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

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).

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

"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.*

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*.

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

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

(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).