

Interlocutory Orders, Etc.

IN THE MATTER OF

PAR PETROLEUM CORPORATION

Docket No. C-4522. Order, December 23, 2020

Letter approving a modification of the Honolulu Terminal Agreement attached to the Order in this Matter.

LETTER APPROVING MODIFICATION

Via Email:

Marc G. Schildkraut, Esq.
Baker Hostetler

Re: *In re Par Petroleum Corporation*, Docket No. C-4522

Dear Mr. Schildkraut:

This is in reference to the petition of Par Pacific Holdings, Inc. (formerly Par Petroleum Corporation, hereafter “Par”) dated December 11, 2019, requesting prior Commission approval of a proposed modification to the Amended Honolulu Terminal Agreement relating to the storage of petroleum products at the Barbers Point Terminal (“Proposed Modification”) as required by Paragraph II.B. of the Decision and Order in *In re Par Petroleum Corporation*, Docket No. C-4522 (“Order”). The Commission placed the petition on the public record for 30 days, until February 24, 2020. We received ten public comments; only three of the comments were germane to this matter. The Commission has considered Par’s petition and all supporting materials, as well as other available information, and has concluded that Par has not demonstrated that the Proposed Modification is consistent with the remedial purposes of the Order. Accordingly, the Commission has determined to deny Par’s petition to modify the Amended Honolulu Terminal Agreement.

In 2014, Par sought to acquire Koho’oha Investments, Inc.’s wholly-owned subsidiary Mid-Pac Petroleum, LLC (“Mid-Pac”) for roughly \$107 million (“Acquisition”). The Commission found that the Acquisition would likely substantially lessen competition and lead to higher prices for bulk supply of Hawaii grade gasoline blendstock (“HIBOB”).¹ Moreover, the potential for competitive harm from the Acquisition stemmed from the importance of

¹ *In re Par Petroleum Corp.*, FTC Docket No. C-4522 (Mar. 18, 2015), Complaint ¶ 5, available at <https://www.ftc.gov/system/files/documents/cases/150312parpetroleumcmpt.pdf>.

Interlocutory Orders, Etc.

imports in establishing HIBOB prices (*i.e.*, Aloha and Mid-Pac’s import capabilities served to constrain the local refiners’ bulk supply prices of HIBOB).²

Specifically, the Commission determined that Par’s acquisition of Mid-Pac’s storage rights at the Barbers Point Terminal could grant Par the ability to limit Aloha’s use of that terminal. Par, via the inherited Mid-Pac rights, could therefore hamper Aloha’s ability to import bulk supply of HIBOB, thus weakening Aloha’s ability to use its import capability to obtain better bulk supply prices from the local refiners. Ultimately, the Commission found that Par’s acquisition of Mid-Pac likely would increase the price of bulk supply of HIBOB, which would likely lead to higher gasoline prices for Hawaii consumers.³

In order to resolve the competition concerns in the bulk supply of HIBOB as alleged in the Complaint, the Order required Par to terminate its petroleum products storage rights at the Barbers Point Terminal.⁴ Further, among other things, the Order requires that Par receive the prior Commission approval of any new agreement relating to storage or throughput between Par and Aloha at the Barbers Point Terminal.⁴ Accordingly, Par terminated its petroleum products storage rights at the Barbers Point Terminal with the execution of the First Amendment to the Terminating Agreement dated January 8, 2015.⁵

Par now seeks prior Commission approval to the Proposed Modification of the Amended Honolulu Terminal Agreement that would effectively reinstate the petroleum products storage rights at the Barbers Point Terminal, rights that the Commission had previously required Par to terminate as a part of the original consent. Par argues that the changed market conditions for HIBOB in the intervening years warrant a modification. Specifically, Par states that, without the modification, “competition to import and store HIBOB would be unduly restricted. This could result in higher prices in Hawaii.”⁶

Par makes three main arguments to support its request for Commission approval of the Proposed Modification. First, Par argues that the Island Energy Services, LLC (“IES”) refinery shutdown irrevocably changed the HIBOB landscape to the detriment of consumers, necessitating the need for a Proposed Modification.⁷ Second, Par maintains that its refinery alone

2 *In re Par Petroleum Corp.*, FTC Docket No. C-4522 (Mar. 18, 2015), Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, available at <https://www.ftc.gov/system/files/documents/cases/150318parpetroleumanalysis.pdf>.

3 *Id.* at 3.

4 *In re Par Petroleum Corp.*, FTC Docket No. C-4522 (Mar. 18, 2015), Decision and Order ¶ II.A, available at <https://www.ftc.gov/system/files/documents/cases/150312parpetroleumdo.pdf>.

5 *Id.* ¶ II.B.

6 *In re Par Petroleum Corp.*, FTC Docket No. C-4522 (Jan. 22, 2020), Petition of Respondent Par Pacific Corporation for Prior Approval at 2, available at https://www.ftc.gov/system/files/documents/cases/c4522parpetroleumpetition_0.pdf.

7 *Id.* at 5.

Interlocutory Orders, Etc.

cannot meet the current supply obligations required by its customer contracts,⁸ and therefore requests that the Commission approve the Proposed Modification. Lastly, Par implies that Aloha cannot import HIBOB cost effectively, and therefore will not do so.⁹ Par submitted eleven documents in support of its petition. Additionally, Par submitted white papers on March 18, 2020, April 9, 2020, September 28, 2020, and December 4, 2020.

