FTC and ITC Issue New Final and Proposed Rules on Electronic Discovery

The U.S. Federal Trade Commission (FTC) and International Trade Commission (ITC) have recently released new final and proposed rules, respectively, that acknowledge the current realities of electronic discovery and aim to make e-discovery in the Commissions' investigative processes more efficient.[1] The FTC's final rules will take effect on November 9, 2012. The ITC has requested comment on its proposed rules, to be received by December 4, 2012.

I. The FTC's Final Rule Revisions

The FTC's revisions to 16 CFR Part 2 of its Rules of Practice affect discovery in compulsory process investigations.

A. Revisions Addressing The Scope and Form of E-Discovery (16 CFR §2.7)

Rule 2.7 authorizes the use of compulsory process, including the issuance of a subpoena or a civil investigative demand, directing its recipient to testify and/or produce documentary material concerning any matter being investigated by the FTC. The revised rule defines electronically stored information ("ESI") as "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] This definition, according to the FTC, includes metadata.

Revised Rule 2.7 allows the FTC, through compulsory process, to "require the production of documentary material, or electronic media or other tangible things, for inspection, copying, testing, or sampling."[3] The FTC has clarified that such inspection, testing, or sampling "would be bounded by the nature and scope of the investigation."[4] The FTC encourages concerns regarding privileged material to be raised with the FTC so that the parties may discuss possible solutions, potentially including "the implementation of an independent 'taint team,' to segregate privileged material obtained under this rule in a manner that is duly respectful of the protected status of any material sought."[5] As a last resort, a petition to limit or quash the compulsory process may be warranted.

Rule 2.7, as revised, also provides that ESI must be produced in the manner and form specified by the FTC; in the absence of any instructions regarding form of production, "ESI must be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form."[6] Since some materials (such as Excel spreadsheets) are not usable unless produced in native format, concerns may arise regarding privileged material contained therein; the FTC has advised that such concerns should be brought to its attention.

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[1] *See* 16 CFR Part 2, 77 Fed. Reg. 59,294, 59,305 (Sept. 27, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-09-27/pdf/2012-23691.pdf; Proposed 19 CFR Part 210, 77 Fed. Reg. 60,952, 60,955 (Oct. 5, 2012), available at http://usitc.gov/secretary/fed_reg_notices/rules/2012-24633.pdf.

[2] 16 CFR §2.7(a)(1).

[3] 16 CFR §2.7(i).

[4] 77 Fed. Reg. at 59,298.

[5] *Id*.

[6] 16 CFR §2.7(j).

Additionally, according to the final rule adopted by the FTC, unless excused in writing or granted an extension of no more than 30 days, the recipient of FTC compulsory process is required to meet and confer with FTC 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."[7] At the meet and confer, the recipient of compulsory process is required to make available personnel knowledgeable about the relevant issues. If any of the issues relate to ESI, a person familiar with the recipient's ESI systems and methods of retrieval should participate in the meeting. Finally, "[t]he 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."[8]

B. Revisions Addressing Claims of Privilege (16 CFR §2.11)

Rule 2.11, as adopted by the FTC, provides detailed requirements for logs listing responsive material withheld from production. According to the new rule, privilege logs must be in searchable electronic format and must specify, with regard to each document:

- document control number(s);
- the full title (if the material is a document) and the full file name (if the material is in electronic form);
- a description of the material withheld;
- the date(s) the material was created and sent;
- the email addresses from which and to which each document was sent;
- the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors and recipients of the material (denoting attorneys with an asterisk);
- the factual basis for withholding the material; and
- any other pertinent information to support the assertion of protected status.

According to Rule 2.11, the parties may agree to modify these logging requirements in their meet and confer session.

Final rule 2.11 also states that disclosure of material protected by the attorney-client privilege or work product doctrine does not operate as a waiver so long as the disclosure was inadvertent, the privilege holder took reasonable steps to prevent disclosure, and the holder took prompt action to rectify the error (including notifying FTC staff). Privileged material that is inadvertently disclosed must be returned or destroyed.

C. Revision Addressing Duty to Preserve Information (16 CFR §2.14(c))

The FTC's final rules provide that in cases where recipients of FTC compulsory process have not been notified that an investigation has been closed, they are relieved of their duty to preserve relevant material "after a period of twelve months following the last written communication from the Commission staff to the recipient or

[7] 16 CFR §2.7(k).

