive in court, imposing an unfair and unduly burdensome requirement on parties subject to FTC investigative proceedings. Additionally, some of the new information requirements, such as the requirement to provide the document title and file name, could force parties to reveal the substance of the very privileged information over which they are asserting protection—a requirement that also goes well beyond federal rules.[46]

The FTC has stated that it is necessary to amend its privilege log requirements to require additional information "because there is no neutral Administrative Law Judge ('ALJ') available in Part 2 proceedings to analyze the sufficiency of the log."[47] But, the additional information requirements (*e.g.,* document/file size, the date material was sent to recipients, if different from the date it was created) fail to address this concern because the type of information requested by the additional requirements does nothing to boost the sufficiency of a log or help the FTC analyze a claim of privilege. Further, the presence or absence of an ALJ does not impact the type of information that FTC should be able to compel a party to provide. If the FTC believes a party has not provided sufficient information in a privilege log so that the FTC may analyze a claim of privilege, the FTC either may request such additional information or, if necessary, file an enforcement action in federal court requesting that a party provide additional information.[48] Amending the rules in the proposed wholesale manner, however, does not allow for appropriate weighing of burden and necessity.

Notably, the FTC's sister agencies that conduct similar nonadjudicatory investigations, such as the Securities and Exchange Commission ("SEC"), do not require that privilege logs contain the

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[45] *See, e.g.,* 26 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 26.90[2] (3d ed. 1997) (stating that a privilege log should contain the following: (1) a brief description of withheld material; (2) the date the material was prepared; (3) the author; (4) recipients; (5) the purpose for preparing the material; (6) the privileges or protections asserted; and (7) how the material satisfies the asserted privilege or protection).

[46] Fed. R. Civ. P. Rule 26(b)(5)(A) (under federal rules a party is required to describe the nature of documents, material, etc. over which it is claiming privilege, however, in doing so a party is not required to "reveal [] information itself privileged or protected").

[47] 77 Fed. Reg. at 3193.

[48] 15 U.S.C. § 57b-1(e).

scope of information proposed by the FTC's new rules.[49] Rather, the SEC requires a privilege log similar to the FTC's current practice rules, which, while already burdensome, is not unreasonable in scope.[50] Requiring privilege logs to contain similar information as the type of information requested by the SEC would be more than sufficient to provide the FTC with enough information to assess a claim of privilege or protection, without imposing unnecessary burdens on investigated parties.

Given the cost and time necessary to undertake a privilege review and produce a privilege log, increasing the burden on investigated parties could force parties to forgo a privilege review in favor of creating clawback and other agreements regarding privileged material with the FTC that will significantly increase the number of documents provided to the FTC and the amount of time FTC staff must spend reviewing documents.

For these reasons, Kelley Drye requests that the Commission retain its current Rule 2.8A privilege log requirements. The current requirements appropriately follow the federal standard without imposing undue burdens on parties subject to a Commission investigation.

E. *Noncompliance with Compulsory Process*

In proposed Rule 2.13, the Commission authorizes the General Counsel to initiate an enforcement action in connection with noncompliance of a Commission order requiring access pursuant to 15 U.S.C. 49, in addition to compliance with compulsory process already covered in the existing rules.[51] Under this new rule, the General Counsel would have unbridled discretion to initiate an enforcement proceeding on behalf of the Commission, or to request that the Attorney General initiate a civil action, "when he or she deems appropriate."[52] This raises concern that the Commission may be granting too much discretion without sufficient oversight. Kelley Drye recommends that the decision to initiate enforcement proceedings, which is central to the agency's law enforcement function, remain within the Commission's purview. This will allow the Commission to base any such decisions on informed consensus, after considering the views of the staff members involved in the specific matter at issue.

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[49] *See* SEC, Div. of Enforcement, ENFORCEMENT MANUAL (Aug. 2, 2011), *available at*, http://www.sec.gov/divisions/enforce/enforcementmanual.pdf (instructing SEC staff to request the following information when requesting privilege logs: (a) identity and position of creator(s); (b) creation date; (c) last known custodian; (d) a brief description of the document; (e) the identity and position of all known recipients of the document; (f) the reason the document is not being produced; and (g) the specific request in the subpoena to which the document relates).

[50] The SEC Act of 1934 § 21(c).

[51] 77 Fed. Reg. at 3199 (to be codified at 16 C.F.R. § 2.11).

[52] *Id.*

F. *Disposition*

Finally, the Commission seeks to limit the parties' continuing obligation to preserve documents. The Commission proposes a new paragraph (c) to Rule 2.14 that relieves both the subjects of an FTC investigation and third parties of any obligation to preserve documents after a year passes with no written communication from the Commission or staff.[53] Kelley Drye supports this revision and appreciates the Commission's recognition that the protracted retention of this documentary material and other evidence is expensive, unnecessary, and wasteful.[54] To further the spirit of this proposed rule, Kelley Drye suggests the inclusion of a formal presumption that the investigation has closed after a year passes with no written communication from the Commission or staff.

Sincerely,

Dana Rosenfeld
Sharon Kim Schiavetti

On Behalf of Kelley Drye & Warren LLP

[53] *Id.* at 3200 (to be codified at 16 C.F.R. § 2.14(c)).

[54] *Id.* at 3194.

APPENDIX A: SUMMARY OF RECOMMENDATIONS

Proposed Rule	Kelley Drye Recommendations
2.6, Notification of Purpose	Require that all third parties with access to nonpublic information certify the material will be maintained in confidence and used only for official law enforcement purposes.
2.7, ESI and the Compulsory Process	Clarify whether metadata will be included in the definition of ESI and consistently apply that definition to all investigative proceedings. Revise definition of ESI to limit application of the translation requirement to instances when reasonably necessary to further the FTC's investigation. Exclude from production privileged information contained in native electronic format, provided that non-privileged information is produced in another format. Narrowly tailor production requirements, particularly as they relate to metadata and duplicative electronic formats, to avoid unnecessarily burdensome cost for respondents. Indicate that time extensions will be reasonably granted (and not necessarily withheld) based on a respondent's written acknowledgment that it is taking steps to comply with the FTC's request, and do not condition time extensions on satisfactory progress toward compliance.
2.7(k), Meet and Confer Requirement	Extend meet and confer timeline to anytime before deadline for filing the motion to quash. At a minimum, extend deadline to "10 business days." Do not condition review of petitions to quash or limit on compliance with meet and confer requirement.
2.9(b)(1), Right of Witnesses	Strike this provision as unreasonable and inconsistent with existing regulations, and revert to the rule as currently written.
2.10, Petitions to Quash	Increase word cap to at least 5,000 words. Strike 5-day deadline for petitions to limit or quash reconvened hearings, and adopt a flexible "within a reasonable time" standard consistent with the Federal Rules of Civil Procedure. At a minimum, clarify deadline to refer to "business days." Require that any FTC staff response or opposition to a petition to limit or quash be served on the petitioner and impose a deadline consistent with the time by when a petition to limit or quash must be filed.
2.11, Withholding Requested Material	Retain current Rule 2.8(A) privilege log requirements as they appropriately follow federal standard without imposing undue burdens on respondents.
2.13, Noncompliance	Ensure that the Commission's decision to initiate enforcement proceedings be the product of informed consensus, and it is not delegated to the General Counsel.
2.14, Disposition	Add a formal presumption that the investigation has closed after a year passes with no written communication from the Commission or staff.