Par filed the petition under Rule 2.41(f)(1) of the Commission's Rules of Practice. The Rule requires Par to obtain prior Commission approval of all proposed modifications to a previously approved remedial agreement unless the Commission waives the approval process.¹⁰ Accordingly, "[a]ll applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders (including modifications to previously approved transactions) shall fully describe the terms of the transactions or modification and shall set forth why the transaction or modification merits Commission approval."¹¹ In other words, Par has the burden of demonstrating that the proposed modification is procompetitive and consistent with the remedial purposes of the Order.

Par does not argue that the relevant product market (*i.e.*, bulk supply of HIBOB) should change nor is there a dispute that the relevant geographic market remains the state of Hawaii. Thus, when evaluating the competitive effects that Par's access to storage at Barbers Point may have on the competition for the supply of HIBOB, the Commission must evaluate the current market conditions for HIBOB demand. In reviewing all materials, we find that there has been no material change in the HIBOB market conditions since 2015. Although IES is no longer a local refiner after the refinery shutdown, we find that there are still three market participants in the bulk supply of HIBOB (*i.e.*, Par, Aloha, and IES) and that flexibility in import capabilities still affects an importer's ability to compete for customers.

We also note that, due to the coronavirus pandemic and related stay at home orders, the demand for fuel fell to approximately a quarter of normal demand at the peak of the lockdowns.¹² In particular, the pandemic-related closures have hit Hawaii hard, as HIBOB demand materially decreased given the drastically reduced ground and air travel since the pandemic began.¹³ Thus, because the pandemic has negatively affected the demand for the

⁸ *Id.* at 9.

⁹ *Id.* at 17.

¹⁰ 16 C.F.R. § 2.41(f)(5). A proposed modification qualifies for a waiver if the modification is "purely ministerial, or unlikely under any plausible facts to affect achieving the remedial purposes" of the relevant order. Par's Proposed Modification does not qualify for a waiver.

¹¹ 16 C.F.R. § 2.41(f)(1).

¹² Ahmad Ghaddar et al., *Coronavirus surge, renewed lockdowns fan fresh worries about global fuel demand*, Business News, <https://www.reuters.com/article/us-global-oil-demand-gasoline/coronavirus-surge-renewed-lockdowns-fan-fresh-worries-about-global-fuel-demand-idUSKCN24I0GR> (last visited Dec. 23, 2020).

Interlocutory Orders, Etc.

bulk supply for HIBOB, we cannot conclude that Par has a need for additional storage at Barbers Point in the near term.

Moreover, several public commenters and market participants have advised the Commission against approving the petition. Both IES and Aloha filed public comments that either directly contradicted certain representations made by Par¹⁴ or otherwise cautioned that Par's access to storage at Barbers Point may have detrimental effects on HIBOB competition in the future.¹⁵ Additionally, the Hawaii Attorney General filed a public comment expressing deep reservations regarding the proposed modification.¹⁶

Ultimately, we find that Par has not met its burden in demonstrating that the Proposed Modification is necessary. We do not find that the HIBOB market has materially changed since 2015, nor has Par established that the Proposed Modification would result in any new procompetitive benefit. For those reasons, and in light of the negative comments and additional competition concerns expressed by various third parties, we cannot conclude that the Proposed Modification, on balance, is consistent with the remedial purposes of the Order.

In summary, the Commission has determined to deny Par's petition for approval of the Proposed Modification of the Amended Honolulu Terminal Agreement.

By direction of the Commission.

13 As of early October 2020, the Big Island has opted out of reopening the island to tourism travel, and Kauai is still undecided. Rick Daysog, *County mayors in disagreement over state's tourism relaunch plan*, News, <https://www.hawaiinewsnow.com/2020/10/08/county-mayors-disagreement-over-states-tourism-relaunch-plan/> (last visited Dec. 23, 2020).

14 Aloha Comment at 1 ("Aloha is concerned that Par's petition overstates the costs and obstacles that Aloha would face in importing HIBOB and that the Commission might conclude that Aloha should be compelled to continue to offer Par HIBOB storage services after the Par Supply Agreement expires."). See <https://www.regulations.gov/document?D=FTC-2020-0005-0005>.

15 IES Comment at 9 ("IES believes that modifying the Agreement under the 2015 Order would be detrimental to competition in the Hawaii petroleum product market and to the reliability of supply to Hawaii consumers. IES strongly urges the FTC to reject the petition by Par."). See <https://www.regulations.gov/document?D=FTC-2020-0005-0004>.

16 Hawaii AG Comment at 2 ("Thus, we express deep reservations that the proposed transaction between Par and Aloha would only further entangle two key market participants in the provision of HIBOB into Hawaii to the detriment of a truly competitive market."). See <https://www.regulations.gov/document?D=FTC-2020-0005-0003>.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

BEAM FINANCIAL, INC.

FTC File No. 182 3177 – Decision, August 17, 2020

RESPONSE TO BEAM FINANCIAL, INC.’S PETITION TO QUASH OR MODIFY A CIVIL INVESTIGATIVE
DEMAND DATED MAY 21, 2020

ORDER DENYING IN PART AND GRANTING IN PART PETITION TO QUASH OR MODIFY CIVIL INVESTIGATIVE DEMAND

By PHILLIPS, Commissioner:

Beam Financial, Inc. (“Beam”) petitions to quash or modify a civil investigative demand issued on May 21, 2020, in connection with the Commission’s investigation into Beam’s business practices. Specifically, Beam seeks to quash the CID on the grounds that the Commission’s leadership structure is unconstitutional. Alternatively, claiming undue burden, Beam asks us to quash the CID to the extent it is duplicative of a Commission request for information two years ago and to extend the CID return date until four months from now.

For the reasons stated below, the Commission denies the petition with respect to Beam’s arguments that the CID should be quashed in whole or in part. With respect to Beam’s requested time extension, the Commission grants the petition in part and will modify the CID return date accordingly.

