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Parts 2 and 4 Rules of Practice Rulemaking (16 CFR Parts 2 and 4) (Project No. P112103)
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These comments are provided in response to FTC's request for public comment regarding proposed changes to procedures in Part 2 of the Commission's Rules of Practice.[3] We applaud the Commission's efforts to expedite and streamline its investigatory processes, particularly with respect to the challenges associated with modern electronic discovery. In light of the often substantial burden inherent in complying with compulsory process in Commission investigations, which is compounded by the explosive growth of electronically stored information, these changes to agency procedure should, for the most part, help the Commission execute its enforcement mandate while minimizing unnecessary cost and burden on parties and bringing investigations to speedier conclusion. However, we note that there are a few proposed changes that may not meet those intended goals but may instead disproportionately increase cost, burden, and risk on parties subject to the Commission's compulsory process.

I. Proposed changes improving the investigatory process

Certain proposed changes are likely to have a positive impact on the ability of recipients of compulsory process to comply. For example, a clear policy establishing early meet and confer with agency staff on issues relating to document production and privilege claims often fosters

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[3] *See* FTC Press Release, FTC Seeks Public Comment on Agency's Rules of Practice (Jan. 13, 2012). While changes also are proposed to procedures in Part 4 of the agency's Rules of Practice, this commentary is limited to certain changes in Part 2 of the Rules.

trust and cooperation and reduces possible confusion regarding mutual expectations.[4] However, the requirement in proposed Rule 2.7(k) that parties must meet and confer with Commission staff within 10 days after receipt of process is not practical for all such recipients, particularly individuals or small businesses that do not routinely deal with such legal matters and may need additional time to retain counsel and be prepared to discuss compliance issues. We suggest revising the proposed language to require the meet and confer to occur within 10 days "or as soon as possible thereafter." Where initial meet and confer discussions lead to impasse, a streamlined process for resolving disputes over FTC subpoenas and civil investigative demands ("CIDs") as set forth in the proposed amendments is efficient for everyone involved.[5]

We also welcome the proposed bright-line rule relieving parties of their obligations to preserve documents related to an FTC investigation after a year passes with no written communication from the Commission or staff, which clarifies obligations, reduces costly unnecessary preservation efforts, and minimizes potential liability resulting from maintaining records that no longer serve a useful business purpose.[6] We urge the Commission, however, to affirmatively notify targets of compulsory process when the agency closes an investigation whenever possible, as such notification will provide the greatest certainty that an investigation has in fact closed and related preservation efforts are no longer necessary.[7]

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[4] *See* proposed Rules 2.4 and 2.7(k).

[5] *See* proposed Rule 2.10.

[6] *See* proposed Rule 2.14(c).

[7] Without affirmative notification that an investigation has closed, personnel responsible for enterprise-wide preservation efforts may be hesitant to lift hold orders. This is especially true in large, complex organizations where those responsible for implementing and managing hold

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Similarly, the non-waiver provisions for inadvertently produced privileged documents reduce risk to recipients of compulsory process, and greatly facilitate the ability of recipients to take advantage of advanced technologies that can significantly reduce the overall costs of compliance.[8] We further note that these proposed changes bring FTC practice further in line with the Federal Rules of Civil Procedure,[9] the Federal Rules of Evidence,[10] and the practice of other administrative agencies.

We view it as significant that the Commission has expressly acknowledged that "searches, identification, and collection all require special skills and, if done properly, may utilize one or more search tools such as advanced key word searches, Boolean connectors, Bayesian logic, concept searches, predictive coding, and other advanced analytics."[11] We applaud the Commission's embrace of the use of emerging search and review technologies, with their potential to greatly increase efficiency and reduce cost, as appropriate in FTC investigations.[12]

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orders may fear that an agency communication restarting the 12-month "clock" may not have been communicated to them from those members of the organization dealing directly with the agency. In the absence of affirmative notification, over-preservation remains a risk.

[8] *See* proposed Rule 2.11(d).

[9] *See* FED. R. CIV. PRO. 26(b)(5).

[10] *See* FED. R. EVID. 502.

[11] 77 FR 3191 (Jan. 23, 2012).

[12] *See, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, Rich. J.L. & Tech., Spring 2011, at 48 ("[T]he myth that exhaustive manual review is the most effective – and therefore the most defensible – approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort.").

While many of the proposed changes represent valuable improvements to Part 2 investigation procedures, proposed changes to Rules 2.7 and 2.11 raise some concerns and may impose increased burden and risk on producing parties that may not be justified in light of the perceived value of those provisions to the Commission.

II. Rule 2.7: Authority to "inspect, copy, or sample documentary material"

Proposed Rule 2.7 addresses compulsory process and the types of documentary material the Commission can seek. The commentary preceding proposed Rule 2.7 explains that the revision includes "staff's authority to inspect, copy, or sample documentary material – including electronic media – to ensure that parties are employing viable search and compliance methods." The authority to gain such access is more clearly laid out in two proposed sections of the Rule. First, proposed Rule 2.7(e) provides that "[e]xcept in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring any person, partnership, or corporation under investigation to grant access to their files, *including electronic media, for the purpose of examination and to make copies*."[13] Second, proposed Rule 2.7(i) provides that the "Commission, through compulsory process, may require the production of documentary material, or *electronic media* or other tangible things, *for inspection, copying, testing, or sampling*."[14]

While of concern, particularly in the modern world of electronically stored information, proposed Rule 2.7(e) is not without precedent. Current Rule 2.11(a) provides that "[i]n investigations other than those conducted under section 20 of the Federal Trade Commission

[13] Emphasis added.

