

Complaint

127 F.T.C.

IN THE MATTER OF
AMERICAN COLLEGE FOR ADVANCEMENT IN MEDICINE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3882. Complaint, June 22, 1999--Decision, June 22, 1999

This consent order, among other things, prohibits the American College for Advancement in Medicine, a California-based association of physicians, from representing, in advertising, promotion, sale, or distribution, that chelation therapy is effective treatment for atherosclerosis without possessing and relying upon competent and reliable scientific evidence to support the representation. In addition, the consent order prohibits the respondent from making any representation regarding the efficacy of chelation therapy for any disease of the human circulatory system unless substantiated by competent and reliable scientific evidence.

Participants

For the Commission: *Walter Gross, Dean Graybill and Russell Porter.*

For the respondent: *Elizabeth Guarino and William MacLeod, Collier, Shannon, Rill & Scott, Washington, D.C. and Robert Skitol, Drinker, Biddle & Reath, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the American College for Advancement in Medicine ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American College for Advancement in Medicine (ACAM) is a California corporation with its principal office or place of business at 23121 Verdugo Drive, Suite 204, Laguna Hills, California. ACAM is a nonprofit professional association comprised principally of physicians who administer traditional and complementary/alternative medical therapies including chelation therapy.

2. Respondent has disseminated to the public brochures and other written materials that constitute advertising under the Federal Trade Commission Act. These materials contain statements about a treatment modality identified as "chelation therapy," which involves the use of "drugs," within the meaning of Sections 12 and 15 of the

Federal Trade Commission Act. Chelation therapy consists of the intravenous injection into the body of a substance which, after bonding with metals and minerals in the bloodstream, is expelled through the body's excretory functions. The principal bonding substance called for in the ACAM treatment protocols, and used generally by practitioners is a synthetic amino acid called *ethylene diamine tetraacetic acid* (EDTA). Respondent distributes its brochures and other written materials to its members who disseminate the material to consumers. Additionally, respondent disseminates its material to consumers through an Internet Web Page and to consumers who contacted respondent through its toll-free telephone number.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertising for chelation therapy including but not necessarily limited to the attached Exhibits A (an Internet Web Page) and B (a pamphlet), which contain identical text. These advertisements contain the following statements, among others:

A. "Chelation therapy is a safe, effective and relatively inexpensive treatment to restore blood flow in victims of atherosclerosis without surgery."

B. "EDTA improves calcium and cholesterol metabolism by eliminating metallic catalysts which cause damage to cell membranes by producing 'oxygen free radicals.' Free radical pathology is now believed by many scientists to be an important contributing cause of atherosclerosis, cancer, diabetes and other diseases of aging. EDTA helps to prevent the production of harmful free radicals."

C. "Chelation therapy is used to reverse symptoms of hardening of the arteries, also known as atherosclerosis or arteriosclerosis."

D. "Every single study of the use of chelation therapy for atherosclerosis which has ever been published, without exception, has described an improvement in blood flow and symptoms."

E. "Chelation therapy promotes health by correcting the major underlying cause of arterial blockage. Damaging oxygen free radicals are increased by the presence of metallic elements and act as a chronic irritant to blood vessel walls and cell membranes. EDTA removes those metallic irritants, allowing leaky and damaged cell walls to heal. Plaques smooth over and shrink, allowing more blood to pass. Arterial walls become softer and more pliable, allowing easier expansion. Scientific studies have proven that blood flow increases after chelation therapy."

F. "Chelation therapy is an office treatment which improves blood flow throughout the entire vascular system"

G. "The reader is advised that varying and even conflicting views are held by other segments of the medical profession This information represents the current opinion of independent physician consultants to ACAM at the time of publication."

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that EDTA chelation therapy is an effective treatment for atherosclerosis.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that scientific studies prove that EDTA chelation therapy is an effective treatment for atherosclerosis.

9. In truth and in fact, scientific studies do not prove that EDTA chelation therapy is an effective treatment for atherosclerosis. Therefore, the representation set forth paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

HOME**WHAT IS CHELATION THERAPY?**

Chelation therapy is a safe, effective and relatively inexpensive treatment to restore blood flow in victims of atherosclerosis without surgery. Chelation therapy involves the intravenous infusion of a prescription medicine called ethylene diamine tetra-acetic acid (EDTA).

WHAT IS EDTA?

EDTA is a substance which removes undesirable metals from the body. Some metals, such as lead, mercury and cadmium are poisons. Lead and cadmium levels correlate with high blood pressure. All metals, even essential nutritional elements, are toxic in excess or when abnormally situated. EDTA normalizes the distribution of most metallic elements in the body. EDTA improves calcium and cholesterol metabolism by eliminating metallic elements in the body. EDTA improves calcium and cholesterol metabolism by eliminating metallic catalysts which cause damage to cell membranes by producing "oxygen free radicals." Free radical pathology is now believed by many scientists to be an important contributing cause of atherosclerosis, cancer, diabetes and other diseases of aging. EDTA helps to prevent the production of harmful free radicals.

WHAT IS IT USED FOR?

Chelation therapy is used to reverse symptoms of hardening of the arteries, also known as atherosclerosis or arteriosclerosis. Atherosclerosis is caused by multiple complex factors, including abnormal accumulations of metallic elements. The end result is plaque formation within arteries which blocks the flow of blood. Plaques are composed of fibrous tissue, cholesterol and calcium. Atherosclerosis leads to heart attack, stroke, senility and may lead to amputation of extremities. Every single study of the use of chelation therapy for atherosclerosis which has ever been published, without exception, has described an improvement in blood flow and symptoms. Adverse editorial comment to the contrary lacks evidence and stems primarily from physicians with a vested interest in catheterization and surgery.

HOW DOES ARTERY DISEASE AFFECT HEALTH?

Blockage of blood vessels by plaque (atheroma) reduces the flow of blood, starving vital organs for oxygen and other nutrients. Cell walls then become leaky, allowing excessive calcium, sodium and other elements to enter. When calcium accumulates to a critical point, deposits form, like concrete. These calcifications can often be seen on xray. Disordered calcium metabolism can also cause coronaries and other arteries to go into spasm, further reducing blood to vital organs.

HOW DOES CHELATION THERAPY AFFECT HEALTH?

Chelation therapy promotes health by correcting the major underlying cause of arterial blockage. Damaging oxygen free radicals are increased by the presence of metallic elements and act as a chronic irritant to blood vessel walls and cell membranes. EDTA removes those metallic irritants, allowing leak and damaged cell walls to heal. Plaques smooth over and shrink, allowing more blood to pass. Arterial walls become softer and more pliable, allowing easier expansion. Scientific studies have proven that blood flow increases after chelation therapy. A complete program of chelation therapy involves a broad-based health care program of regular exercise, proper nutrition, vitamin and mineral supplementation and avoidance of tobacco and other damaging habits.

EXHIBIT A

WHAT ARE THE INTERACTIONS BETWEEN CHELATION THERAPY AND OTHER TREATMENTS FOR ARTERY DISEASE?