[8] *Id*. The FTC views the meet and confer process as an iterative one and "strongly encourages" subsequent discussions with the FTC regarding issues relating to compliance with compulsory process and document production, as they arise. 77 Fed. Reg. at 59,299.

the recipient's counsel."[9] The FTC has clarified that this provision "does not lift any obligation that parties may have to preserve documents for investigations by other government agencies, or for litigation."[10]

II. The ITC's Proposed Rules

The ITC has proposed to amend its Rules of Practice and Procedure in an attempt to "reduce expensive, inefficient, unjustified, or unnecessary discovery practices in agency proceedings [under Section 337 of the Tariff Act of 1930] while preserving the opportunity for fair and efficient discovery for all parties."[11] The ITC's proposed additions to 19 CFR § 210.27 make the rule similar to Federal Rule of Civil Procedure 26(b).

A. Proposed Rules Addressing The Scope of E-Discovery (Proposed 19 CFR §210.27(c) and (d))

Proposed Rule 210.27(c) provides that a person need not produce ESI that the person deems not reasonably accessible because of undue burden or cost. In such a case, the party seeking discovery may file a motion to compel. The subject of the information request has the burden to demonstrate that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the administrative law judge may still require discovery, but only if the requesting party shows good cause. The administrative law judge must also consider the general limitations on discovery delineated in proposed § 210.27(d) and may specify conditions for the discovery.[12]

Under proposed Rule 210.27(d), the administrative law judge would have to "limit by order the frequency or extent of discovery" if the judge determines that:

- the discovery sought is unreasonably cumulative or duplicative or can be obtained from a less burdensome source;
- the requesting party "has had ample opportunity to obtain the information";
- the responding party "has waived the legal position that justified the discovery or has stipulated to the facts pertaining to the issue to which the discovery is directed" (a consideration not included in Fed. R. Civ. P. 26(b)(2)(C)); or
- the burden or expense of the requested discovery outweighs its likely benefit.[13] With regard to this consideration, the administrative law judge would take into account "the needs of the investigation, the importance of the discovery in resolving the issues to be decided by the Commission, and the public interest."[14] (This is in contrast to the language of Fed. R. Civ. P. 26(b)(2)(C), which mandates analysis of the importance of the issues at stake in the action).

[9] 16 CFR §2.14(c).

[10] 77 Fed. Reg. at 59,301.

[11] 77 Fed. Reg. 60,952, 60,952.

[12] For Example, according to the FTC, "the administrative law judge may, in appropriate circumstances, condition discovery upon payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible." 77 Fed. Reg. at 60,954.

[13] Proposed 19 CFR § 210.27(d), 77 Fed. Reg. at 60,955.

[14] *Id.*

B. Proposed Rules Addressing Claims of Privilege (Proposed 19 CFR §210.27(e))

According to the ITC's proposed rules, a person withholding documents by claiming privilege or attorney work product would be required to produce a privilege log within ten days of making the claim. The privilege log would need to describe "the nature of the information not produced or disclosed, in a manner that will enable the requester to assess the claim without revealing the information at issue."[15] With regard to each document, the person claiming privilege would have to specify:

- the date the information was created or communicated;
- the authors and all recipients;
- the employer and position for each author and recipient, including whether the person is an attorney or patent agent;
- the general subject matter of the information; and
- the type of privilege or protection claimed.

The ITC's proposed rules also outline a procedure for handling the inadvertent production of privileged or protected information. Under the proposed rules, if allegedly privileged information is accidentally produced, the producing party may notify all recipients. Within five days of notification, the recipients would be required to return or destroy all copies of the information and take reasonable steps to retrieve the information if it has already been disclosed to others. Additionally, the recipients of the information would be prohibited from using or disclosing the information until the claim of privilege or protection is resolved. Within five days of notification the parties would be obligated to meet and confer to try to resolve the claim.

The proposed rules allow parties to choose to enter into agreements regarding inadvertently produced ESI. However, as explained by the ITC, this proposal is not a categorical "claw-back" rule and "would not supplant any applicable waiver doctrine."[16] The ITC envisions administrative law judges applying federal and common law (e.g., consideration of whether the privilege holder took reasonable steps to prevent disclosure) "when determining the consequences of any allegedly inadvertent disclosure."[17]

III. Conclusion

The FTC's final rule revisions and the ITC's proposed rules, if adopted, will likely streamline electronic discovery in the context of FTC and ITC investigations and bring the Commissions' rules more in line with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Kevin Burke at 212.701.3843 or kburke@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com or Yafit Cohn at 212.701.3089 or ycohn@cahill.com

[15] Proposed 19 CFR § 210.27(e)(1), 77 Fed. Reg. at 60,955.

[16] 77 Fed. Reg. at 60,955.

[17] *Id.*