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(d) *Factors considered in deciding a stay application.* The parties, the Administrative Law Judge, and the Commission must address the following factors, in advocating for or against, or in resolving, a stay application:

- (1) The likelihood of the applicant's success on review;
- (2) Whether the applicant will suffer irreparable harm if a stay is not granted;
- (3) The degree of injury to other parties or third parties if a stay is granted; and
- (4) Whether the stay is in the public interest.

**§ 1.149 Adoption of miscellaneous rules.**

Part 4 of this subchapter is adopted into this subpart and governs proceedings under this subpart, and, within §§ 4.2 and 4.4, references to "part 3" shall include this subpart.

**PART 2—NONADJUDICATIVE PROCEDURES**

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AUTHORITY: 15 U.S.C. 46.

**Subpart A—Inquiries; Investigations; Compulsory Processes**

**§ 2.1 How initiated.**

Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations. The Director of the Bureau of Competition has also been delegated, without power of redelegation, authority to open investigations in response to requests pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 *et seq.*, if the requests do not ask the Commission to use process. Before responding to such

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a request, the Bureau Director shall transmit the proposed response to the Secretary and the Secretary shall notify the Commission of the proposed response. If no Commissioner objects within three days following the Commission's receipt of such notification, the Secretary shall inform the Bureau Director that he or she may proceed.

[48 FR 41374, Sept. 15, 1983, as amended at 50 FR 53304, Dec. 31, 1985; 65 FR 67259, Nov. 9, 2000]

### § 2.2 Complaint or request for Commission action.

(a) A complaint or request for Commission action may be submitted via the Commission's web-based complaint site (<https://www.ftccomplaintassistant.gov/>); by a telephone call to 1-877-FTC-HELP (1-877-382-4357); or by a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of, filed with the Office of the Secretary in conformity with § 4.2(d) of this chapter. No forms or formal procedures are required.

(b) The person making the complaint or request is not regarded as a party to any proceeding that might result from the investigation.

(c) Where the complainant's identity is not otherwise made public, the Commission's policy is not to publish or divulge the name of a complainant except as authorized by law or by the Commission's rules. Complaints or requests submitted to the Commission may, however, be lodged in a database and made available to federal, state, local, and foreign law enforcement agencies that commit to maintain the privacy and security of the information provided. Further, where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission in the course of a referral of the complaint or request, or in furtherance of an investigation, may disclose the identity of the complainant. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and

under any of the statutes it administers.

[77 FR 59305, Sept. 27, 2012]

### § 2.3 Policy as to private controversies.

The Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public.

[32 FR 8446, June 13, 1967]

### § 2.4 Investigational policy.

Consistent with obtaining the information it needs for investigations, including documentary material, the Commission encourages the just and speedy resolution of investigations. The Commission will therefore employ compulsory process when in the public interest. The Commission encourages cooperation in its investigations. In all matters, whether involving compulsory process or voluntary requests for documents and information, the Commission expects all parties to engage in meaningful discussions with staff to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought, in light of the inherent value of genuinely cooperative discovery.

[77 FR 59305, Sept. 27, 2012]

### § 2.5 By whom conducted.

Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are "examiners" or "Commission investigators" within the meaning of the Federal Trade Commission Act and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

[45 FR 36341, May 29, 1980]

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### §2.6 Notification of purpose.

Any person, partnership, or corporation under investigation compelled or requested to furnish information or documentary material shall be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law. A copy of a Commission resolution, as prescribed under §2.7(a), shall be sufficient to give persons, partnerships, or corporations notice of the purpose of the investigation. While investigations are generally nonpublic, Commission staff may disclose the existence of an investigation to potential witnesses or other third parties to the extent necessary to advance the investigation.

[77 FR 59305, Sept. 27, 2012]

### §2.7 Compulsory process in investigations.

(a) *In general.* When the public interest warrants, the Commission may issue a resolution authorizing the use of compulsory process. The Commission or any Commissioner may, pursuant to a Commission resolution, issue a subpoena, or a civil investigative demand, directing the recipient named therein to appear before a designated representative at a specified time and place to testify or to produce documentary material, or both, and in the case of a civil investigative demand, to provide a written report or answers to questions, relating to any matter under investigation by the Commission. For the purposes of this subpart, the term:

(1) 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.