Chelation therapy can be utilized in conjunction with most other therapies for cardio-vascular disease. EDTA is compatible with blood thinners, blood vessel dilators, medicines for blood pressure and heart arrhythmias, calcium blockers and beta blockers. The need for drugs is often reduced or eliminated after a course of chelation therapy.

WHAT IS THE COST COMPARISON?

Bypass surgery is the mechanical repair of only a small portion of the arterial tree. Total costs average about \$45,000 and can be as high as \$60,000 or even more. Chelation therapy is an office treatment which improves blood flow throughout the entire vascular system at a fraction of the cost of bypass surgery. For example, if 20 to 40 four-hour chelation treatments in a physician's office were required for a given patient, it would cost an estimated \$2000-\$4000.

WHAT ABOUT SAFETY AND SIDE EFFECTS?

Chelation therapy is among the safest of medical procedures. More than 400,000 patients have received over four million treatments during the past 30 years. Not one death has been directly caused by chelation therapy, when properly administered by a physician who was fully trained and competent in the use of this therapy. Side effects are possible, as with any drug therapy. Vein irritation, mild pain, headache and fatigue may occur. Occasionally a mild and transient fever occurs. These and other minor side effects, if they occur, are easily controlled by adjusting the duration and frequency of treatment, or with the use of other simple measures. Side effects tend to diminish after the first few treatments. Most patients experience few or no side effects.

HOW DO I KNOW IF I NEED OR CAN BENEFIT FROM CHELATION THERAPY?

If you have chest pain or leg pain on walking; shortness of breath; painful, discolored feet; transient loss of vision; paralysis; or rapidly failing memory, see a physician! Any unexplained or persistent symptoms which affect your heart, head or limbs should be explored for circulatory blockage.

HOW WILL I BE ABLE TO TELL IF CHELATION THERAPY HAS HELPED ME?

Patients routinely report reduction or elimination of their symptoms with an increasing sense of well being after chelation therapy. Family and friends are often the first to notice and report improvement in appearance, behavior and performance. Comparison of pre- and post-therapy diagnostic tests can provide objective evidence of effectiveness.

CAN MY PERSONAL PHYSICIAN GIVE THIS TREATMENT?

Any licensed physician can legally administer this treatment. Courses to train physicians in the safe use of chelation therapy are offered twice yearly by the American College for Advancement in Medicine. Interested physicians should contact ACAM for information about training and certification in this important type of medical therapy.

CAN CHELATION THERAPY BE USED AFTER BYPASS SURGERY?

Yes! Although chelation therapy is best utilized to avoid bypass surgery, many patients who have previously undergone one or more bypass procedures, often with little or no benefit, have subsequently benefited greatly from chelation therapy. Treatment for each patient must be individualized. If all else fails, including chelation therapy, bypass remains available as a last resort.

IS CHELATION THERAPY A LEGAL TREATMENT?

EXHIBIT A

...completely [blank] At licensed physician's discretion, and, therapy of
 according to his or her professional judgement, is of potential benefit. Certain advertising
 claims for EDTA are not yet approved by the FDA. The FDA does not regulate the practice of
 medicine, but only limits marketing and advertising claims for drugs. The FDA has approved marketing
 claims for the use of EDTA to treat lead poisoning and several other conditions. Treatment of
 atherosclerosis is not yet an allowable claim for inclusion in the marketing literature of EDTA.

DO MEDICAL INSURANCE COMPANIES PAY FOR CHELATION THERAPY?

Most medical insurance companies, including Medicare, have been financially depleted by paying for so many expensive surgeries. Segments of the health care industry which profit greatly from surgical procedures are politically powerful. Physicians who review claims for medical insurance companies often favor the extremely expensive and risky procedures, such as bypass surgery, while refusing payment for equally beneficial, far less expensive and immeasurably safer chelation therapy. While insurance policies do not specifically exclude chelation therapy in their policies, patients have often had to resort to the courts in order to collect their insurance benefits.

HOW DO I FIND A PHYSICIAN WHO IS TRAINED AND COMPETENT IN CHELATION THERAPY?

The American College for Advancement in Medicine provides a free national listing of its member doctors, most of whom include chelation therapy in their practice. To receive this list, send a self-addressed, business-size (#10) envelope with .55 cents postage to:

*American College for Advancement in Medicine
 P. O. Box 3427
 Laguna Hills, CA 92654*

The reader is advised that varying and even conflicting views are held by other segments of the medical profession. The information presented here is educational in nature and is not intended as a basis for diagnosis or treatment.

This information represents the current opinion of independent physician consultants to ACAM at the time of publication.

ACAM publishes and distributes this information as a courtesy to the public.

[HOME]

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EXHIBIT B

ATTACHMENT 5

Consumer Information

CHELATION
THERAPY

*A Comprehensive Approach
to the
Treatment of
Epidemic Heart and Artery Disease
and Related Disorders*

Exhibit A-1

EXHIBIT B

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EXHIBIT B

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EXHIBIT B

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EXHIBIT B

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IS CHELATION THERAPY A LEGAL TREATMENT?

Yes! Chelation therapy is completely legal. A licensed physician is free to utilize any therapy of acceptable risk which, in his or her professional judgement, is of potential benefit — even if advertising

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claims for treatment are not yet approved by the FDA. The FDA does not regulate the practice of medicine but only limits marketing and advertising claims for drugs. The FDA has approved marketing claims for the use of EDTA to treat lead poisoning and several other conditions. Treatment of atherosclerosis is not yet an allowable claim for inclusion in the marketing literature of EDTA.

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EXHIBIT B

**HOW DO I FIND A PHYSICIAN WHO IS
TRAINED AND COMPETENT IN
CHELATION THERAPY?**

For further information contact the American College
for Advancement in Medicine.

**AMERICAN COLLEGE
FOR ADVANCEMENT IN MEDICINE
23121 Verdugo Drive, Suite 204
Laguna Hills, California 92653**

**Telephone: (714) 583-7666
Toll Free Outside CA: (800) 532-3688**

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views are held by other segments of the medical
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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American College for Advancement in Medicine is a California corporation with its principal office or place of business at 23121 Verdugo Drive, Suite 204, Laguna Hills, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order:

1. Unless otherwise specified, "*respondent*" shall mean American College for Advancement in Medicine, its agents, representatives and employees.

2. "*EDTA*" shall mean the drug, *ethylene diamine tetraacetic acid*.

3. "*Chelation therapy*" shall mean the introduction into the human body of any agent for the purpose of bonding with and removing any compound or chemical element from the body. "*EDTA chelation therapy*" means that EDTA is the bonding agent used.

4. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

5. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of chelation therapy, shall not make any representation, in any manner, expressly or by implication:

A. That EDTA chelation therapy is an effective treatment for atherosclerosis, or

B. About the effectiveness or comparative effectiveness of chelation therapy for treating or preventing any disease or condition related to the human circulatory system,

unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution, in or affecting commerce, of chelation therapy, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

III.