I. Background

Beam is a San Francisco-based company that offers mobile, high-interest, FDIC-insured bank accounts. Petition (“Pet.”) at 1. Beam launched a mobile banking app to the public in September 2019. Prior to the official launch of its app, Beam had released a “beta” version of the app.

On July 6, 2018, Commission staff sent Beam a letter (the “access letter”) requesting voluntary production of information and documents in connection with the beta version of the app. Pet. Exhibit (“Exh.”) B. The focus of that inquiry was whether consumers were receiving the advertised interest rate returns on their deposits. The access letter sought production by August 3, 2018, but staff and Beam subsequently agreed to a rolling production, which Beam completed in early September 2018. Staff determined that no further action was warranted at that time. At the request of Beam’s counsel, staff destroyed Beam’s responses to the access letter.

On May 21, 2020, the Commission issued a CID to Beam in support of an investigation into whether Beam has engaged in deceptive or unfair practices related to its financial products or services, including the accessibility of consumer funds, the advertised rates of return and

Responses to Petitions to Quash

interest, and the functionality of the company's mobile apps. Pet. Exh. A.¹ Unlike the 2018 access letter, which sought information about the beta version of the app, the CID is focused on the app officially released in September 2019 and seeks information from October 1, 2019, to the present. The CID return date is June 22, 2020.

The CID was delivered to Beam's San Francisco office on May 26, 2020. When staff received no reply from Beam, it sent the CID to Beam's counsel on June 16, 2020.² In response, Beam's counsel claimed that the COVID-19 pandemic has created substantial logistical difficulties for the company, [REDACTED], [REDACTED], impeding Beam's ability to comply with the CID. *See* Pet. Exh. C. Beam proposed to resubmit the material that it previously produced in response to the 2018 access letter and, by August 1, to respond in part to three interrogatories addressing a topic that staff identified as a particular concern: that consumers have reportedly been unable to withdraw, or easily to withdraw, their funds deposited with Beam. Beam proposed that all other responses to the CID specifications be deferred until December 15, 2020. *Id.* Staff found unacceptable an almost six-month deferral of substantive responses on thirty-three of the thirty-six specifications in the CID. But staff offered to modify the production schedule to address Beam's claims of hardship, proposing that the parties develop a schedule for a rolling production. Staff also asked Beam to address the extent to which the 2018 materials would satisfy the CID requests, and whether Beam's proposed near-term response would sufficiently address concerns about customers' access to their deposited funds. *See* E-mail from Gregory Madden to Erik Kosa and Allen Denson (July 6, 2020). Rather than engage with staff on these issues, Beam filed this petition to quash on July 6, 2020.

II. Analysis

Beam raises two objections to the CID. *See* Pet. at 4. First, it asserts that the Supreme Court's recent decision in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2184 (2020), renders the FTC's leadership structure unconstitutional and, by extension, invalidates the CID. Second, Beam argues that the CID deadlines for compliance are unreasonable in light of the effects of the COVID-19 pandemic on Beam and its 2018 productions. We address each of these arguments in turn.

1 The CID was issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and was authorized by an August 1, 2016, Commission Resolution permitting the use of compulsory process in agency investigations into possible FTC Act violations in connection with Internet-related goods or services. *See* Pet. Exh. A (third-to-last page).

2 Rule 2.10 of our Rules of Practice provides that a petition to quash is due "within 20 days after service of the Commission compulsory process." 16 C.F.R. § 2.10(a)(1). Staff took the position that service was accomplished on May 26, but offered to extend the deadline for a petition to quash to July 6, 2020, to accommodate discussions with Beam's counsel.

Responses to Petitions to Quash

B. The Supreme Court Has Not Overturned Its Precedent Upholding the FTC's Constitutionality.

Beam claims that the FTC lacks authority to issue or enforce the CID because the agency's leadership structure—specifically, the for-cause removal protections afforded FTC Commissioners³—is unconstitutional. Pet. at 4-6. The Supreme Court upheld the constitutionality of the FTC's for-cause removal provisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Beam argues, however, that under the Court's recent decision in *Seila Law*, any agency that exercises “quintessentially executive power” (like the present-day FTC, Beam says) must be directly accountable to the President, making for-cause limitations on the President's removal power constitutionally impermissible.

The Court's holding in *Seila Law*, however, is narrower than Beam asserts. *Seila Law* involved a challenge to the for-cause removal protections for the Director of the Consumer Financial Protection Bureau (“CFPB”), which, unlike the multi-member Federal Trade Commission, is led by a single official. The Court described the question it faced as whether Congress could restrict the President's power to remove the head of “an independent agency that wields significant executive power *and is run by a single individual*.” *Seila Law*, 140 S. Ct. at 2192 (emphasis added). The Court held that the CFPB's single-director structure violated constitutional principles of separation of powers; Congress could not restrict the President's authority to remove the Director of the agency at will. *Id.*

In *Seila Law*, the Court expressly declined the petitioner's invitation to overturn *Humphrey's Executor*, its precedent sustaining the constitutionality of the FTC's for-cause removal provisions. *Id.*⁴ It also declined to extend that precedent “to the novel context of an independent agency led by a single Director.” *Id.*; see *id.* at 2211 (“While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power.”). The Court distinguished *Humphrey's Executor* in substantial part on the ground that the CFPB is a single-director agency, whereas the FTC is a bipartisan, multimember body. The Court found that the CFPB's single-director structure “forecloses certain indirect methods of Presidential control.” *Id.* at 2204. A single agency head with a five-year term means some Presidents “may *never* appoint” a CFPB Director, nor will the President “have the opportunity to appoint any other leaders . . . who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.” *Id.* And because the CFPB's budget is supplied by the Federal Reserve Board, rather than through the appropriations process, “no . . . opportunity exists for the President to influence the CFPB Director,” by “recommend[ing] or veto[ing] spending bills that affect the operation of” the agency. *Id.* In short, the CFPB's structure violated the Constitution “by vesting significant governmental power in the hands of a single individual accountable to no

³ See 15 U.S.C. § 41 (Commissioners “shall be appointed for terms of seven years,” which expire on a staggered basis, and “may be removed by the President” only “for inefficiency, neglect of duty, or malfeasance in office”).

