

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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IN THE MATTER OF INTUIT INC.
-----x

File No. 1923119

INTUIT INC.'S PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND

July 7, 2020

David Gringer
D. Reed Freeman
Wilmer Cutler Pickering
Hale and Dorr LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202)-663-6363
david.gringer@wilmerhale.com
reed.freeman@wilmerhale.com

Counsel for Petitioner

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Last year, more taxpayers filed their taxes completely for free using Intuit’s TurboTax software—over 13 million—than all of TurboTax’s competitors combined. Nonetheless, for over a year, the Commission has been investigating Intuit’s participation in the IRS Free File program, a voluntary federal program created and administered by the IRS to provide eligible taxpayers with a free government-sponsored online tax software option. The IRS’s rules for the program are clear: participants like Intuit have no obligation whatsoever to market the software they donate to the Free File program, and they are free to engage in commercial activity in the same manner as if they did not participate in the program. Notwithstanding these clear regulations, staff’s investigation has focused on whether Intuit has a duty to disclose its Free File program offer on its commercial website, and whether marketing for Intuit’s commercial products “misdirects” customers otherwise eligible for the IRS Free File program to TurboTax.

Intuit has cooperated extensively with staff’s investigation, providing over forty pages of interrogatory responses and 500,000 pages of documents in response to the FTC’s first CID, issued on June 28, 2019. The voluminous information Intuit established that an enforcement action would be unwarranted, and that Intuit was at all times clear and fair with its customers. Instead of closing the investigation, as the facts, law, and an independent investigation

commissioned by the IRS compel, the FTC issued a second CID on May 18, 2020 that expands the investigation into a full-fledged audit of Intuit's business practices, Intuit's relationship with the IRS, and even whether Intuit has ever sought or claimed a tax deduction for its charitable giving.

The new CID is incredibly burdensome. Counting subparts, it includes 166 interrogatories. There are broad document demands. And notwithstanding the new and unanticipated stresses of work in the COVID-19 environment, the staff seeks investigational hearings with at least eight different Intuit employees, and the CID includes a sixteen-topic corporate hearing notice that will require at least *five* Intuit employees to testify over several days. All this on top of the substantial burdens associated with Intuit's full compliance with the first CID, and all because Intuit had the temerity to participate in a voluntary federal program where it donated software to low and middle income taxpayers and adhered to the IRS's rules in doing so. Truly, no good deed goes unpunished.

Even though it believes the CID unwarranted in scope and substance, Intuit has agreed to comply with nearly all of it because the evidence—when objectively considered—strongly exonerates it from any alleged wrongdoing.

In this Petition, however, Intuit respectfully requests only minor modifications to its corporate investigational hearing. *First*, that the Commission eliminate topic 12 of the investigational hearing, which as modified by FTC staff seeks information about the “public relations benefits,” and “tax deductions or other tax benefits sought, claimed or received by the Company for offering its Free File Product.” Plainly, even under the FTC's broad authority under Section 6 of the FTC Act, this topic has no bearing whatsoever on whether Intuit engaged

in unfair or deceptive conduct. It also potentially seeks to impose an undue burden on Intuit's constitutionally-protected right to petition the government.

Second, Intuit requests that the Commission eliminate topic 16, which requires testimony on 211 interrogatory responses Intuit has or will provide to the staff. While the staff has proposed narrowing the request to fewer interrogatories, even as modified the topic remains incredibly overbroad and impermissibly intrudes on privileged communications.

After multiple, good-faith attempts at resolution, the staff has refused to withdraw the topics at issue, and Intuit is left with no recourse but to seek the Commission's assistance to limit the scope of the testimony sought. This motion is timely brought pursuant to 16 C.F.R. § 2.10 because staff agreed to extend the deadline for a Petition to quash to July 7, 2020.

BACKGROUND

A. Intuit's Free Products

Intuit currently offers two free tax filing solutions to customers: IRS Free File Program Delivered by TurboTax, which as the name suggests, is provided through the IRS; and TurboTax Free Edition, a completely free product offered on Intuit's commercial website. Although both products provide for genuinely free tax filing, they have a different genesis and serve different segments of customers.

In 2002, the IRS established the Free File program, a public-private partnership between the agency and a consortium of online tax companies to offer free tax-filing software to a segment of the American public. *See* 2002 Memorandum of Understanding ("MOU") § I (Oct. 30, 2002), <https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf>. The partnership ensured "higher quality" tax services than the federal government could provide on its own, "maximize[d] consumer choice" in light of the many participating companies, and

“promote[d] competition” for free tax-preparation services, *id.* § 2, while allowing the IRS to stay out of the tax software business, as it wished.

