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 Commissioners[3]—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.

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

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.

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*.

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