(2) “Documentary material” includes all documents, materials, and information, including ESI, within the meaning of the Federal Rules of Civil Procedure.

(3) “Compulsory process” means any subpoena, CID, access order, or order for a report issued by the Commission.

(4) “Protected status” refers to information or material that may be withheld from production or disclosure on the grounds of any privilege, work product protection, or statutory exemption.

(b) *Civil Investigative Demands.* Civil Investigative Demands (“CIDs”) shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices under section 5(a)(1) of the Federal Trade Commission Act (hereinafter referred to as “unfair or deceptive acts or practices”).

(1) CIDs for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the Commission’s custodian to whom such material shall be made available. Documentary material, including ESI, for which a CID has been issued shall be made available as prescribed in the CID. Such productions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(2) CIDs for tangible things, including electronic media, shall describe each class of tangible thing to be produced with sufficient definiteness and certainty as to permit each such thing to be fairly identified, prescribe a return date providing a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the Commission’s custodian to whom such things shall be submitted. Submission of tangible things in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(3) CIDs for written reports or answers to questions shall propound with sufficient definiteness and certainty the reports to be produced or the questions to be answered, prescribe a return

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date, and identify the Commission's custodian to whom such reports or answers to questions shall be submitted. The submission of written reports or answers to questions in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(13) of the Federal Trade Commission Act.

(4) CIDs for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall commence, and identify the hearing official and the Commission custodian. Oral testimony in response to a CID shall be taken in accordance with the procedures set forth in section 20(c)(14) of the Federal Trade Commission Act.

(c) *Subpoenas.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may require by subpoena the attendance and testimony of witnesses and the production of documentary material relating to any matter under investigation. Subpoenas for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time for production, and identify the Commission's custodian to whom such material shall be made available. A subpoena may require the attendance of the witness or the production of documentary material at any place in the United States.

(d) *Special reports.* Except in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring a person, partnership, or corporation to file a written report or answers to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(e) *Commission orders requiring access.* Except 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.

(f) *Investigational hearings.* (1) Investigational hearings may be conducted

in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether a respondent is complying with an order of the Commission or to monitor performance under, and compliance with, a decree entered in suits brought by the United States under the antitrust laws, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Webb-Pomerene (Export Trade) Act.

(2) Investigational hearings shall be conducted by one or more Commission employees designated for the purpose of hearing the testimony of witnesses (the "hearing official") and receiving documents and information relating to any subject under investigation. Such hearings shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the hearing.

(3) Unless otherwise ordered by the Commission, investigational hearings shall not be public. For investigational hearings conducted pursuant to a CID for the giving of oral testimony, the hearing official shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, Commission staff, and any stenographer or other person recording such testimony. A copy of the transcript shall promptly be forwarded by the hearing official to the Commission custodian designated under §2.16 of this part. At the discretion of the hearing official, and with the consent of the person being examined (or, in the case of an entity, its counsel), persons other than Commission staff, court reporters, and the hearing official may be present in the hearing room.

(g) *Depositions.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may order by subpoena a deposition pursuant to section 9 of the Federal Trade Commission Act, of any person, partnership, or corporation, at any

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stage of an investigation. The deposition shall take place upon notice to the subjects of the investigation, and the examination and cross-examination may proceed as they would at trial. Depositions shall be conducted by a hearing official, for the purpose of hearing the testimony of witnesses and receiving documents and information relating to any subject under investigation. Depositions shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the deposition.

(h) *Testimony from an entity.* Where Commission compulsory process requires oral testimony from an entity, the compulsory process shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate in advance and in writing the matters on which each designee will testify. The persons designated must testify about information known or reasonably available to the entity and their testimony shall be binding upon the entity.