Pursuant to the terms of the agreement, the IRS assumes *sole responsibility* for “[p]romotion of the [Free File program]” and Intuit and program participants have no obligation to advertise or market it. *Id.* § VI.B. The IRS sets the criteria for eligibility for the program and each FFA member’s Free File offering has its own eligibility criteria, *see IRS, Free File: Do Your Federal Taxes for Free* (last accessed July 4, 2020), <https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free>, structured so that the product can be used by at least 10% but no more than 50% of taxpayers eligible for Free File, *see Byers v. Intuit, Inc.*, 600 F.3d 286, 289–90 (3d Cir. 2010). To use Intuit’s Free File software in the 2020 filing season, a taxpayer must have an Adjusted Gross Income (“AGI”) of \$36,000 or less, be on active military duty with an AGI of \$69,000 or less, or be eligible for the Earned Income Tax Credit.

Although participants have no obligation to advertise the program, *see IRS, Independent Assessment of the Free File Program - Appendix A: The Economics of IRS Free File 35* (Sept. 13, 2019), <https://www.irs.gov/pub/newsroom/02-appendix-a-economics-of-irs-free-file.pdf> (explaining that “the MOU puts the burden of advertising on the IRS alone”), Intuit has focused in recent years on growing Free File usage. During the 2019 filing season, Intuit invested \$1.5 million in its Tax Time Allies campaign to broadly promote no-cost tax filing services, including Free File, which resulted in more than 700,000 taxpayers clicking on ads that directed them to the IRS’s Free File homepage. As in the past, moreover, Intuit sent former Free File customers *up to seven* email reminders inviting them to again use Intuit’s Free File product, far exceeding the *one* required by the MOU, *see Eighth MOU* § 4.32.4 (Oct. 31, 2018), <https://www.irs.gov/pub/irsutl/Eight%20Free%20File%20MOU.pdf>. Approximately 230,000

taxpayers clicked on those email reminders, bringing them directly to the landing page for Intuit’s Free File offering. In the end, approximately 1.2 million Americans filed their 2018 taxes using Intuit’s Free File product, accounting for more than 50 percent of *all* Free File use, *see* IRS, Independent Assessment of the Free File Program 26 (Oct. 3, 2019), https://www.irs.gov/pub/newsroom/01_free-file-programassessment-100319.pdf (“IRS Report”).

The Free File program allows access to the free tax software contributed by participating companies through a “website hosted and maintained by the IRS.” Eighth MOU § 1.17. This system makes sense. The software of each participating company has its own eligibility criteria, such as based on age, income, or state residency. Accessing the program through the IRS page allows eligible taxpayers to “review each company offer or . . . use a ‘Lookup’ tool that will find the software for which they are eligible.” IRS, *Tax Time Guide: Try Money-Saving IRS Free File*, IR-2018-38 (Mar. 1, 2018), <https://www.irs.gov/newsroom/tax-time-guide-try-money-saving-irs-free-file>. Agency press releases regarding the Free File program have thus advised that “taxpayers can ONLY access Free File sites through IRS.gov.” IRS Report at 84.

Separate from its participation in the Free File program, Intuit offers TurboTax Free Edition on its commercial website. Free Edition may be used for free by any taxpayer, no matter her income, so long as she has a “tax return[] that can be filed on Form 1040 without any attached schedules.” *E.g.*, TurboTax Help, *Is TurboTax Free Edition Right for Me?*, Intuit TurboTax (May 24, 2019), <https://ttlc.intuit.com/community/choosing-a-product/help/is-turbotax-free-edition-right-for-me/00/26236>. According to government estimates, nearly 50 million Americans—approximately one third of all taxpayers—file tax returns using only Form 1040 and could therefore file for free using Free Edition. *See* National Taxpayer Advocate, *2018 Annual Report to Congress* ix (2019), <https://taxpayeradvocate.irs.gov/Media/Default/>

Documents/2018-ARC/ARC18_Volume1.pdf (“[I]t is estimated [that] approximately 47 million taxpayers (32 percent) [can] meet their filing requirements [using only Form 1040].”). Over 12 million taxpayers did just that last year.