⁴ See Brief for the Petitioner at 31-34, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (No. 19-7), available at https://www.supremecourt.gov/DocketPDF/19/19-7/124949/20191209155012780_Seila%20Law%20brief%20for%20petitioner.pdf.

Responses to Petitions to Quash

one.” *Id.* at 2203. None of this characterizes the FTC, with its multi-member and bipartisan leadership, staggered terms, presidentially-designated Chairman, and congressionally appropriated funding. All these attributes give the FTC a degree of political and presidential accountability that the Court found was lacking in the CFPB.

Because the Supreme Court expressly refused to overrule *Humphrey’s Executor*, we decline to do so in considering this petition to quash a CID. Accordingly, we deny Beam’s request to quash the CID.

C. Beam Has Not Shown Undue Burden that Would Warrant Quashing the CID in Part and Deferring Compliance Entirely for Four Months.

1. The CID Is Not Duplicative of the FTC’s 2018 Request.

Next, Beam claims that certain of the CID specifications are duplicative of information requested in the 2018 access letter, arguing that “[i]t is unreasonable to ask the same questions twice.” Pet. 7-9. Beam asks the Commission to quash the CID “to the extent it is duplicative of the Inquiry Letter.” *Id.* at 11.

But the CID, on its face, is not duplicative of the 2018 access letter. The two seek information for different time periods and probe Beam’s conduct in connection with different versions of its mobile banking app. Thus, Beam’s assertion that it “must start from scratch to produce the same information over again” (Pet. at 8-9) rings hollow.

Beam faults staff for “not articul[at]ing . . . why the Inquiry Letter materials are stale or otherwise insufficient for purposes of the investigation.” *Id.* It is Beam, however, who bears the burden of substantiating its claim of unreasonableness. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) (“The burden of showing that the request is unreasonable is on the subpoenaed party.”). And it is Beam, not staff, who has the most information about its operations and documents and thus is in a position to explain whether, and how, its 2018 production suffices to answer the CID’s inquiries about its current activities. The Petition provides no such explanation, nor did Beam offer any such explanation to staff during the meet-and-confer process, despite staff’s invitations to do so.

Thus, we deny the request to quash the CID in part.

2. Beam Has Not Substantiated its Claims of Undue Burden.

Finally, Beam argues that the CID’s compliance deadlines are unduly burdensome in light of the [REDACTED] the company is experiencing due to the COVID-19 pandemic. The Petition identifies several factors complicating Beam’s task of responding to the CID: [REDACTED]

[REDACTED] . Pet. at 3, 9-10.

Responses to Petitions to Quash

The standard for assessing the burden imposed by agency investigative process is well established. Agency process is not unduly burdensome unless compliance “threatens to unduly disrupt or seriously hinder” the normal operations of the recipient’s business. *Texaco*, 555 F.2d at 882; *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). This test is “not easily met” because “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Texaco*, 555 F.2d at 882. Moreover, the recipient of process must make “a record . . . of the measure of [its] grievance rather than ask [the court] to assume it.” *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950). Beam has not made such a showing.

We do not doubt that the COVID-19 pandemic has created complications for Beam’s task of complying with the CID. But Beam fails to show that present circumstances preclude it from making any meaningful response to the CID until mid-December. For instance, Beam claims that [REDACTED] . Pet. at 9. But that argument is premised on “[c]omplying with the current CID deadlines.” *Id.* Beam fails to acknowledge the possibility of a rolling production (as FTC staff proposed) and thus provides no explanation as to why [REDACTED] renders infeasible incremental progress toward compliance with the CID in the near term.

Nor are we persuaded by Beam’s argument that [REDACTED] require deferring CID compliance entirely until the end of the year. While [REDACTED] unquestionably imposes complications, complications of this nature are rarely insurmountable in the year 2020. If there are reasons why this is not the case for Beam, the Petition does not present them.

Beam also points to [REDACTED], which it attributes to the COVID-19 pandemic, as another factor supporting its claim of undue burden. But other than a general assertion that [REDACTED] (Pet. at 3), Beam does not support its argument that [REDACTED] leave no room for a response to the CID. Beam does not contend, for example, that [REDACTED]. And, here again, Beam fails to address the possibility of incremental progress toward compliance through a rolling production. Absent a concrete showing by Beam that [REDACTED] to make any efforts toward compliance with the CID at present, we decline to put on hold entirely the Commission’s investigation into business practices that may be causing ongoing consumer injury.

Despite Beam’s failure to carry its burden, we will grant a modest extension of the CID return date to facilitate Beam’s compliance. Beam has now been in possession of the CID for two months and therefore has had an opportunity to study and develop a plan for responding. From the outset, Commission staff offered to work with Beam to develop a schedule for a rolling production that would accommodate Beam’s concerns while still providing the Commission the information it needs. If Beam doubts its ability to comply in full with the CID by the deadline as hereby extended, it may wish to take staff up on that offer.