(i) *Inspection, copying, testing, and sampling of documentary material, including electronic media.* 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.

(j) *Manner and form of production of ESI.* 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. All instructions shall be followed by the recipient of the process absent written permission to the contrary from a Commission official identified in paragraph (l) of this section. Absent any instructions as to the form for producing ESI, ESI must be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form.

(k) *Mandatory pre-petition meet and confer process.* Unless excused in writing or granted an extension of no more than 30 days by a Commission official identified in paragraph (l) of this section, a recipient of Commission compulsory process shall meet and confer with Commission staff within 14 days after receipt of process or before the deadline for filing a petition to quash, whichever is first, to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted. The initial meet and confer session and all subsequent meet and confer sessions may be in person or by telephone. The recipient must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with compulsory process. Such personnel could include individuals knowledgeable about the recipient's information or records management systems, individuals knowledgeable about other relevant materials such as organizational charts, and persons knowledgeable about samples of material required to be produced. If any issues relate to ESI, the recipient shall have a person familiar with its ESI systems and methods of retrieval participate in the meeting. The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.

(l) *Delegations.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics and the Office of Policy Planning, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are all authorized to modify and, in writing, approve the terms of compliance with all compulsory process, including subpoenas, CIDs, reporting programs, orders requiring reports, answers to questions,

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and orders requiring access. If a recipient of compulsory process has demonstrated satisfactory progress toward compliance, a Commission official identified in this paragraph may, at his or her discretion, extend the time for compliance with Commission compulsory process. The subpoena power conferred by section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) and section 5 of the Webb-Pomerene (Export Trade) Act (15 U.S.C. 65) are specifically included within this delegation of authority.

[77 FR 59305, Sept. 27, 2012, as amended at 80 FR 15160, Mar. 23, 2015]

### § 2.8 [Reserved]

### § 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in a deposition or investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted, and of any testimony as stenographically recorded, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of the testimony. Upon completion of transcription of the testimony, the witness shall be offered an opportunity to read the transcript. Any changes by the witness shall be entered and identified upon the transcript by the hearing official, together with a statement of the reasons given by the witness for requesting such changes. After the changes are entered, the transcript shall be signed by the witness unless the witness cannot be found, is ill and unavailable, waives in writing his or her right to sign, or refuses to sign. If the transcript is not signed by the witness within 30 days of having been afforded a reasonable opportunity to review it, the hearing official shall sign the transcript and state on the hearing record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign, as prescribed by section 20(c)(14)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in a deposition or investiga-

tional hearing may be accompanied, represented, and advised by counsel, as follows:

(1) 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 question directed to a witness is pending, except with respect to issues involving protected status.

(2) Any objection during a deposition or investigational hearing shall be stated concisely on the hearing record in a nonargumentative and nonsuggestive manner. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status. Counsel may instruct a witness not to answer only when necessary to preserve a claim of protected status.

(3) The hearing official may elect to recess the deposition or investigational hearing and reconvene the deposition or hearing at a later date to continue a course of inquiry interrupted by any objection made under paragraph (b)(1) or (2) of this section. The hearing official shall provide written notice of the date of the reconvened deposition or hearing to the witness, which may be in the form of an email or facsimile. Failure to reappear or to file a petition to limit or quash in accordance with § 2.10 of this part shall constitute non-compliance with Commission compulsory process for the purposes of a Commission enforcement action under § 2.13 of this part.

(4) In depositions or investigational hearings, immediately following the examination of a witness by the hearing official, the witness or his or her counsel may on the hearing record request that the hearing official permit the witness to clarify any answers. The grant or denial of such request shall be within the discretion of the hearing official and would ordinarily be granted except for good cause stated and explained on the hearing record, and with an opportunity for counsel to undertake to correct the expressed concerns of the hearing official or otherwise to reply.

(5) The hearing official shall conduct the deposition or investigational hearing in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct. The hearing official shall, where appropriate, report pursuant to §4.1(e) of this chapter any instance where an attorney, in the course of the deposition or hearing, has allegedly refused to comply with his or her directions, or has allegedly engaged in conduct addressed in §4.1(e). The Commission may take any action as circumstances may warrant under §4.1(e) of this chapter.