The TurboTax commercial site features important services that cannot be offered through the Free File program due to the IRS’s rules. For example, Community (formerly known as AnswerXchange), TurboTax’s free and widely-used question-and-answer service, cannot be offered on the Free File platform because it could expose Free Filers to marketing or sales activity—or links to such activity—in violation of the FFA’s MOU with the IRS. *See* Eighth MOU § 4.32.5 (generally prohibiting all “marketing, soliciting, sales or selling activity, or electronic links to such activity” in the Free File program). The same is true of TurboTax Live, which offers live, line-by-line tax advice and expert review by credentialed Certified Public Accountants and tax attorneys.

B. ProPublica’s Accusations

In April and May 2019, ProPublica published a number of stories critical of Intuit. Claiming without basis that tax-preparation software companies “like Intuit” “would rather [consumers] didn’t know” about the Free File program, ProPublica complained that Intuit did not direct Free File-eligible taxpayers on its commercial website to its Free File product. J. Elliot & L. Waldron, *Here’s How TurboTax Just Tricked You Into Paying to File Your Taxes*, ProPublica (Apr. 22, 2019), <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes>. And it criticized Intuit for promoting TurboTax Free Edition, which it panned (without basis) as “only free for people with the simplest taxes,” *id.*, without mentioning the product’s eligibility criteria or acknowledging that it covers—for free—the tax needs of nearly

one-third of all American taxpayers or that more taxpayers use it to file for free than all other methods of free tax preparation combined.

In short order, Intuit received notice that the FTC had begun investigating whether the company had engaged in, or was engaged in, violations of Section 5 of the FTC Act “by misdirecting eligible taxpayers away from the Internal Revenue Service’s Free File Program.” *See* Letter from Tejasvi Srimushnam to Intuit Inc. dated May 9, 2019. Notably, Intuit is unaware of any customer who had complained to the FTC about these issues before that date.

C. The FTC Staff’s Expanding Investigation of Intuit

After receiving notice of the FTC’s investigation on May 9, 2019, Intuit received the Commission’s first Civil Investigative Demand (the “First CID”) on June 28, 2019. The First CID included 45 separate interrogatories, counting subparts, along with 24 document requests (again, counting subparts). Although the Applicable Time Period was stated as June 24, 2016 to the date of full and complete compliance with the CID, 16 of the interrogatory requests and 13 of the document requests requested information or documents reaching back to 2013, more than doubling the time period implicated.

Intuit engaged in good-faith negotiations with FTC staff regarding the scope of the First CID, including an in-person meeting with the staff on July 18, 2019 and multiple phone conversations. Intuit provided proposed search terms and custodians for all document requests (including document collections for 27 custodians across the company), which the staff reviewed, provided modifications to, and approved. Pursuant to these negotiations, the FTC modified the scope of the First CID in a letter dated August 30, 2019. Intuit made nine productions in response to the First CID, on July 29, July 31, September 4, September 13, October 11, November 21, and December 23, 2019; and on January 23 and March 27, 2020.

These productions included more than 40 pages of interrogatory responses and more than 500,000 pages of documents.

On May 19, 2020, the FTC issued a second CID (the “Second CID”) to Intuit. The Second CID included 166 interrogatory requests, counting subparts, and six new document requests. Additionally, the Second CID requested that Intuit designate a corporate representative to give testimony on 16 broad topics, which together encompass virtually every part of Intuit’s TurboTax business. The FTC also issued 11 individual CIDs to Intuit employees for investigational hearings, each of which included 11 identical topics of inquiry.

Intuit again negotiated in good faith with staff regarding the scope of the CIDs’ requests. Intuit met and conferred three times with the staff, on May 27, 2020, June 4, 2020, and June 17, 2020. In response to various concerns raised by Intuit, including that it called for the same information provided in response to the First CID, the staff partially modified the scope of the Second CID on June 10, 2020. On June 15, 2020, staff further modified the Second CID, agreeing to accept a declaration in lieu of oral testimony for two of the individual CIDs, postpone a decision about how to proceed with a third, and to modify the scope of certain topics for Intuit’s corporate designees and of a number of interrogatories and requests for documents.

Since the June 15, 2020 letter, Intuit and the staff have engaged in further negotiation over email, including, as relevant here, on topics 12 and 16. On June 25, 2020, staff proposed changing topic 12 to seek testimony about:

the Company’s involvement in Free File, Inc. (including financial, monetary, and public relations benefits) in regard to:

- Preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] and

- Tax deductions or other tax benefits sought, claimed, or received by the Company for offering its Free File Product.