Responses to Petitions to Quash

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Beam Financial, Inc.'s Petition to Quash or Modify Civil Investigative Demand be, and hereby is, **DENIED IN PART AND GRANTED IN PART**.

IT IS FURTHER ORDERED THAT Beam Financial, Inc., shall comply in full with the Commission's Civil Investigative Demand no later than 15 days from the date of this order, subject to any modifications as to scope or timing that Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

INTUIT INC.

FTC File No. 192 3119 – Decision, August 17, 2020

RESPONSE TO INTUIT INC.'S PETITION TO QUASH IN PART A CIVIL INVESTIGATIVE DEMAND
DATED MAY 18, 2020

**ORDER DENYING PETITION TO QUASH IN PART
CIVIL INVESTIGATIVE DEMAND****By PHILLIPS, Commissioner:**

Intuit Inc. petitions the Commission to quash in part a Civil Investigative Demand (CID) issued on May 18, 2020 (and served on Intuit on May 19, 2020), in connection with the Commission's investigation into whether Intuit has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*¹

Specifically, Intuit requests the elimination of two of the topics designated in the CID for corporate investigational hearing testimony. *Petition*, at 2-3. Intuit seeks elimination of IH Topic

¹ The Commission initiated the Intuit investigation pursuant to a resolution to determine whether unnamed parties have been or are engaged in deceptive or unfair Internet-related practices, in violation of Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 52. See *Resolution Directing Use of Compulsory Process in Non-Public Investigation of Unnamed Persons, Partnerships or Corporations Engaged in the Deceptive or Unfair Use of E-Mail, Metatags, Computer Code or Programs, or Deceptive or Unfair Practices Involving Internet-Related Goods or Services*, File No. 9923259 (Aug. 1, 2016). The investigation also seeks to determine whether Commission action to obtain equitable monetary relief for injury to consumers or others would be in the public interest. *Id.*

Responses to Petitions to Quash

12, which seeks information about the benefits that Intuit has sought, claimed, or received from offering a free tax filing product as part of the “Free File Program” administered by the Internal Revenue Service (IRS). *Id.* at 2. It also seeks elimination of IH Topic 16, which seeks testimony about Intuit’s responses to the interrogatories served on it in both the May 18, 2020 CID and a prior CID issued on July 1, 2019. *Id.* at 3. For the reasons set forth below, we deny Intuit’s petition.

I. Background

Intuit offers two products that provide consumers tax-filing services for free—to those individuals who meet certain eligibility requirements. *Petition*, at 3. The first product is Intuit’s “IRS Free File Program Delivered by TurboTax.” *Id.* at 3-5. That product is offered as a result of Intuit’s participation, along with other electronic tax preparation and filing companies, in an IRS program to deliver free online tax software to low and middle-income consumers. *Id.* at 1-2. Intuit offers its Free File product via freefile.intuit.com. The second free product is Intuit’s “TurboTax Free Edition.” *Petition*, at 5-6. Intuit offers that product via its primary website, turbotax.intuit.com.

In May 2019, the Commission initiated an investigation into whether Intuit had engaged, or was engaging, in violations of the FTC Act. *Petition*, at 7. On July 1, 2019, the Commission issued the first CID to Intuit, seeking the production of documents and responses to interrogatories. On May 18, 2020, the Commission issued a second CID to Intuit seeking further documents and responses to interrogatories and requiring Intuit to designate a corporate representative to testify in an investigational hearing (IH) set for July 14, 2020. The second CID was modified several times to accommodate Intuit’s concerns and schedule. The most recent modification, on July 8, 2020, affected, among other things, the scope of IH Topics 12 and 16—the subject of Intuit’s current petition. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated July 8, 2020).

As modified, IH Topic 12 concerns Intuit’s involvement in the IRS Free File program, specifically: (a) preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market; and (b) the tax deductions or other tax benefits that Intuit has sought, claimed, or received for offering its Free File product. *Id.* at 2.

As modified, IH Topic 16 concerns the “substance, meaning of, and factual basis for” a subset of Intuit’s responses to the interrogatories served on it in the July 1, 2019 CID (namely, Interrogatory No. 2(a), 3(a)-(b), 4(a), 5(a), 5(e)), and the May 18, 2020 CID (Interrogatory No. 1, 2, 4(a)-(e), 13, 21, 22, 25). *Id.* at 3.

On July 7, 2020—the deadline date for challenging IH Topics 12 and 16, *see Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 29, 2020), at 1—Intuit transmitted by email to the Commission’s Acting Secretary its current petition to quash. *See Letter from David Gringer to April Tabor* (dated July 7, 2020). Intuit requested that the Commission “afford [its cover] letter, the accompanying Petition, and any written order in response with confidential treatment pursuant to 16 C.F.R. § 4.9(c).” *Id.* at 1. Intuit did not submit with its initial transmission a redacted public version of the petition that it sought to be

Responses to Petitions to Quash

treated as confidential, as required by Rule 4.2(d)(4) of our Rules of Practice, 16 C.F.R. § 4.2(d)(4). The following day, July 8, pursuant to the Acting Secretary's notice of deficiency, Intuit submitted a redacted public version of its petition to quash.

II. Analysis

A. Timeliness of Intuit's Petition

On July 7, 2020, Intuit attempted to file its current petition. Intuit sought confidential treatment of the petition pursuant to 16 C.F.R. § 4.9.² Its attempted filing was rejected, however, because Intuit had failed to include a redacted version of the petition for public disclosure—as required by Rule 4.2 of our Rules of Practice. That rule provides that when a petition to quash is filed as confidential, “it will be rejected for filing pursuant to § 4.2(g), *and will not stay compliance* with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files * * * [a] redacted public version of the document that is clearly labeled ‘Public’.” 16 C.F.R. § 4.2(d)(4)(ii) (emphasis added).