Nothing in this order shall prohibit respondent from making any representation for any drug that is specifically permitted in labeling for such drug under any tentative final or final standard promulgated by the U. S. Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

It is further ordered, That respondent and its successors and assigns, shall mail, or otherwise deliver, a copy of this order and an exact copy of the letter attached hereto as Attachment A to each member of respondent within thirty (30) days after the date of service of this order.

V.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX.

This order will terminate on June 22, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A

By First Class Mail, Postage Prepaid and Address Correction Requested

[To be printed on American College for Advancement in Medicine letterhead]

[date]

Dear [recipient]:

ACAM has agreed to settle a civil dispute with the Federal Trade Commission (FTC) involving information we disseminated to the public about chelation therapy. A copy of the complaint and order is enclosed. The FTC alleged that we did not have a reasonable basis for certain statements we made concerning the efficacy of chelation therapy as a treatment for atherosclerosis. The FTC also alleged that we misrepresented that chelation therapy had been proven to be effective in treating atherosclerosis. The complaint and consent agreement in this matter address issues raised by certain statements that we made in promotional brochures and other materials that were distributed to the public. The Commission's action should not be construed to regulate how doctors use or prescribe drugs in the course of treating their patients or other choice of therapy issues.

Although we do not admit that the FTC's allegations are true, we have agreed not to make unsubstantiated claims, not to misrepresent the implications of any tests or studies, and to send this letter as part of our settlement with FTC. Individual members of ACAM, when acting in their individual capacities, are not parties to this settlement. Nevertheless, the FTC has advised that if you disseminate advertising or promotional materials that contain unsubstantiated claims for the efficacy of chelation therapy in treating diseases of the human circulatory system, or that make misrepresentations about any tests or studies, you could be subject to investigation and possible enforcement action by the FTC.

Sincerely yours,

Re: Petition of Associates First Capital Corporation to Quash or Limit Civil Investigative Demands and to Establish Order Safeguarding Handling of Confidential Information — File Nos. 982-3506 and P944809

January 12, 1999

Dear Messrs. Sandler and Klubes and Ms. Steptoe:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash or Limit and for a protective Order ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. In light of this ruling, the new deadline for Associates First Capital Corporation ("Petitioner" or "Associates") to respond and otherwise comply with the Civil Investigative Demands ("CID") for written interrogatories and documentary material is Tuesday, January 26, 1999. The CIDs for oral testimony are rescheduled as follows: Michael J. Gade - February 8, 1999; Gil Schielbalhut - February 9, 1999; Gavin P. Goss - February 10, 1999; Owen P. Davis, February 11, 1999; Ken Mize - February 16, 1999; H.J. Fullen - February 18, 1999; Timothy W. Bellows - February 22, 1999; Stephanie C. Rumph - February 23, 1999; Mary Kinsey - February 24, 1999. Each hearing will begin at 9:30 a.m. and take place at the Commission's Dallas Regional Office, as previously scheduled.

Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹ Filing of a request for such a review does not stay or otherwise affect the new return date — January 26, 1999 — unless the Commission rules otherwise. *See* 16 CFR 2.7(f) (1998).

¹ This letter is being delivered by facsimile transmission and by express U.S. mail service. The facsimile is provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date on which you receive the express mail copy of this letter.

I. BACKGROUND

Petitioner is a diversified financial services company and is one of the nation's largest subprime lenders.² Subprime lending is the extension of credit to higher-risk borrowers at higher rates and fees. Petitioner's domestic consumer operations, *i.e.*, the subject of the Commission's current investigation, are organized into eight geographic regions that include currently about 1,350 branch offices, with a loan portfolio of more than 3 million loans valued in excess of \$26 billion. Petitioner's Memorandum of Points and Authorities in Support of Petition to Quash or Limit Civil Investigative Demands and for an Order Establishing Safeguards for the Handling of Confidential Information ("Pet. Mem.") at 6-7. The Commission's investigation focuses on a variety of practices, including possible violations of the Equal Credit Opportunity Act ("ECOA") (codified as amended at 15 U.S.C. 1681 *et seq.* (1998)) and its implementing rule, Regulation B, 12 CFR 202 *et seq.* (1998) ("Reg. B"); the Truth-in-Lending Act ("TILA") (codified as amended at 15 U.S.C. 1601 *et seq.* (1998)), as amended by the Home Ownership and Equity Protection Act of 1994 ("HOEPA") and its implementing rule, Regulation Z, 12 CFR 226 (1998) ("Reg. Z"); and Section 5 of the Federal Trade Commission Act of 1914 ("FTC") (codified as amended at 15 U.S.C. 45 (1997)); or other laws enforced by the Federal Trade Commission.

On October 6, 1998, after months of attempting to obtain information necessary to its investigation through the voluntary cooperation of Petitioner, the Commission issued eleven CIDs to Petitioner pursuant to two omnibus compulsory process resolutions (File Nos. 982 3506 and P944809). The two resolutions collectively authorize the use of compulsory process to determine whether subprime lenders or others may be violating the TILA, including the HOEPA, the ECOA, or Section 5 of the FTC Act, as well as the relevant implementing regulations; and to determine whether Commission action to obtain consumer redress would be in the public interest.

The eleven issued CIDs include one for documents, one for written interrogatories, and nine for oral testimony. The CIDs seek information related to Petitioner's corporate structure, affiliates,

² See Heather Timmons, *Finance Firm Mergers Heat Up As Associates Nabs Avco for \$3.9B*, AMER. BANKER, Aug. 12, 1998, at 1 (noting Petitioner's "long held position as the largest consumer finance company in the United States").

business plans, and annual reports; loan products; computer systems; employee training, performance, evaluation, and compensation; audits; marketing; pricing policies; appraisals; underwriting criteria; payment procedures; insurance sales; record retention and destruction policies; and consumer complaints, lawsuits, and internal investigations. They also seek mortgage and other consumer loan data, as well as the identity of current and former employees.

On November 4, 1998, Petitioner's counsel met Commission staff to raise concerns about the compliance burden of several CID specifications. Following the meeting, pursuant to 16 CFR 2.7(c), the Associate Director for the Commission's Division of Financial Practices ("DFP") agreed by letter to modify the CIDs in an effort to reduce Petitioner's production burden. The CIDs were modified to exclude a national bank and its credit card operations; to narrow several specifications to cover only branches within certain designated geographic areas and the chains of command within those areas, thereby reducing the search burden from 1,350 branches to only 30 branches; to exclude open-end loans and two subsidiary companies from the universe of loans to be searched for certain loan data; and, contingent upon Petitioner fully complying with the CIDs, to end the continuing obligation to produce newly-generated documents. On November 10, 1998, Petitioner filed the Petition that is the subject of this opinion.