[14] Emphasis added.

Act, the Commission may issue an order requiring any person, partnership or corporation being investigated to grant access to files for the purpose of examination and the right to copy any documentary evidence." There does not, however, appear to be a current analogue to proposed Rule 2.7(i). Indeed, new proposed Rule 2.7(i) raises several significant concerns. First, it is available through mere compulsory process and does not require the procedural safeguard of obtaining a Commission order. Second, it is applicable to any proceeding governed by Part 2 rules, unlike Rule 2.7(e) access orders, which are not available in investigations regarding unfair or deceptive acts or practices.

Perhaps of greatest concern is the apparent authority to require the production of any "electronic media" for "inspection, copying, testing, or sampling." The literal meaning of the proposed amendment would allow the Commission to issue a subpoena or CID requiring the production of, for example, servers, hard drives or back-up tapes, so that the Commission staff can "inspect" the electronic information to see if there is anything of interest contained on those sources. The commentary indicates that the new authority is necessary to "ensure that parties are employing viable search and compliance methods," but the text of the proposed rule itself provides no such limiting principle. Further, the proposed rules expressly decline to define "electronic media" and, therefore, the proposed rule appears to give staff essentially unfettered access to any source of electronically stored information. For example, staff could conceivably obtain access to an enterprise-wide e-mail system or shared electronic document repository and review large volumes of highly-sensitive confidential business information, much of which likely has no relevance to the subject or scope of the purported investigation. Moreover, while other compulsory process provisions (such as those covering CIDs or subpoenas under proposed Rule 2.7(b) & (c)) limit the scope of discovery to documentary material *relevant* to the investigation,

proposed Rule 2.7(i) appears divorced from the enabling statute that allows the FTC to issue subpoenas requiring "the production of all such documentary evidence *relating* to any matter under investigation"[15]

The unbounded scope of the authority under proposed Rule 2.7(i) also raises significant privilege issues. While the recipient of compulsory process pursuant to this rule would presumably have the right to withhold privileged material pursuant to proposed Rule 2.11, conducting a privilege review, redacting the privileged material from the electronic media at issue, and then compiling the required privilege log would in some cases present an enormous burden depending on the subject matter and the volume of the ESI contained on the electronic media sought, since the privilege review would necessarily have to be conducted across the entire contents of the electronic media.

Ultimately, it is unclear that such measures to "ensure that parties are employing viable search and compliance methods" are within the scope of the Commission's authority or are warranted as a policy matter. Further, the costs and risks to the producing party would seem to far outweigh any purported benefit to the Commission. The justification seems to assume that recipients of compulsory process could be relied upon to locate and produce material responsive to a CID or subpoena when the material is in hardcopy format, but that additional agency oversight now may be necessary when the material is in electronic format. We believe recipients

[15] 15 USC § 45 (emphasis added). We also note that the term "electronic media" is deliberately undefined and that requiring parties to produce or authorize direct access to "electronic media" – as distinguished from producing relevant, non-privileged, information stored on electronic media – could potentially raise Fourth Amendment issues relating to unreasonable searches and seizures. Given the increasingly complex information storage choices available, rules relating to requiring parties to produce or permit direct access to electronic media create more ambivalence and confusion than they provide helpful guidance.

of compulsory process are in the best position to locate and produce material in response to CIDs and subpoenas provided that the Commission "describe[s] each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified."[16] Any concerns regarding the search or other methodology used by parties to comply with such requests where they involve electronic media can be adequately addressed through meet and confer discussions. We therefore urge the Commission not to deviate from its traditional practice of issuing CIDs and subpoenas that require the production only of non-privileged material that is relevant to the articulated subject matter of its investigation, and to reject the adoption of proposed Rule 2.7(i).

III. Rule 2.11: Withholding privileged material

Proposed Rule 2.11 addresses withholding material requested through compulsory process, and in particular withholding such material on the basis of privilege. Specifically, the proposed rule requires each entry on the privilege log to contain the following information: (1) full title and full file name, (2) description, (3) date created or prepared, (4) date sent to each recipient, (5)-(6) names, titles, physical addresses, email addresses, and organizations of all authors and recipients; (7) factual basis supporting the privilege claim, and (8) number of pages or bytes. The commentary claims that the proposed rule will give "more meaningful and specific information concerning privilege claims in Part 2 investigative proceedings."

The review and creation of a privilege log is a very significant, if not the primary, burden and cost of complying with compulsory process, and this burden and cost continues to increase as the amount of electronically stored information that the average organization or custodian

[16] *See* relevance standard contained in proposed Rule 2.7(b) & (c).

regularly maintains continues to rise. As the FTC has recognized, "[p]reparation of a complete privilege log . . . can impose substantial costs on a party that in some circumstances outweigh the benefits of the log."[17] Unlike other aspects of document search and analysis that largely can be automated, the creation of a privilege log requires extensive work by lawyers who must review all potentially privileged material and manually create entries on the log for each item withheld.