Intuit attempted to cure this deficiency, by submitting a redacted public version, but it did so on July 8, the day after the deadline for filing had expired. Intuit's petition to quash is, therefore, procedurally untimely. *In the Matter of Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W.L. Gore & Associates, Inc.*, 151 F.T.C. 687, 689, 2011 FTC LEXIS 180, *4 (May 23, 2011).

Intuit's claim that its failure initially to include a redacted public version is justified by its request for confidential treatment of the entire petition, including any information that would identify the petitioner, *see Email from David Gringer to April Tabor* (dated July 8, 2020 at 9:26 AM), is contrary to our rules and precedent. Rule 4.2(d)(4) applies to “petitions labeled ‘confidential’ * * * [where the accompanying public versions] redact the identity of the petitioner or matter name, or lack an accompanying public redacted version.” *W.L. Gore*, 151 F.T.C. at 689, 2011 FTC LEXIS 180 at *5. Indeed, “the identity of the petitioner and the matter name * * * may not be redacted.” *Id.* n.6 (emphasis added).

Notwithstanding the untimeliness of Intuit's petition, the Commission, through the Acting Secretary, exercised its discretion to recognize documents filed on July 8th as timely. *See Email from April Tabor to David Gringer* (dated July 8, 2020 at 10:20 AM). For the reasons stated below, we conclude that it should be denied on the merits.

² Pursuant to authority delegated by the Commission, the Commission's Principal Deputy General Counsel addressed Intuit's request for confidential treatment in two separate letters, granting in part and denying in part Intuit's request for confidential treatment of the redacted material. *See Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 16, 2020); *Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 22, 2020).

Responses to Petitions to Quash

B. IH Topic 12**1. Relevance**

Intuit first challenges IH Topic 12 on relevance grounds. *Petition*, at 10-12. It asserts that, even as modified, IH Topic 12 “simply is not ‘reasonably relevant’ to the FTC’s investigation.” *Id.* at 11. According to Intuit, information about the benefits that Intuit may have sought, claimed or received from its participation in the IRS Free File program, including limiting governmental encroachment into its market, “say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products.” *Id.* Although Intuit is correct that the investigation, at its core, seeks to determine whether its advertising and marketing practices have been deceptive or unfair, Intuit’s conception of relevance to that investigation is unduly limited.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Supreme Court held that an FTC compulsory process demand for information or documents is permissible “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Id.* at 652. Courts have long confirmed, moreover, that an FTC investigation is lawful where the Commission seeks to learn whether there is *reason to believe* that the law has been violated and, if so, whether issuance of a complaint would be in the public interest. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (citing *Morton Salt Co.*, 338 U.S. at 642-43). The standard for the relevance of administrative compulsory process is, therefore, “broader and more relaxed” than would be in an adjudicatory discovery demand. *In the Matters of Civil Investigative Demand to Johnson & Johnson Dated August 19, 2019, and Subpoena Duces Tecum to Johnson & Johnson Dated August 19, 2019*, FTC File No. 191-0152, 2019 FTC LEXIS 95 (Oct. 18, 2019), at *7 (citing *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). Indeed, the Commission’s compulsory process need not be limited to information necessary to prove a specific charge; it can demand, instead, any documents or information “relevant to the investigation—the boundary of which may be defined quite generally” by the Commission. *Invention Submission*, 965 F.2d at 1090; *see Johnson & Johnson, supra*, 2019 FTC LEXIS 95, at *8.

IH Topic 12, as modified, easily meets those relaxed standards of relevance. Intuit’s participation in the IRS Free File program, as part of its efforts to prevent or limit the government’s “encroachment” into the online tax preparation market, is highly relevant, for example, to understanding the market relationship between Intuit’s participation in the IRS Free File Program, Intuit’s other free product, and Intuit’s paid tax preparation products. The more consumers that the IRS program draws away from, say, Intuit’s “TurboTax Free Edition,” the stronger are Intuit’s economic incentives to lure those consumers to its own products—whether free or not—by means of deceptive or unfair practices. To be sure, evidence of “intent” is not required for a deception or unfairness violation under the FTC Act. *See, e.g., FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968). But such evidence is undoubtedly

Responses to Petitions to Quash

“relevant to the proper scope of the remedial order” that the Commission may seek if its investigation results in the filing or issuance of a complaint against Intuit. *Chrysler Corp.*, 561 F.2d at 363. For example, such evidence would support a remedial order that Intuit affirmatively disclose the availability of its Free File product to its other customers who otherwise would be eligible for that program.

Likewise relevant is the information regarding Intuit’s tax benefits from participating in the IRS Free File program. In its discussions with the Commission staff, Intuit has raised two possible defenses to a potential Commission complaint that would implicate the tax benefits it may have received. First, Intuit has claimed that its participation in the IRS program is charitable in nature, and that the product that Intuit administers in that program—the IRS Free File Program Delivered by TurboTax—is not owned by Intuit. Any tax benefits that Intuit claims or receives from participating in that program is likely to shed light on that claim. Second, Intuit has invoked the doctrine of derivative sovereign immunity as a possible defense, which would require Intuit to establish—as a factual predicate for that doctrine—a valid contract between Intuit and the IRS, including mutual consideration. Any Intuit tax benefits are plainly relevant to the question whether such a contractual relationship in fact exists.