II. ANALYSIS

A. Scope of Commission's Legal Authority to Conduct Investigations

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* Sections 6, 9, 10, and 20 of the FTC Act (codified as amended at 15 U.S.C. 46, 49, 50, and 57b-1). These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, the Commission in its investigatory power is analogous to "the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Among the Commission's investigatory powers is the ability to use CIDs to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 57b-1. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission. *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *rehearing en banc denied* (1992), *cert. denied*, 507 U.S. 910 (1993) (quoting *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (quoting *FTC v. Lonning*, 539 F.2d 202, 210 n.14 (D.C. Cir. 1976)). Generally, the federal court ask only whether: 1) the information sought is within the Commission's authority, *see U.S. v. Morton Salt Co.*, 338 U.S. at 643; 2) the information sought is reasonably relevant to the investigation, *see Invention Submission Corp.*, 965 F.2d at 1089 (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 873 n.23 (D.C. Cir.) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)), *cert. denied*, burdensome, *see e.g., Invention Submission Corp.*, 965 F.2d at 1090.

B. Statutory Compliance of Civil Investigative Demands

Petitioner argues that the CIDs do not comport with legal requirements because they do not identify the nature of the conduct under investigation. *See* Petition at 1, 3; Pet. Mem. at 1 (citing 15 U.S.C. 57b-1(c)(2) (1997),³ 16 CFR 2.6 (1998)); *id.* at 2, 35 (quoting S. Rep. No. 96-500, at 23 (1979));⁴ *id.* at 3, 36 (quoting now Chairman Pitofsky) (citing S. Rep. No. 96-500, at 23-24);⁵ *id.* at

³ Petitioner cites to 15 U.S.C. 45(c)(2) as statutory authority requiring CIDs to identify the nature of conduct under investigation. Pet. Mem. at 1. No such section exists. Corrected in the text above, the properly cited authority provides, "Each [CID] ... shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of the law applicable to such violation." 15 U.S.C. 57b-1(c)(2) (1997).

⁴ Petitioner cites to non-existent pages in S. Rep. No. 96-500, which numbers to page 64. The correct citation for quoted material excerpted in Pet. Mem. is found in the text above. The complete language of the material excerpted from the cited Report of the Senate Committee on Commerce, Science, and Transportation on S. 991, the Federal Trade Commission Act of 1979, reads, "The adoption of this provision is intended to limit the practice of the Commission of giving vague description of the general subject matter of the inquiry and provides a standard by which relevance may be determined." S. Rep. No. 96-500, at 23 (1979). Petitioner, however, fails to point out an important qualification that follows this excerpted sentence, which reads, "However, this requirement is not intended to be overly strict so as to defeat the purpose of the [FTC Act] or to breed litigation and encourage parties investigated to challenge the sufficiency of the notice." *Id.*

⁵ Petitioner cites to non-existent pages in S. Rep. No. 96-500. Chairman Pitofsky's comments are found properly as cited in the text above.

33n.5 (quoting FTC Act § 20(c)(2) (codified as amended at 15 U.S.C. 57b-1(c)(2) (1997); *id.* at 34n.6 (quoting 16CFR 2.6 (1998)).

Petitioner further cites *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980), for the proposition that references to "statutes that are the basis for the investigation" do not constitute statements as to the nature of conduct under investigation. Petitioner avers that the subject CIDs do not adequately notify it of the precise conduct under investigation but merely cite to the two omnibus resolutions, dated August 1, 1994 and June 1, 1998, which collectively refer to the ECOA and its implementing rule, Reg. B; the TILA, including the HOEPA and its implementing rule, Reg. Z; and Section 5 of the FTC Act. Pet. at 2; Pet. Mem. at 33-35 & 34n.7 (citing Exs. 41-42). Petitioner also complains that the Commission has rejected its repeated requests during more than two years to identify the conduct under investigation. *See* Pet. Mem. at 3-4.

Petitioner's challenge to the legal sufficiency of the CIDs fails in two points. First, the CIDs recitation of statutory authorities provides adequate notice to Petitioner as to purposes of the investigation. In fact, *Carter*, the very case cited by Petitioner for the proposition that recitation of statutory authorities is insufficient, holds the opposite. In *Carter* the court upheld the Commission's subpoenas, noting that although Section 5's prohibitions standing alone might not serve very specific notice, when it was defined by its relationship to a more specific statute, (*i.e.*, Section 8(b) of the Cigarette Labeling and Advertising Act), notice was sufficient. *Carter*, 636 F.2d at 788. In *Carter* the Court stated that "an agency will be deemed to have given adequate notice of the purposes of the investigation by reciting its statutory duties when the statutes themselves alert the parties to the purposes of the investigation." *Id.* at 787. Similarly, the statutes recited in the Resolutions at issue in this matter provide adequate notice as to the nature of the conduct under investigation. In another case on point, *FTC v. O'Connell Assocs.*, 828 F. Supp. 165, 170-71 (E.D.N.Y. 1993), the court upheld the standard of notice as being satisfied where the FTC resolution in that case stated its purpose as being to determine whether violations of specified laws were occurring or had occurred. In *O'Connell*, the court struck down an argument virtually identical to that of Petitioner here and held that even though the Commission's resolution did not state the nature of conduct under investigation, the corresponding CIDs were legal, given the breadth of the resolution in that case. *Id.* Petitioner

concedes that the subject CIDs identify the statutes upon which the investigation is based. Pet. Mem. at 1, 34 & 34n.7. Moreover, the resolution issued in connection with File No. P944809 lists specific conduct that may constitute a violation of the ECOA or Reg. B.

Second, even if notification of the statutory bases for the Commission's investigation provides insufficient notice as to the nature of conduct under investigation, Petitioner has had more than ample notice as to the nature of that conduct, given the omnibus resolutions and CIDs; correspondence, conversations, and requests leading up to the CIDs; and broad press coverage, Congressional testimony, and private lawsuits regarding Petitioner's alleged abusive home equity lending practices. *See supra* Part I; *see also supra* note 4 ("sufficiency of notice"). Petitioner also received notice by way of a joint access letter on or about April 24, 1998 from the Commission and the Department of Justice, which requested specific information related to both mortgage and non-mortgage consumer lending. *See* Pet. Mem. at 16-25. In addition, in several meetings with Commission and Department of Justice staff,⁶ Petitioner received notice as to the nature of the conduct under investigation. In a follow-up letter to one meeting, staff specifically requested information related to Petitioner's credit insurance penetration rates, among other topics. In sum, the notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioner more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation.

*C. Breadth of, and Burden of Compliance with,
Civil Investigative Demands*

Petitioner contends that the CIDs are unreasonably broad and would impose an undue burden on its operations. Petition at 1, 3; *see* Pet. Mem. at 2, 3-4, 41-44, 50. Petitioner also argues that CIDs for oral testimony target its senior executives based on their position rather than on an articulated rationale that these executives possess the sought-after information. Petition at 3; Pet. Mem. at 4-5, 52-54 (citing Fed. R. Civ. Pro. 30(b)(6) compared with 15 U.S.C. 57b-1(c)(14)).