The staff proposed narrowing topic 16 from “[e]ach of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019,” to:

The substance, meaning of, and factual basis for the Company’s answers and responses to the following Interrogatories in this CID and the prior CID issued July 1, 2019:

- CID 1: Interrogatories 2(a), 3(a), 3(b), 4(a), 5(a), and 5(e)
- CID 2: Interrogatories 1, 2, 4(a)–4(e), 13, 21, 22, and 25.

Intuit also requested that the individual investigational hearings not be scheduled during the first two weeks of September, when schools will be starting, considering the unusual difficulties associated with beginning the school year during a pandemic. Staff responded that they would agree to Intuit’s request only if Intuit accepted the proposed modifications and did not pursue relief with the Commission. Intuit explained in response that its reasonable request for a two-week pause in investigational hearings because of a global pandemic should not be used to coerce agreement. On July 6, 2020, staff agreed to Intuit’s request to start the investigational hearings on September 14, but refused to withdraw the topics at issue. The staff did say it would withdraw topic 12 but only if Intuit stipulated “that the free file offering is an Intuit product that Intuit benefits from offering.” As Intuit explained in response, Intuit would not so stipulate because the proposed stipulation was counterfactual.¹

¹ The staff’s request for an inaccurate one-sentence stipulation in return for withdrawing the topic illustrates that the topic serves no valid investigative purpose.

ARGUMENT

The Commission should quash topics 12 and 16 of the investigational hearing request in the Second CID. Topic 12 is not relevant to the FTC’s investigation and impermissibly burdens Intuit’s protected First Amendment conduct. Topic 16 is overbroad and unduly burdensome, and impermissibly seeks testimony as to privileged and protected information. Intuit has brought these concerns to, and sought to negotiate in good faith with, FTC staff, but those efforts were unsuccessful.

I. TOPIC 12 IS IRRELEVANT AND VIOLATES INTUIT’S FIRST AMENDMENT RIGHTS

First, the Commission should limit the CID to exclude testimony on topic 12, because it is irrelevant and it impermissibly intrudes on Intuit’s protected First Amendment activity.

A. Topic 12 Has No Relation To The Conduct Under Investigation

Topic 12, both as written and with the staff’s proposed modification, is irrelevant. This is because neither the generalized “benefit” Intuit derives from Free File, nor the slightly more specific “public relations” benefit or tax benefit Intuit may (or may not) have received from its participation in the Free File program and charitable donation of its TurboTax software to the IRS, are topics relevant to the FTC’s inquiry into whether Intuit “has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products.”

The FTC’s “[s]ubpoena enforcement power is not limitless[.]” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). Indeed, the Supreme Court has recognized that “matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). One such limitation is that the information sought by the FTC must be “reasonably relevant” to

its investigation. *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977); *see also FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1977) (“The test for the relevancy of an administrative subpoena . . . is whether the information sought is ‘reasonably relevant’ to the agency’s inquiry.”). That is to say, although “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,” *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1030 (D.C. Cir. 1978) (quoting *Morton Salt Co.*, 338 U.S. at 652), the information sought must be “adequate, but not excessive, for the purposes of the relevant inquiry,” *id.* (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)). That is not the case here, and the Commission should therefore exclude testimony sought on topic 12.

Even with the staff’s proposed modification, topic 12 simply is not “reasonably relevant” to the FTC’s investigation. Information about “public relations” benefits Intuit purportedly receives from its participation in the Free File program, or about any alleged benefit Intuit derives from the program in terms of so-called government “encroachment,”² say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products. Likewise, whether Intuit sought or received a tax benefit from donations of software to the IRS has no connection to any issue under investigation.

It is telling that despite Intuit’s repeated requests to the staff to articulate any basis for seeking this information, they have been unwilling to do so. Instead, staff has either asked Intuit

² The IRS has “no interest in entering the market” because doing so is not “an economically feasible option for the agency,” even in the absence of the Free File program. IRS Report App. A, at 26. Intuit is unaware of any effort by staff to coordinate (or consult) with the IRS, notwithstanding the latter’s oversight of the Free File program and its completed investigation of Propublica’s allegations, and notwithstanding 16 C.F.R. § 4.6, which states that “[i]t is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.”

to stipulate—counterfactually—that Intuit obtains unspecified “benefits” from the program, or responded with bromides like, “I think we get to ask about that,” or “we may just have to agree to disagree on that one.” This is insufficient. Because it lacks any connection to the investigation, topic 12 should be quashed. *See, e.g., FTC v. Turner*, 609 F.2d 743, 746 (5th Cir. 1980) (affirming district court’s decision not to enforce FTC subpoena seeking information about respondent’s financial assets when such information was irrelevant to the FTC’s investigation).