Intuit’s tax benefits, if any, are also relevant to whether Intuit’s conduct is unfair. An act or practice is unfair under the FTC Act if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n); *see, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010). The tax benefits that Intuit may have gained from participating in the IRS Free File program—while at the same time offering its other products, both free and paid—are relevant, in the unfairness analysis, to understanding the costs and countervailing benefits to consumers or to competition. They are also relevant to any remedy that the Commission may seek if a violation is proven. *See FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (“The potential costs of the proposed remedy on the parties and society in general are balanced against the benefits of avoiding injury to consumers.”).

2. The First Amendment

Intuit asserts that testifying on the issue of whether it has sought, claimed or received any tax benefits for participating in the IRS program would intrude on its First Amendment right against compelled disclosure of political activity. *Petition*, at 12-14. Specifically, it argues that that First Amendment privilege “extends to petitioning the government with regard to taxes and tax policy,” and that IH Topic 12 “creates precisely the type of chilling effect the First Amendment privilege is intended to protect.” *Id.* at 13. We are unconvinced that the testimony sought in the CID would in fact have the chilling effect that Intuit claims. Even if it does, moreover, the testimony is still permissible and the confidentiality safeguards in our statute and Rules of Practice are sufficient to ameliorate any such fears.

As Intuit acknowledges, the party invoking the First Amendment privilege against compelled testimony must first show that enforcing the testimonial demand would have the claimed chilling effect on that party’s First Amendment rights. *Petition*, at 12 (citing *Perry v.*

Responses to Petitions to Quash

Schwarzenegger, 591 F.3d 1126, 1140 (9th Cir. 2009)). Only if that *prima facie* burden is met will the party seeking the testimony be required to articulate a compelling governmental interest that is rationally related to the information that the testimony seeks, and show that the testimony is the least restrictive means of obtaining that information. *Id.* Notably, that “second step of the analysis is meant to make discovery that impacts First Amendment * * * rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it.” *Perry*, 591 F.3d at 1140.

Intuit’s petition does not satisfy those standards. Even assuming that the Commission’s seeking of information about Intuit’s tax benefits somehow implicates a government petitioning activity,³ Intuit has not presented any evidence that “the CID, if enforced, would burden Intuit’s exercise of that right.” *Petition*, at 13. Nor has it explained how testifying about the tax benefits of the IRS program would chill its future protected activities, including petitioning of the government for like benefits. The cases that Intuit cites to support its otherwise-naked chilling claim are inapposite. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), struck down a bar admission requirement that compelled the disclosure of membership in political parties. *AFL-CIO v. Fed. Election Comm’n*, 333 F.3d 168 (D.C. Cir. 2003), invalidated a regulation that compels the disclosure of a political campaign’s staff, volunteers, and election strategies. Neither case concerned petitioning the government for tax benefits. And both involved the compelled public disclosure of the claimants’ political memberships and associations. It hardly strains the imagination to see how such public disclosure would have a chilling effect on the claimants’ First Amendment political rights.

Here, Intuit has not identified any nexus between the disclosure of a for-profit business’s tax benefits, as part of a *non-public* government investigation, and that business’s willingness to seek future tax benefits. Nor can we detect any. Indeed, it seems to defy common sense that a for-profit business might forgo seeking some (presumably lawful) tax benefits merely out of fear that those benefits may one day be the subject of testimony in a government investigation. We conclude, therefore, that Intuit has failed to carry its *prima facie* burden of showing that testifying on IH Topic 12 would chill its First Amendment rights.

Moreover, as we discussed above, Intuit’s tax benefits information is highly relevant to the Commission’s investigation—specifically, to Intuit’s own purported defenses. Intuit cannot, on the one hand, claim that its participation in the IRS Free File program is purely charitable and derivatively immune while, on the other hand, refusing to supply the information (which only Intuit can supply) that would support or rebut those claims. *See, e.g., P. & B. Marina, Ltd. P’ship v. Logrande*, 136 F.R.D. 50, 61-62 (E.D.N.Y. 1991) (plaintiffs entitled to discovery of information bearing on whether petitioning activities were a sham in response to defendant’s raising the Noerr-Pennington doctrine as a defense). Thus, even if compelled testimony on IH Topic 12 were deemed to have some chilling effect, the testimony is still necessary, and thus permissible, because the information sought is highly relevant to the compelling government

³ The only case that Intuit cites, without discussion (*Petition*, at 13) for general support of that proposition—*Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 790 (6th Cir. 2007)—expressly declined to decide the issue. *Id.*

Responses to Petitions to Quash

interest in law enforcement, and it is the least restrictive means of obtaining that information. *Perry*, 591 F.3d at 1140. We also note that the FTC Act and our Rules of Practice provide Intuit with ample protections against the public disclosure of information obtained via compulsory process. *See, e.g.*, 15 U.S.C. §§ 46(f), 57b-2(b); 16 C.F.R. §§ 2.7(f)(3), 4.10(d)-(g). *See also Perry*, 591 F.3d at 1140 n.6 (“protective order limiting the dissemination of disclosed * * * information may mitigate the chilling effect and could weigh against a showing of [First Amendment] infringement.”).

C. IH Topic 16**1. Attorney-Client Privilege**

Intuit first challenges IH Topic 16 on privilege grounds. It claims that because its interrogatory responses were prepared with the assistance of counsel, providing testimony on the substance, meaning, and factual basis of those responses “would implicate privileged attorney-client communications made in the process of preparing those responses.” *Petition*, at 14. Intuit’s position is unusual: although interrogatory responses are often drafted with the assistance of counsel, “depositions typically provide an opportunity to further probe the facts elicited through interrogatories.” *English v. WMATA*, 323 F.R.D. 1, 26 (D.D.C. 2017); *see, e.g., FDIC v. Giancola*, No. 13-C-3230, 2015 WL 5559804, at *4 (N.D. Ill. Sept. 18, 2015); *FDIC v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *3 (N.D. Fla. Oct. 29, 2013).