For its showing of undue burden, Petitioner provides statistics projecting 16,100 labor hours for compliance with all CIDs. Pet. Mem. at 2, 40. Petitioner also advances operational impact statements

⁶ Two of these meetings were held on May 22, 1998 and May 27, 1998. Pet. Mem. at 20-22.

and includes estimates for compliance with certain CID specifications for documents and interrogatory-type responses. *See* Pet. Mem. at 37-39, 41-42, 44-45 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 653 (1950)) (citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967); *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303 (4th Cir. 1992); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (quoting *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*)); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1055-56 (2d Cir. 1973)).⁷

Finally, Petitioner characterizes the Commission's DFP as having acted in bad faith, asserting that DFP has been unwilling to compromise and respond to reasonable proposals by Petitioner, despite extensive voluntary cooperation by Petitioner to Commission and Department of Justice requests. *See* Petition at 2-3; Pet. Mem. at 9-24, 31-33. Petitioner points out that the Department of Justice agreed to identify former Petitioner's employees whom it had interviewed and to describe the information received during those interviews, while the Commission has refused this request by Petitioner. Pet. Mem. at 33.

All of Petitioner's arguments fail. First, Petitioner completely ignores that the burden of compliance is relative to the capacity to comply. Thus, Petitioner exaggerates its compliance burden, given its capacity to comply in light of the size of its domestic operations, *i.e.*, some 1,350 branches; its loan portfolio of more than 3 million loans valued in excess of \$26 billion; and, given the limited scope of its operations encompassed in the Commission's investigation relative to Petitioner's overall corporate size and structure including 246 subsidiaries. Pet. Mem. at 6-7.

Here, no undue burden exists for Petitioner where the CIDs are confined, as feasible, to four designated areas, *i.e.*, specified counties in four states ("designated areas"), particularly given Petitioner's own characterization that its operations are highly dispersed and decentralized across the United States and abroad. Pet. Mem. at 44.

⁷ In addition, Petitioner asserts that its compliance with documentary CIDs would: 1) include or likely include numerous privileged documents beyond those listed in Petitioner's submitted Preliminary Schedule of Privileged Documents Pursuant to Commission Rule 2.8A, Pet. Mem. at 50; and 2) require the production of documents related to the securitization or initial public offering, which are not significantly related to Petitioner's lending practices and protected by attorney-client privilege or work product doctrine, *id.* at 50-51 (citing *In re Grand Jury Proceedings*, 601 F.2d 162, 166 (5th Cir. 1979)). To the extent that documents are legitimately privileged, Petitioner may withhold such documents, as long as it lists such documents on a privilege log.

Petitioner's estimate of some 16,100 labor hours for compliance with all CIDs and other estimates, likewise, fail to constitute any undue burden of compliance, where Petitioner employs approximately 22,600 employees and managers. Pet. Mem. at 6. Petitioner also is vague as to whether the estimate of 16,100 hours takes into account the modifications to the CIDs agreed to by FTC staff. Moreover, elsewhere in its petition, the Petitioner suggests that a search pursuant to the modified CIDs "may require as many as 400 managers and executives to search their files, and that such a search could take a day" Pet. Mem. at 44. The estimate would lead to a calculation of only 3,200 labor hours.

Second, Petitioner's argument ignores the Commission's agreement to modify the CIDs and so reduce Petitioner's compliance burden by excluding a national bank and its credit card operations; to narrow several specifications to cover only branches within the "designated areas" and the chains of command within those areas, thereby reducing the search burden from 1,350 branches to only 30 branches; to exclude open-end loans and two subsidiary companies from the universe of loans to be searched for certain loan data; and, contingent upon Petitioner fully complying with the CIDs, to end the continuing obligation to produce newly-generated documents. *See supra* Part I.

The Commission's issuance of CIDs or subpoenas to high-level executives such as corporate presidents and vice presidents has been upheld in a number of cases. *Cf. Carter*, 636 F.2d at 789-90 (upholding subpoenas *duces tecum* issued to corporate officers based on "strong likelihood" that their testimony would be required); *FTC v. Anderson*, 631 F.2d 741, 751 (D.C. Cir. 1979) (upholding subpoena *duces tecum* to company vice president). The executives identified in the CIDs for oral testimony likely are in a position to address investigative inquiries concerning Petitioner's corporate policies and procedures and their implementation. Nonetheless, if Petitioner believes that other corporate officials would be more knowledgeable about the issues under investigation, Petitioner should make such a proffer to the Commission staff.

Third, although Petitioner objects to several CID specifications, it has not advanced any specific proposals for modifying the CIDs. Finally, even if the CIDs could properly be characterized as "broad," breadth alone is insufficient reason to refuse their enforcement. *See*

FTC v. Texaco, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*). In sum, given the context of the investigations and Petitioner's far-flung and massive operations, the CIDs are properly tailored to elicit necessary information and do not impose undue compliance burdens.

*D. Time Period Permitted for Compliance with
Civil Investigative Demands*

Petitioner complains that the CIDs provide an unreasonable short time period to comply with the amount of information requested. Petitioner also suggests that the time period should not be considered reasonable because it has produces at least some documents voluntarily and that its voluntary cooperation should be considered in reviewing its petition. Petition at 3; Pet. Mem. at 9-16, 51-52. Further, Petitioner contends that the time period is unbounded as to the continuing compliance obligation, *i.e.*, until "the date of full and complete compliance." Pet. Mem. at 47-49 (quoting CIDs Instruction 3); *id.* at 48-49 & 48n.16 (acknowledging that a continuing obligation to FTC can be imposed if limited to a reasonable, defined time period) (quoting *United States v. Powell*, 379 U.S. 48, 57 (1964) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)) (citing *Invention Submission Corp.*, File No. 882 3060, Trade Reg. Rep. (CCH) ¶ 23,068 (Oct. 4, 1991); *In re Subpoena to Testify Before Grand Jury Numbers S286-4-7*, 630 F. Supp. 235, 236 (N.D. Ind. 1986); *In re Heuwerker*, 584 F. Supp. 119, 124-25 (S.D.N.Y. 1984)).

Petitioner's arguments are unpersuasive for the following reasons. First, the CIDs, in fact, specify a finite date and time for compliance. Second, the use of the phrase "full and complete compliance" is customary Commission language to communicate that the compliance obligation does not terminate until all responsive information is produced.

Third, although Petitioner points to numerous exhibits filed with its petition as being related to its voluntary cooperation, these exhibits relate to an investigation (referred to by Petitioner as the "Detroit investigation") that is separate and apart from the investigation at issue in connection with these CIDs. *See* Pet. Mem. at 9-16.⁸ While

⁸ Petitioner is well aware that these are separate investigations, having received notice of this investigation through a 1997 Commission letter that provided reference to the nature of the conduct under investigation by stating that the Commission was conducting an investigation to determine whether Petitioner's lending practices violate or have violated the ECOA or Regulation B, the TILA, as amended by the HOEPA, or Regulation Z, Section 5, or other laws enforced by the Commission. Interestingly, Petitioner failed to include this letter among its 54 exhibits in support of its Petition.

Petitioner states that it cooperated voluntarily with the Commission in the Detroit investigation, Petitioner ceased all voluntary cooperation in that investigation at the same time it did in the investigation that is the subject of this Petition. Further, voluntarily producing *some* requested documents does not excuse the Petitioner from producing *all* documents responsive to Commission issued CIDs.