[77 FR 59307, Sept. 27, 2012]

**§2.10 Petitions to limit or quash Commission compulsory process.**

(a) *In general.* (1) *Petitions.* Any petition to limit or quash any compulsory process shall be filed with the Secretary within 20 days after service of the Commission compulsory process or, if the return date is less than 20 days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation. Such petition shall not exceed 5,000 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2) of this section, and affidavits and other supporting documentation. Petitions to limit or quash that fail to comply with these provisions shall be rejected by the Secretary pursuant to §4.2(g) of this chapter.

(2) *Statement.* Each petition filed pursuant to paragraph (a)(1) of this section shall be accompanied by a signed separate statement representing that counsel for the petitioner has conferred with Commission staff pursuant to §2.7(k) of this part in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the issues in controversy have been resolved by agree-

ment, the statement shall, in a non-argumentative manner, specify the issues so resolved and the issues remaining unresolved. The statement shall recite the date, time, and place of each conference between counsel, and the names of all parties participating in each such conference. Failure to include the required statement may result in a denial of the petition.

(3) *Reconvened investigational hearings or depositions.* If the hearing official elects pursuant to §2.9(b)(3) of this part to recess the investigational hearing or deposition and reconvene it at a later date, the witness compelled to reappear may challenge the reconvening by filing with the Secretary a petition to limit or quash the reconvening of the hearing or deposition. Such petition shall be filed within 5 days after receiving written notice of the reconvened hearing; shall set forth all assertions of protected status or other factual and legal objections to the reconvening of the hearing or deposition, including all appropriate arguments, affidavits, and other supporting documentation; and shall be subject to the word count limit in paragraph (a)(1) of this section. Except for good cause shown, the Commission will not consider issues presented and ruled upon in any earlier petition filed by or on behalf of the witness.

(4) *Staff reply.* 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.

(5) *Extensions of time.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics and the Office of Policy Planning, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file petitions to limit or quash Commission compulsory process.

(b) *Stay of compliance period.* The timely filing of a petition to limit or quash any Commission compulsory process shall stay the remaining

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amount of time permitted for compliance as to the portion or portions of the challenged specifications or provisions. If the petition is denied in whole or in part, the ruling by the Commission shall specify new terms for compliance, including a new return date, for the Commission's compulsory process.

(c) *Disposition and review.* The Commission will issue an order ruling on a petition to limit or quash within 40 days after the petition is filed with the Secretary. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice to the petitioner of the order.

(d) *Public disclosure.* All petitions to limit or quash Commission compulsory process and all Commission orders in response to those petitions shall become part of the public records of the Commission, except for information granted confidential treatment under §4.9(c) of this chapter.

[77 FR 59308, Sept. 27, 2012, as amended at 80 FR 15160, Mar. 23, 2015]

### §2.11 Withholding requested material.

(a)(1) Any person withholding information or material responsive to an investigational subpoena, CID, access order, or order to file a report issued pursuant to §2.7 of this part, or any other request for production of material issued under this part, shall assert a claim of protected status, as that term is defined in §2.7(a)(4), not later than the date set for the production of the material. The claim of protected status shall include a detailed log of the items withheld, which shall be attested by the lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim. A document, including all attachments, may be withheld or redacted only to the extent necessary to preserve any claim of protected status. The information provided in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. The failure to provide information sufficient to support a claim of protected status may result in a denial

of the claim. Absent an instruction as to the form and content of the log, the log shall be submitted in a searchable electronic format, and shall, for each document, including attachments, provide:

- (i) Document control number(s);
  - (ii) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
  - (iii) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;
  - (iv) The date the material was created;
  - (v) The date the material was sent to each recipient (if different from the date the material was created);
  - (vi) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;
  - (vii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;
  - (viii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;
  - (ix) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;
  - (x) The factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and
  - (xi) Any other pertinent information necessary to support the assertion of protected status by operation of law.
- (2) Each attorney who is an author, recipient, or person copied on the material shall be identified in the log by an asterisk. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, the information



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required by paragraph (a)(1)(vi) of this section shall be provided in the log.