At any rate, Intuit is mistaken. The attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Thus, “an objective fact is not privileged merely because it happened that * * * legal advice was ultimately sought about that fact.” *Intervet, Inc. v. Merial Ltd.*, 256 F.R.D. 229, 232 (D.D.C. 2009). Intuit, having provided responses to the Commission’s CID interrogatories, should reasonably expect to be queried about those responses. A corporate testimonial designee “must testify to both the facts within the knowledge of the business entity and the entity’s opinions and subjective beliefs * * * includ[ing] the entity’s interpretation of events and documents.” *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98-C-3952, 2000 WL 116082, *9 (N.D. Ill. Jan. 24, 2000).

Of course, to the extent that, during its corporate testimony, Intuit’s designee is asked a question that in fact elicits privileged information, Intuit’s counsel “may protect against the disclosure * * * by interposing appropriate objections and giving instructions on a question-by-question basis.” *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). But the mere existence of such a possibility is no reason to preclude all questioning concerning Intuit’s responses. *See United States v. Matsura*, No. 14-CR-388, 2015 WL 10912346, at *5 (S.D. Cal. July 10, 2015) (withholding privileged information, not quashing entire subpoena request, is proper recourse to address privilege concerns).

Intuit’s citation to *Smithkline Beecham*, *supra*, in support of its position, is misplaced. *See Petition*, at 14. The corporate deposition topic challenged in that case covered the entirety of Smithkline’s responses to interrogatories and requests for production, and Smithkline’s objection

Responses to Petitions to Quash

to it rested solely on burden, “because it would require having a witness study the vast amount of discovery pertaining to the case.” *Smithkline Beecham*, 2000 WL 116082, at *9. To be sure, the court—noting that “answering requests for production and interrogatories customarily is performed with the assistance of counsel”—stated that “the proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege.” *Id.* But, contrary to Intuit’s claim, the court did not strike the challenged topic on that basis. Instead, it found the topic notice “[i]n its present form, * * * overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information.” *Id.* at *10. Thus, we read that court’s sweeping statement about privilege as mere dicta. At any rate, to the extent that the decision is read (as Intuit apparently reads it) as holding that potential privilege concerns in corporate testimony about discovery responses justifies categorically striking down the entire inquiry—rather than dealing with privilege claims during the testimony on a question-by-question basis—we disagree with it as contrary to the weight of authority.

2. Overbreadth and Undue Burden

Finally, Intuit claims that IH Topic 16 is overbroad and unduly burdensome. *Petition*, at 15-16. It presses that claim even though the Commission staff already has agreed to reduce the number of interrogatory responses subject to corporate testimony—using Intuit’s own method of counting parts and subparts—from 211 interrogatories to 30. *Id.* at 15, 16. Intuit argues that, even as modified, IH Topic 16 “still lacks reasonable particularity because it does not identify with specificity the information sought,” and would be “requiring Intuit to prepare multiple corporate designees.” *Id.* at 16. We disagree.

Reasonable particularity “merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents.” *Nippo Corp./Int’l Bridge Corp. v. AMEC Earth & Environmental, Inc.*, No. 09-CV-0956, 2009 WL 4798150, at *3 (E.D. Pa. Dec. 11, 2009); *accord Inline Packaging, LLC v. Graphic Packaging Int’l, Inc.*, No. 15-CV-3183, 2018 WL 9919939, at *8 (D. Minn. Jan. 23, 2018). Intuit fails to point to any specific interrogatory where the language is so lacking in specificity as to make Intuit unable to prepare its corporate designee for testimony. Nor has our own review of the modified interrogatories revealed any such deficiency. For example, Intuit cites as burdensome testimony on “Intuit’s use of subject advertising keywords,” *Petition*, at 16, but the original interrogatory designated only 50 such keywords (out of thousands that Intuit has used), and even that number was later reduced to only 15. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 15, 2020), at 5.

Nor does Intuit’s complaint about having to prepare multiple corporate designees suffice to show undue burden. “Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). It is to be expected, therefore, that “[i]f a deponent is unable to testify about certain relevant areas of inquiry, the business entity must designate additional parties to satisfy a [corporate testimonial] notice.” *Smithkline Beecham*, 2000 WL 116082, at *8. Indeed, “courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco*, 555 F.2d at 882

Responses to Petitions to Quash

(citing cases). Intuit has not shown that its preparation of multiple designees would disrupt its normal business operations, especially as the Commission staff has been receptive to reasonably accommodating the logistical needs of such witnesses. Nor has Intuit shown that the cost of such preparation is too high “relative to the financial positions” of the company—“measured against the public interest of this investigation.” *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff’d*, 636 F.2d 781 (D.C. Cir. 1980).⁴

III. CONCLUSION

For the foregoing reasons, Intuit’s petition to quash is denied.

IT IS HEREBY ORDERED THAT Intuit Inc.’s Petition to Quash in Part May 18, 2020 Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Intuit shall comply in full with the Commission’s Civil Investigative Demand no later than Tuesday, September 8, 2020, at 9:00 a.m. (Pacific Time), or at such other date, time, and location as the Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

⁴ Intuit’s proposal that the Commission staff use the testimony of individual witnesses to obtain the information sought about its corporate interrogatory responses (*Petition*, at 16) is plainly inadequate: Only the testimony of Intuit’s corporate designee(s) would bind Intuit itself. *See* 16 C.F.R. § 2.7(h).