Fourth, Petitioner has had virtually identical document and information requests in its possession since its receipt of the April 24, 1998 joint Commission and Department of Justice access letter and has precipitated by its own actions and undue delay the Commission's issuance of the CIDs. Thus, the time-frame set forth in the CIDs as originally issued was not unreasonable under the circumstances of this investigation.

E. Request for Four-Part Order

Petitioner requests that, in the event the Commission elects to limit, rather than quash, the CIDs, the Commission issue a four-part order to preserve the confidentiality of this non-public investigation. First, Petitioner renews a previously denied request that DFP intervene in *Stewart v. Associates Consumer Discount Company*, in which Petitioner, pursuant to a federal court order, must produce to class-action plaintiffs' counsel the government's CIDs and must identify all documents produced in response to the CIDs. Petitioner claims that DFP's failure to intervene in the *Stewart* case is prejudicial to its interests in that case. Petition at 4 (citing *Stewart*, No. 97-CV-4678 (E.D. Pa.)); Pet. Mem. at 27-31 (citing Exs. 35-39) (quoting FTC Operating Manual 16.9.3.4); *see id.* at 57 (asserting that DFP did not advise the *Stewart* court as to the need for maintaining confidentiality of the investigation). Petitioner also requests that the Commission issue an order prohibiting the company from providing to any third party any documents received from or provided to DFP in this investigation. Petition at 3; Pet. Mem. at 57-58.

Petitioner's repeated request for the Commission's intervention in *Stewart* is denied. The Commission has an interest in protecting its investigations from public disclosure, and our Rules of Practice and Statutes restrict the disclosure by the agency of confidential information received during an investigation. However, no statutory or regulatory basis exists for Commission intervention in private lawsuits to shield an FTC investigatory target from discovery requests

for government-issued CIDs and documents produced pursuant thereto. If a protective order is warranted, it should be requested from the court hearing the private case, rather than involving this agency in discovery matters concerning other cases. *See FTC v. Anderson*, 442 F. Supp. 1118, 1124 (D.D.C. 1977), *aff'd*, 631 F.2d 741 (D.C. Cir. 1979). Moreover, there is no basis for the Commission to issue an order contravening the express order of a federal district court, and, in any event, the Commission declines to do so here.

Second, Petitioner requests a copy of any certificate filed by the Department of Justice ("DOJ") and an opportunity to challenge such a DOJ request prior to disclosure of any information in the Commission's possession to the DOJ. Pet. Mem. at 55-56 (asserting certification procedure inadequate) (citing Commission Rule 4.11(c), contending that such an order is necessary to protect transfer of any provided confidential information to DOJ, where such information is beyond DOJ's jurisdiction, Petition at 4 (citing ECOA and Reg. B); Pet. Mem. at 54-56 (citing 16 CFR 4.11(c) (1998); 15 U.S.C. 46(f), 57b-2(b)(6) (1997)), and time-barred, *id.* at 55 (noting without citing ECOA's two-year statute of limitations).

Again, Petitioner's request is denied. Indeed, the Commission's procedures for disclosing information to other law enforcement agencies specifically prohibit the Commission from disclosing the request for such information to the owner of the information if the other law enforcement agency requests that the owner not be notified. 16 CFR 4.11(c) (1998). The Commission has refused a request for such an order under similar circumstances. *See Brana Publishing, Inc.* 115 FTC 1297, 1305 (1992) (Petition to Limit or Quash CID, File No. 872-3209). It is within the Commission's discretion to determine what information may be provided lawfully by one law enforcement agency to another. As the federal courts have stated, "agencies are entitled to a presumption of administrative regularity and good faith," and "[w]ith no indication that the Commission will act cavalierly or in bad faith," its assertions with respect to the treatment of subpoenaed material should be accepted at face value." *FTC v. Invention Submission Corp.*, 965 F.2d at 1091 (quoting *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980)).

Third, Petitioner alleges that DFP's pattern of investigatory conduct violates the Commission's statutes and regulations governing the confidentiality of a nonpublic investigation and the information

obtained during such an investigation. Petitioner alleges that staff has engaged in at least three courses of conduct that violate Commission confidentiality restrictions: 1) staff aired a network television segment involving the company's alleged practices in connection with training seminars; 2) staff may have revealed the existence of the Commission's investigation to a private plaintiffs' attorney involved in litigation with one of the Petitioner's subsidiaries; and 3) staff sent letters to state attorneys general seeking consumer complaints about Petitioner without explicitly requesting that this information be kept confidential. *See* Pet. Mem. at 29-30. As a result of these allegedly improper disclosures, Petitioner requests that DFP staff be ordered to comply with such rules and regulations. Petition at 5; Pet. Mem. at 58-59. There is no evidence to suggest that Commission staff has violated the FTC statutes and rules governing confidentiality.

As the alleged violative conduct of DFP, staff routinely conducts seminars and training sessions to alert businesses, consumers, and state authorities to various industry practices that may be injurious to consumers. In connection with some seminars, the staff did use a video of a *Primetime Live* television story (ABC News television broadcast, Apr. 23, 1997), as well as other videos and oral presentations, to illustrate some of the abusive practices allegedly occurring in the home equity lending industry. Although the *Primetime Live* tape discussed Petitioner's business practices, staff conducting the seminars did not mention Petitioner or indicate that the Commission was investigating the company. In fact, the *Primetime Live* program had been publicly broadcast prior to the seminars, and was thus public knowledge.

Similarly, although staff did contact the private plaintiffs' attorney to seek information about the private lawsuit, staff did not reveal the existence of the Commission's investigation. In conducting nonpublic investigations, it is standard practice for Commission staff to contact third parties for information. The disclosure of limited information in the context of such an investigatory inquiry does not violate the statutes or rules governing the confidentiality of Commission investigations. Moreover, to the extent that the Commission staff does obtain information from third parties during the course of an investigation, such information and the sources thereof are protected by a number of privileges, including the work product doctrine and, depending upon circumstances, the informant's privilege. *See, e.g.*, 15 U.S.C. 57b-2(f); 16 CFR 4.10(a)(8).

Finally, it is routine for staff to contact state attorneys general for consumer complaints. The Commission's statutes and rules contemplate that the Commission will work closely with the states on matters of mutual concern. The states are aware that the Commission's investigations are almost always nonpublic, and staff's letter soliciting complaints specifically stated that the investigation is nonpublic.

The Commission takes the confidentiality of its investigations very seriously. However, in the absence of any evidence that the staff has failed to abide by the Commission's policies and procedures, an order commanding staff to follow such procedures is unjustified. *See Michael DiMattina*, FTC Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demands, 118 FTC 1248, 1254 (Oct. 21, 1994) ("it is the Commission's policy that staff should take care to avoid undue harm to a company's legitimate business interests; absent specific evidence to the contrary, it is assumed that staff will act in a manner consistent with this policy"); *see also HTI/ORHS South Seminole Joint Venture*, Re: Petition to Quash or Limit Civil Investigative Demand, 118 FTC 1229, 1234 (Aug. 12, 1994) ("The Commission must, however, balance the potential that its investigation may cause injury against the potential that its investigation may enable the Commission to uncover and remedy what are alleged to have been very serious violations of Section 5 of the Federal Trade Commission Act").