As the comments to the proposed rule recognize, the requirements for privilege logs submitted in response to compulsory process under the Part 2 rules are more onerous than those of Rule 3.38A, governing assertions of privilege in Part 3 proceedings. Rule 3.38A eliminated the requirement that a privilege log must always contain specific information for each item being withheld.[18] Instead, the Commission substituted the more flexible requirement of Federal Rule of Civil Procedure 26(b)(5)(A), which prescribes that the nature of the materials withheld be described "in a manner that . . .will enable other parties to assess the claim." While we appreciate that there is no neutral ALJ available in Part 2 proceedings to analyze the sufficiency of privilege logs, the burden of the specific detail required in proposed Rule 2.11 is substantial. Moreover, recipients of Part 2 compulsory process are either the subjects of investigation or third parties with information potentially relevant to investigations, whereas Part 3 parties are beyond the investigation stage and instead proceeding through formal adjudication before an ALJ. The costs associated with Part 2 compliance should not be greater than those imposed during Part 3 proceedings.

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[17] *See Reforms to the Merger Review Process*, Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission (Feb. 16, 2006).

[18] *See* 73 FR 58839.

Similarly, back in 2006 the FTC issued reforms to its Hart-Scott-Rodino merger review process that were "intended to control costs by . . . reducing the size of privilege logs."[19] Such reforms included allowing recipients of Second Requests in HSR proceedings to elect to submit a partial privilege log for all of the custodians in the search group and a complete privilege log for a much more limited subset of the custodians in the search group. The partial log requires, for each withheld document only: (1) the name of the custodian from whom responsive documents are withheld on the basis of a claim of privilege; and (2) the total number of documents (stating the number of attachments separately) contained in each such custodian's files that are withheld under a claim of privilege. The complete log requires, for each withheld document from the productions of the designated subset of custodians: (1) authors; (2) addressees; (3) all recipients of the original and any copies; (4) date; and (5) a description of the document in a manner that, though not revealing the privileged information, provides sufficiently detailed information to enable staff, the FTC, or a court to assess the applicability of the privilege claimed. While the FTC reserves the right to request additional information in individual circumstances, the information required in a merger investigation before the FTC is much less burdensome and more narrowly limited to the specific information that allows the FTC or a court to assess the applicability of the privilege claimed.

By contrast, proposed Rule 2.11 goes much further in requiring very detailed information for each entry on a privilege log, much of which does not appear likely to be "more meaningful" when assessing the privilege claim. For example, the requirement to provide titles, physical addresses, email addresses, and organizations of all authors and recipients is incredibly broad

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[19] *See Reforms to the Merger Review Process*, Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission (Feb. 16, 2006).

and onerous. Compliance with that provision would require a manual investigation into the personal details of every individual identified in every email string withheld as privileged. It is difficult to comprehend how email addresses, physical addresses, and titles[20] of every author and recipient is "more meaningful," or necessary, to the ability of the Commission staff to assess every instance of a privilege claim – particularly when balanced against the cost and burden of compliance. While we recognize that the privilege log requirements can be modified by agreement reached through the "meet and confer" process, the baseline requirement in the proposed rule will prove extremely burdensome, particularly in large-scale investigations where the number of privileged documents withheld can be many thousands.

We encourage FTC to adopt the more flexible approach contained in Rule 3.38A, consistent with the Federal Rules of Civil Procedure, or the partial log approach adopted for HSR Act second requests. At a minimum, we encourage FTC to eliminate the specific requirements of providing email addresses, physical addresses and titles of authors and recipients, as they are extremely costly and burdensome to comply with and they do not provide meaningful, or necessary, information when assessing the claim of privilege for at least the vast majority of documents typically included on a privilege log. Any of these approaches could be accompanied by a provision requiring parties to provide additional information upon the request of Commission staff in the event disagreements regarding particular privilege claims arise in individual circumstances.

[20] We understand that identification of attorneys and non-attorneys on a communication is meaningful in assessing privilege claims, but do not agree that specific titles are meaningful, or necessary, in assessing privilege claims.

Finally, to the extent the Commission ultimately prescribes specific categories of information to be included on privilege logs submitted in Part 2 investigations, we urge the Commission to allow producing parties to populate privilege logs automatically from metadata associated with the withheld material. This could be done with the understanding that the Commission reserves the right to request additional information should the metadata prove insufficient for assessing the privilege claim for particular items of withheld material in individual circumstances.

IV. Conclusion

Overall, we view the proposed changes to the procedures in Part 2 of the agency's Rules of Practice as a welcome modernization. Many of the rules will improve the Commission's ability to investigate potentially unlawful conduct, while keeping pace with the dynamic challenges of dealing with electronically stored information and minimizing risk and unnecessary burdens for recipients of compulsory process. However, we urge the Commission to take into consideration concerns expressed regarding proposed Rules 2.7 and 2.11 in finalizing the rules.