B. Topic 12 Impermissibly Intrudes on Protected First Amendment Activity

In addition, the FTC’s proposed modification to topic 12 seeks testimony that impermissibly intrudes on Intuit’s First Amendment-protected conduct.

It is axiomatic that “[t]he First Amendment protects political association as well as political expression.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). “[T]he government must justify its[elf] . . . when governmental action ‘would have the practical effect of ‘discouraging’ the exercise of constitutionally protected political rights.’” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). That includes when the government compels disclosure of political activity, which can have a chilling effect on protected First Amendment speech. *See id.* at 1139–40. A party can accordingly assert a First Amendment privilege against discovery requests that seek such disclosures. *See id.* at 1140.

In analyzing an assertion of First Amendment privilege, courts first look to whether the party asserting the privilege has made a *prima facie* case that enforcing the request would have a chilling effect on the party’s First Amendment rights, before shifting the burden to the government to show that the information sought is rationally related to a compelling government interest and that the discovery sought is the least-restrictive means of obtaining the information. *Perry*, 591 F.3d at 1140. As with every First Amendment analysis, courts “balance the burdens

imposed on individuals and associations against the significance of the . . . interest in disclosure,” *id.* (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003)). “The party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation.” *Id.* at 1141.

Intuit has clearly made the requisite *prima facie* showing. The First Amendment guarantees Intuit “the right . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. This right certainly extends to petitioning the government with regard to taxes and tax policy. *Cf. Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 790 (6th Cir. 2007). Nor could there be any question that the CID, if enforced, would burden Intuit’s exercise of that right. *See, e.g., AFL-CIO*, 333 F.3d at 175 (noting that “[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation” (citations omitted)); *see also Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (“[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.” (citations omitted)).

In contrast, staff cannot rebut Intuit’s *prima facie* case. In seeking information from Intuit about the tax benefits it sought, claimed, or received for taking part in the Free File Program, the FTC is asking for testimony on Intuit’s protected activity of petitioning the government for tax benefits, presumably because such protected activity will somehow influence the staff’s decision whether or not to recommend an enforcement action. This creates precisely the type of chilling effect the First Amendment privilege is intended to protect, by bringing additional risks and scrutiny to Intuit for engaging in protected conduct. And the staff has so far

not provided any rationale for why such sought or obtained tax benefits would be relevant, let alone *highly* relevant, to its investigation into Intuit’s marketing and advertising practices for its online tax software. Thus, at the very least, the FTC should quash this part of topic 12 as violating the First Amendment privilege.

II. TOPIC 16 OF THE INVESTIGATIONAL HEARING REQUEST INTRUDES ON ATTORNEY-CLIENT COMMUNICATIONS AND IS OVERBROAD

Next, topic 16 should be quashed because it intrudes impermissibly on attorney-client communications and attorney work product, and because it seeks testimony that is overbroad and unduly burdensome to Intuit.

A. Topic 16 Seeks Privileged Communications

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Both FTC regulations, 16 C.F.R. § 2.7(a)(4), and the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b)(1), recognize that attorney-client communications can accordingly be withheld from discovery.

Topic 16 seeks testimony on “[t]he substance and meaning of” Intuit’s answer to the FTC’s interrogatories in the two CIDs, “as well as the factual basis for such answers.” Intuit’s interrogatory responses were prepared with the assistance of undersigned counsel, and providing testimony on “[t]he substance and meaning of[,] . . . as well as the factual basis for” the company’s answers would implicate privileged attorney-client communications made in the process of preparing those responses. At least one court has found a Rule 30(b)(6) request for deposition on the topic of a party’s responses to interrogatories unenforceable precisely for that reason. *See Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *9

(N.D. Ill. Jan. 24, 2000) (noting that such a “proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege” and granting motion for a protective order).

Under staff’s proposed modification, topic 16 would cover only a subset of interrogatories. However, the privilege applies equally to a subset of the interrogatories as it applies to the whole—the interrogatories the FTC focuses on in its proposal were drafted with the advice of counsel, and such communications are privileged. The Commission should accordingly quash the CID to exclude any testimony on topic 16.