F. Request for a Copy of Staff's Response to Associates' Petition and Oral Argument

Finally, Petitioner requests a copy of DFP's response to its Petition and the right to file a reply to any DFP response to the Petition, as well as a hearing on the matter. Petitioner argues that these opportunities would afford it due process. Petition at 5-6. These requests are denied. First, under Commission's rules, staff is permitted to communicate on a nonpublic basis with Commissioners during Part II investigations and the disclosure of such communications may undermine the deliberative privilege afforded government agencies. *See* 16 CFR 4.7(f). Moreover, such information is exempt from disclosure under Rule 4.10(a) of the Commission's Rules of Practice. 16 CFR 4.10(a) (1998). Given the exhaustive nature of the Associates' Petition, Memorandum, and Exhibits, Commissioner Anthony has determined that due process does not require either the

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Response to Petition

release of an otherwise nonpublic staff memorandum or a hearing on the merits of the Associates' Petition to Quash or Limit the CIDs.

III. CONCLUSION

This is a proper and statutorily authorized investigation. The CIDs seek information that is plainly relevant to that investigation and have been crafted and modified by Commission staff to avoid placing an undue burden on Petitioner.

For the foregoing reasons, the Petition is denied, and pursuant to Rule 2.7(e), 16 CFR 2.7(e) (1998), Petitioner is directed to comply with the Civil Investigative Demands for written interrogatories and documentary material on or before Tuesday, January 26, 1999, and to comply with the oral CIDs as rescheduled above.

**Re: Associates First Capital Corporation, Request for Full Review
and Stay of Civil Investigative Demands Return Date —
File Nos. 982-3506 and P944809**

February 11, 1999

Dear Messrs. Sandler and Klubes and Ms. Steptoe:

The Commission has considered: (1) the Petition and supporting documentation filed on behalf of Associates First Capital Corporation ("Petitioner") to quash the pending Civil Investigative Demands ("CIDs") for documents and oral testimony; (2) the Request for Full Commission Review and Stay of CID Return Date ("Review Request") filed on behalf of Petitioner on January 20, 1999,¹ (3) Petitioner's Supplemental Memorandum of Points and Authorities in Support of Petition to Quash or Limit Civil Investigative Demands and for an Order Establishing Safeguards for the Handling of Confidential Information ("Supplemental Memorandum") filed with the Review Request; (4) the January 12, 1999 ruling by Compulsory Process Commissioner Sheila F. Anthony, denying in full Petitioner's Petition to Quash or Limit Civil Investigative Demands and to Establish Order Safeguarding Handling of Confidential Information ("Petition"), and establishing new deadlines for full and complete compliance with the subject CIDs ("January 12th Ruling"); and (5) the specifications of the CIDs.

Upon review of the materials noted above, the Commission has determined that the Review Request raises no issues that were not fully considered and discussed in the January 12th Ruling. Accordingly, the Commission concurs in and adopts the January 12th Ruling.

Petitioner's arguments in its Review Request and Supplemental Memorandum merely recast the assertions previously raised in its Petition. In doing so, Petitioner mischaracterizes the legal precedent in *FTC v. Carter*, 636 F.2d 781 (D.C. Cir. 1980) and *FTC v. O'Connell Assocs.*, 828 F. Supp. 165 (E.D.N.Y. 1993). Thus, the Commission agrees with the January 12th Ruling that sufficient notice was provided through recitation of the statutory bases, as well as through the omnibus resolutions, CIDs, and correspondence, conversations, and requests leading up to the CIDs. Furthermore, the

¹ The Commission served Petitioner with its January 12th Ruling on January 14, 1999 and received the Review Request on January 20, 1999, or within 3 working days (6 calendar days) of date of service of the Ruling. See 16 CFR 2.7(f) (1998).

Commission rejects Petitioner's argument that the January 12th Ruling as to burden of CID compliance is contrary to the record. The Commission believes that such burden is not undue in light of the nature and extent of the investigation and the expansive nature of Petitioner's business operations. Finally, Petitioner's argument that certain organizations may be impacted more than others belies its contention that the Commission's CIDs are merely a "fishing expedition."

By letter dated January 25, 1999, the Commission granted Petitioner's request to briefly stay its compliance obligations pending a ruling by the full Commission. That stay is hereby terminated. The Commission hereby directs that on or before February 26, 1999, Petitioner comply with the CIDs for written interrogatories and documentary material. As to compliance with the CIDs for oral testimony, the Commissioner hereby directs that such compliance be carried out according to the following schedule: Michael J. Gade - March 15, 1999; Gil Schielbalhut - March 16, 1999; Gavin P. Goss - March 17, 1999; Owen P. Davis - March 18, 1999; Ken Mize - March 22, 1999; H.J. Fullen - March 24, 1999; Timothy W. Bellows - March 29, 1999; Stephanie C. Rumph - March 30, 1999; and Mary Kinsey - March 31, 1999. As previously scheduled, each hearing for oral testimony will begin at 9:30 a.m. (CST) and take place at the Commission's Dallas Regional Office.

**Re: Wal-Mart Stores, Inc.'s Petition to Quash Civil Investigative
Demand and Subpoena Ad Testificandum — File No. 991-0024**

March 1, 1999

Dear Messrs. Coston and Saad:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition").¹ The Petition is denied for the reasons set forth in the attached memorandum. The new deadline for Wal-Mart Stores, Inc. ("Petitioner"), to respond to the Civil Investigative Demand is Monday, March 8, 1999, and to appear and give testimony as required by the Subpoena *Ad Testificandum* is Thursday, March 11, 1999 at 9:00 a.m. Eastern time. Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.² The filing of a request for review by the full Commission does not stay or otherwise affect the new return dates unless the Commission rules otherwise. See 16 CFR 2.7(f).

MEMORANDUM

Pursuant to its authority under Sections 6, 9, and 20 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 46, 49, 57b-1, the Federal Trade Commission ("FTC" or "Commission") is conducting a non-public investigation of a proposed acquisition. In furtherance of this investigation, the Commission has sought certain information required for it to ensure that full and fair competition markets exist in places where consumers and, indeed Wal-Mart Stores, Inc. ("Wal-Mart" or "Petitioner"), can benefit. On December 18, 1998, the Commission issued a resolution authorizing the use of compulsory process to obtain information necessary to evaluate the proposed transaction. Pursuant to the resolution, on February 5, 1999, the Commission issued a civil investigative demand, returnable on February 17, 1999, (the "CID") and a subpoena *ad testificandum*, returnable on February 23, 1999, (the "Subpoena") to Wal-Mart, a

¹ The decision was made by Commissioner Mozelle W. Thompson, acting as the Commission's delegate. See 16 CFR 2.7(d)(4).