(b) A person withholding responsive material solely for the reasons described in paragraph (a) of this section shall meet and confer with Commission staff pursuant to § 2.7(k) of this part to 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 this section. The failure to comply with paragraph (a) shall constitute noncompliance subject to judicial enforcement under § 2.13(a) of this part.

(c) Unless otherwise provided in the instructions accompanying the compulsory process, and except for information or material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

(d)(1)(i) The disclosure of material protected by the attorney-client privilege or as work product shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying Commission staff of the claim and the basis for it.

(ii) After being so notified, Commission staff must:

(A) Promptly return or destroy the specified material and any copies, not use or disclose the material until any dispute as to the validity of the claim is resolved; and take reasonable measures to retrieve the material from all persons to whom it was disclosed before being notified; or

(B) Sequester such material until such time as an Administrative Law Judge or court may rule on the merits of the claim of privilege or protection in a proceeding or action resulting from the investigation.

(iii) The producing party must preserve the material until the claim of privilege or protection is resolved, the investigation is closed, or any enforcement proceeding is concluded.

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(2) When a disclosure is made that waives attorney-client privilege or work product, the waiver extends to an undisclosed communication or information only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or material concern the same subject matter; and

(iii) They ought in fairness to be considered together.

[77 FR 59308, Sept. 27, 2012]

### § 2.12 [Reserved]

### § 2.13 Noncompliance with compulsory processes.

(a) In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, civil penalties, or criminal sanctions. The Commission may also take any action as the circumstances may warrant under § 4.1(e) of this chapter.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized, when he or she deems appropriate:

(1) To initiate, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a recipient to comply with, or to obey, a subpoena, a CID, or an access order, if the return date or any extension thereof has passed, or if the recipient breaches any modification regarding compliance;

(2) To approve and have prepared and issued, in the name of the Commission, a notice of default in connection with the failure of a recipient of an order to file a report pursuant to section 6(b) of the Federal Trade Commission Act to timely file that report, if the return date or any extension thereof has passed; to initiate, on behalf of the Commission, an enforcement proceeding; or to request to the Attorney General, on behalf of the Commission, to initiate a civil action in connection with the failure of such recipient to timely file a report, when the return date or any extension thereof has passed;

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(3) To initiate, on behalf of the Commission, an enforcement proceeding under section 7A(g)(2) of the Clayton Act (15 U.S.C. 18a(g)(2)) in connection with the failure to substantially comply with any request for the submission of additional information or documentary material under section 7A(e)(1) of the Clayton Act (15 U.S.C. 18a(e)(1)), provided that the General Counsel shall provide notice to the Commission at least 2 days before initiating such action; and

(4) To seek an order of civil contempt in cases where a court order enforcing compulsory process has been violated.

[77 FR 59309, Sept. 27, 2012]

### § 2.14 Disposition.

(a) When an investigation indicates that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, the Commission may initiate further proceedings.

(b) When corrective action is not necessary or warranted in the public interest, the investigation shall be closed. The matter may nevertheless be further investigated at any time if circumstances so warrant.

(c) In matters in which a recipient of a preservation demand, an access letter, or Commission compulsory process has not been notified that an investigation has been closed or otherwise concluded, after a period of twelve months following the last written communication from the Commission staff to the recipient or the recipient's counsel, the recipient is relieved of any obligation to continue preserving information, documentary material, or evidence, for purposes of responding to the Commission's process or the staff's access letter. The "written communication" may be in the form of a letter, an email, or a facsimile.

(d) The Commission has delegated to the Directors of the Bureaus of Competition and Consumer Protection, their Deputy Directors, the Assistant Directors of the Bureau of Competition, the Associate Directors of the Bureau of Consumer Protection, and the Regional Directors, without power of

redelegation, limited authority to close investigations.