B. Topic 16 is Overbroad and Unduly Burdensome

Topic 16 is also overbroad and unduly burdensome because it does not identify with any reasonable particularity which information in Intuit’s answers to the FTC’s interrogatories the company should prepare to testify on. A CID is unenforceable if “the demand is unduly burdensome or unreasonably broad.” *Texaco*, 555 F.2d at 882. While “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest,” courts have modified or quashed investigative subpoenas that “unduly disrupt or seriously hinder normal operations of a business.” *Id.* The broad scope of topic 16 creates exactly such a situation, by requiring Intuit to expend significant resources to prepare multiple employees to serve as corporate representative on a topic that essentially covers every aspect of Intuit’s online marketing and advertising.

Topic 16 asks for testimony as to “[t]he substance and meaning of each of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019, as well as the factual basis for such answers.” Between the two CIDs, there are, counting subparts, 211 interrogatories covered by this topic, ranging across the entire spectrum of Intuit’s online products and covering all aspects of the company’s marketing and advertising strategy. As Intuit

explained in meet-and-confer negotiations, no person could educate themselves across that scope of information *and* be able to speak knowledgeably about such a breadth of content.

Indeed, courts have rejected as overbroad Rule 30(b)(6) topics indistinguishable from topic 16, because they lack the requisite particularity. *See, e.g., Integra Bank Corp. v. Fidelity & Deposit Co. of Maryland*, No. 3-11-cv-00019-RLY-WGH, 2014 WL 109105, at *3 (S.D. Ind. Jan. 10, 2014) (listing cases) (overruling objections to protective order issued in response to 30(b)(6) topic calling for testimony on responses to 24 interrogatories). In this case, such an overbroad line of inquiry would also be unduly burdensome to Intuit, by requiring it to put forward somewhere between eight and ten witnesses to satisfactorily cover the topics of both CIDs' interrogatories.

Even with staff's proposed modification, topic 16 suffers from the same defects. Though restricted to a smaller subset of interrogatories, topic 16 still lacks reasonable particularity because it does not identify with specificity the information sought. The modification would also still result in undue burden, by requiring Intuit to prepare multiple corporate designees on a wide range of topics. As modified, the topic still covers 30 interrogatories, including subparts, ranging from Intuit's use of subject advertising keywords; to web traffic on the TurboTax website; design of, features, and marketing for all of Intuit's TurboTax Products; and even Intuit's position in related private litigation.

As Intuit has explained to the staff, if it wishes to inquire about Intuit's interrogatory responses, it may do so during the individual investigative hearings. It does not need a separate Investigative Hearing centered around those responses.

CONCLUSION

Intuit respectfully requests that its Petition be granted, and the Commission should limit its Second CID in the manner described above.

Respectfully submitted,

Dated: July 7, 2020

WILMER CUTLER PICKERING HALE
AND DORR LLP

David Gringer

David Gringer
D. Reed Freeman
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202)-663-6363
david.gringer@wilmerhale.com
reed.freeman@wilmerhale.com

MEET AND CONFER STATEMENT

Pursuant to 16 C.F.R. § 2.7(k), counsel for petitioner conferred with counsel for the Commission on several occasions in a good-faith effort to resolve the issues relating to the scope of investigational hearings topics in the Second CID raised in this petition. The meetings took place by telephone between D. Reed Freeman, David Gringer, Blake Roberts, and Ben Chapin (counsel for petitioner) and Ian Barlow, Frances Kern, James Evans, Rebecca Plett, and/or Bryan Cowell (counsel for the FTC) on May 27, 2020 at approximately 10:00 AM ET, June 4, 2020 at approximately 09:00 AM ET, and June 17, 2020 at approximately 01:00 PM ET. Counsel for petitioner and for the FTC also had extensive email communications during that period, and up to July 6, 2020. Although staff agreed to several modifications of the Second CID, the parties were not able to reach an agreement as to Topic 12 and Topic 16 of the investigational hearing demand of Intuit. The staff has not explained to counsel for petitioner why it was unwilling to withdraw the topics.

David Gringer

David Gringer

CERTIFICATE OF SERVICE

I hereby certify that, on July 7, 2020, the foregoing petition to quash was served by electronic mail to the following:

Office of the Secretary
600 Pennsylvania Ave. NW
Washington, D.C. 20580
electronicfilings@ftc.gov

Acting Secretary April Tabor
600 Pennsylvania Ave. NW
Washington, D.C. 20580
atabor@ftc.gov

David Gringer

David Gringer