² This ruling is being delivered by both facsimile and express mail. The facsimile copy is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail.

non-party, seeking, among other things, information regarding Wal-Mart's future business plans in certain geographic areas. The Commission staff contends this information is needed to evaluate the potential effects of the proposed acquisition. However, Wal-Mart objected, refused to provide the information, and, on February 16, 1999, filed a petition to quash the Subpoena and CID (the "Petition").

In support of its Petition, Wal-Mart essentially argues that the information sought by the Commission is extremely sensitive, proprietary information, and Wal-Mart does not trust the Commission to protect its confidentiality. While Wal-Mart suggests it might reveal the information sought if the Commission makes an "additional showing of need" and provides "additional guarantees of confidentiality," Petition at 1, Wal-Mart adds: "If the FTC persists in seeking this information, Wal-Mart will have no choice but to litigate every process it receives until a cooperative protocol is developed." Petition at 5.

After reviewing the Subpoena, CID, Petition, and FTC Staff's recommendation in this matter, I find that none of Petitioner's arguments provide sufficient basis for quashing the process.

I. DISCUSSION

A. Confidentiality

Section 21 of the Act, entitled "Confidentiality," 15 U.S.C. 57b-2, sets forth detailed procedures for protecting sensitive information. The statute requires the Commission to designate an agent to act as the custodian for information obtained through compulsory process and provides that none of the information provided "shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material"³ 15 U.S.C. 57b-2(b). Information received in the course of an investigation is also exempt from disclosure under the Freedom of Information Act. 15 U.S.C. 57b-2(f). However, the Commission may use such information "as may be required for official use by any duly authorized officer or employee of the Commission under regulations which shall be promulgated by the Commission." 15 U.S.C. 57b-2(b)(3)(B).

Rule 4.10 of the Commission's Rules of Practice, 16 CFR 4.10, also restricts disclosure of information received in response to

³ Subject to certain notice and certification requirements, the Commission may also share the information with the Congress and with other law enforcement agencies. 15 U.S.C. 57b-2(b).

compulsory process to those outside the Commission without the prior consent of the person who produced the material. 16 CFR 4.10(d). If the Commission intends to disclose confidential information to persons other than the submitter in connection with the taking of oral testimony, the Commission must provide "10 days' notice of the intended disclosure" or afford "an opportunity to seek an appropriate protective order." 16 CFR 4.10(f). The Commission may disclose confidential information obtained through compulsory process, or voluntarily in lieu thereof, "in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order." 16 CFR 4.10(g). These statutory and regulatory requirements are further backed by criminal sanctions.⁴

In this case, Wal-Mart claims that it seeks to avoid compliance with the Subpoena and CID because due to past experience, it does not have sufficient confidence in the Commission's ability to protect sensitive business data. While there is reason to be concerned about claims regarding an alleged past failure of Commission Staff to take reasonable care to protect sensitive business information, the appropriate response to subsequent process is *not* self-help by the recipient. As outlined above, the FTC Act and the Commission's rules provide a sufficient protocol for dealing with the confidential information the Commission has requested from Wal-Mart.

As the court in *FTC v. Invention Submission Corp.*, so succinctly explained:

Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Wal-Mart is neither entitled to nor merits special treatment.

⁴ Under Section 10 of the FTC Act and Section 4.10(c) of the Commission's regulations, "Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court." 15 U.S.C. 50; 16 CFR 4.10(c).

B. Alleged Past Breach of Confidentiality

In an attempt to avoid compliance with the Subpoena and CID issued in this investigation, Wal-Mart cites an incident that allegedly took place during the Commission's suit to block the Staples/Office Depot merger. Wal-Mart claims that at that time it provided an employee affidavit to the Commission with the understanding that the Commission would "keep it confidential unless Wal-Mart consented to its release." Petition at 4. Wal-Mart further contends that without Wal-Mart's consent, "the affidavit ended up in publicly filed court papers." *Id.*

These claims, if true, would warrant concern. However, Commission staff gives a very different account of the alleged incident. Even assuming Wal-Mart's version of events is correct, the incident would have no bearing on Wal-Mart's current obligation to comply with the Subpoena and CID at issue here. As detailed above, the FTC Act and the Commission's rules spell out the rights and obligations of both the Commission and those served with compulsory process by the Commission.⁵ If Wal-Mart believed that the Commission's actions during the Staples/Office Depot matter violated the law, Wal-Mart should have sought remedial action at that time. But, it did not. Consequently, it is not appropriate for Wal-Mart, or any other compulsory process recipient, to unilaterally refuse to comply with its legal obligations based on its own perception of its past treatment at the hands of the Commission.

C. Unfair Burden

As an additional defense to non-compliance with its Subpoena and CID obligations, Wal-Mart complains that due to the "breadth of goods it sells" and its nationwide presence, Wal-Mart receives numerous requests for information from the FTC each year. Petition at 3. Wal-Mart continues that it "cannot be expected to disclose highly confidential information and expend large amounts of time and resources each time the agency reviews a merger relating in some way to Wal-Mart's business." *Id.* While the Commission is willing to hear any claim of undue burden, there is no evidence of such burden here.

⁵ We would reemphasize that the Commission is permitted to disclose information designated confidential in court proceedings so long as it affords the submitter an opportunity to seek or avail itself of an appropriate protective or *in camera* order. 16 CFR 4.10(g). Wal-Mart does not contend that it was denied such an opportunity in connection with the Staples/Office Depot proceedings.

For example, there is no evidence that the Commission has repeatedly directed compulsory process requests to Wal-Mart on a whim. Rather, the actions of third-parties in proposing transactions and the facts of geography and the products Wal-Mart sells have apparently required that the FTC collect information from Wal-Mart. Thus, the Commission has previously sought precisely the information required for it to ensure that full and fair competition markets exist in places where consumers and indeed, Wal-Mart can benefit.

D. Claim of Compromise

Wal-Mart argues that it has sought to compromise with the FTC by providing some general information such as "the number of stores to be opened in Arizona over the next three years and has confirmed that it has no plans to construct stores in certain cities." Petition at 4. Commission Staff claims this "general information" is insufficient, and the Commission needs substantially more detail in order to evaluate the potential effects of the proposed transaction. I find Staff's argument more persuasive.

E. Threat of Future Resistance

As set forth above, I have seen nothing in the record to justify Wal-Mart's refusal to comply with its legal obligation. But, Wal-Mart closes its Petition by stating: "if the FTC persists in seeking this information, Wal-Mart will have no choice but to litigate every process it receives until a cooperative protocol is developed." Petition at 5. I am concerned when anyone, including Wal-Mart, threatens to take unilateral action to resist legal obligations without regard to judicial economy or, for that matter, the very real need that the Commission has for this information in order to fulfill its obligation to protect the public interest. While the Commission will be disappointed if Wal-Mart were to resist all process in the future, apparently regardless of merit, its threats do not provide a basis for according Wal-Mart special treatment.

III. CONCLUSION

In light of the foregoing, it is evident that: (1) the FTC is conducting a proper and statutorily authorized investigation, and (2) the information sought by the Commission is relevant to that investigation. Wal-Mart's justification for not producing the requested information are either meritless or irrelevant to this case.

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