[77 FR 59309, Sept. 27, 2012]

### § 2.15 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) The Bureau Director, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information granting immunity under title 18, section 6002, of the United States Code.

(b) The Commission retains the right to review the exercise of any of the functions delegated under paragraph (a) of this section. Appeals to the Commission from an order requiring a witness to testify or provide other information will be entertained by the Commission only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed fifteen (15) pages in length and shall be filed within five (5) days after notice of the complained of action. The appeal shall not operate to suspend the hearing unless otherwise determined by the person conducting the hearing or ordered by the Commission.

(18 U.S.C. 6002, 6004)

[37 FR 5016, Mar. 9, 1972, as amended at 48 FR 41375, Sept. 15, 1983; 61 FR 50645, Sept. 26, 1996]

### § 2.16 Custodians.

(a) *Designation.* The Commission shall designate a custodian and one or more deputy custodians for material to be delivered pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. The custodian shall have the powers and duties prescribed by section 21

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of the FTC Act. Deputy custodians may perform all of the duties assigned to custodians. The appropriate Bureau Directors, Deputy Directors, Associate Directors in the Bureau of Consumer Protection, Assistant Directors in the Bureau of Competition, Regional Directors or Assistant Regional Directors shall take the action required by section 21(b)(7) of the FTC Act if it is necessary to replace a custodian or deputy custodian.

(b) *Copying of custodial documents.* The custodian designated pursuant to section 21 of the Federal Trade Commission Act (subject to the general supervision of the Executive Director) may, from among the material submitted, select the material the copying of which is necessary or appropriate for the official use of the Commission, and shall determine, the number of copies of any such material that are to be reproduced. Copies of material in the physical possession of the custodian may be reproduced by or under the authority of an employee of the Commission designated by the custodian.

(c) Material produced pursuant to the Federal Trade Commission Act, while in the custody of the custodian, shall be for the official use of the Commission in accordance with the Act; but such material shall upon reasonable notice to the custodian be made available for examination by the person who produced such material, or his duly authorized representative, during regular office hours established for the Commission.

[45 FR 36343, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 48 FR 41376, Sept. 15, 1983; 50 FR 53305, Dec. 31, 1985]

§ 2.17 **Statutory delays of notifications and prohibitions of disclosure.**

Upon authorization by the Commissioner who issues compulsory process pursuant to § 2.7(a) or, alternatively, upon authorization by the General Counsel, Commission attorneys may seek to delay notifications or prohibit disclosures pursuant to the Right to Financial Privacy Act (12 U.S.C. 3409), the Electronic Communications Privacy Act (18 U.S.C. 2705), or section 7 of the U.S. SAFE WEB Act (15 U.S.C. 57b-2a).

[76 FR 54691, Sept. 2, 2011]

16 CFR Ch. I (1-1-23 Edition)

**Subpart B—Petitions Filed Under Section 7A of the Clayton Act, as Amended, for Review of Requests for Additional Information or Documentary Material**

AUTHORITY: 15 U.S.C. 18a(d), (e).

§ 2.20 **Petitions for review of requests for additional information or documentary material.**

(a) For purposes of this section, “second request” refers to a request for additional information or documentary material issued under 16 CFR 803.20.

(b) *Second request procedures—(1) Notice.* Every request for additional information or documentary material issued under 16 CFR 803.20 shall inform the recipient(s) of the request that the recipient has a right to discuss modifications or clarifications of the request with an authorized representative of the Commission. The request shall identify the name and telephone number of at least one such representative.

(2) *Second request conference.* An authorized representative of the Commission shall invite the recipient to discuss the request for additional information or documentary material soon after the request is issued. At the conference, the authorized representative shall discuss the competitive issues raised by the proposed transaction, to the extent then known, and confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. The conference will ordinarily take place within 5 business days of issuance of the request, unless the recipient declines the invitation or requests a later date.

(3) *Modification of requests.* The authorized representative shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation. A request for additional information or documentary material may be modified only in writing