

Without Burdening Legitimate Business Activity: Recent Proposals to Improve the FTC's Investigative Process and Transparency

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The Federal Trade Commission's mission is to "[p]rotect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity."¹ The last clause of the mission statement—*without burdening legitimate business activity*—is getting renewed attention of late.

Chairman Joseph Simons has engaged the agency in a period of self-reflection through thoughtful public hearings on whether FTC law, enforcement priorities, and policies should be adjusted in light of the broad-based changes to the economy.² One particular topic for examination is "whether the agency's investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct."³ Suggestions from public commenters have ranged from enhancing FTC Commissioner oversight to ensure the continued integrity of the investigatory process, to reducing investigatory burdens that disadvantage small companies.⁴ Important themes cited in submitted comments include enhanced agency transparency—in the investigatory and settlement negotiation processes and after a case has been closed⁵—as well as greater overall efficiency.⁶ Proponents of increased transparency have noted how such transparency would aid companies involved in the investigation process by providing

¹ See Fed. Trade Comm'n, *About the FTC*, <https://www.ftc.gov/about-ftc>.

² See Press Release, Fed. Trade Comm'n, *FTC Announces Hearings on Competition and Consumer Protection in the 21st Century* (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

³ See Notice of Hearings and Request for Comments, 83 Fed. Reg. 38,307, 38,310 (Aug. 6, 2018) (requesting public comment on "[w]hether the agency's investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct" as an issue of particular interest to the Commission).

⁴ See, e.g., ACT | The App Association, *Comments of ACT | The App Association to the Federal Trade Commission on Competition and Consumer Protection in the 21st Century*, at 2 (Question 11: "The agency's investigation, enforcement, and remedial processes") (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0022-155013.pdf; Computer & Comm'n's Indus. Ass'n, *Re: Competition and Consumer Protection in the 21st Century Hearings*, Project Number P181201, at 2 (Aug. 18, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0011-151068.pdf.

⁵ See, e.g., David L. Lawson et al., *AT&T Services Inc.*, *Comments of AT&T Services Inc. Response to Issue 11*, at 7–13 (Aug. 20, 2018) (filed by M. Sean Royall), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0016-155005.pdf; Pam Dixon, *World Privacy Forum*, *Comments of the World Privacy Forum to the Federal Trade Commission Regarding Competition and Consumer Protection in the 21st Century Hearings*, Project Number P181201, at 16 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0025-155098.pdf; Scott Blake Harris et al., *Entertainment Software Association*, *Comments of the Entertainment Software Association on Topic #11—The Federal Trade Commission's Investigation, Enforcement and Remedial Processes*, at 4–5 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0020-155012.pdf.

⁶ *Id.*

insight into the agency's practices.⁷ They also have explained that additional information, such as more facts about why an investigation was closed, would help other companies understand how to implement practices compliant with the FTC's expectations.⁸

Others in the Commission are also echoing the calls for greater agency efficiency. For example, FTC Commissioner Christine Wilson noted that, while civil investigative demands (CIDs) are central to the staff's ability to investigate, the agency should be sensitive to their costs and exercise its subpoena powers wisely.⁹ And, as the Office of General Counsel explained: "The FTC's ability to obtain information through subpoenas and civil investigative demands (CIDs) is critical to the task of investigating potential law violations. The FTC uses this authority deliberately and responsibly, avoiding unnecessary burdens on businesses and individuals and consistent with our obligations to enforce the law."¹⁰

This article will consider recent proposed efforts to improve FTC processes with the objective of reducing regulatory burden and enhancing efficiency in consumer protection matters. It will also provide tips on working effectively with agency staff, recognizing that efficiency is a two-way street.

Increased Transparency and Communication

In response to the FTC's request for public comments concerning the agency's investigation, enforcement, and remedial processes, many commenters asserted that the FTC would benefit from increasing transparency around investigations, arguing that transparency in the investigatory process would allow for companies to better understand the expectations of the Commission, prior to, during, and after an enforcement proceeding.¹¹ Specific proposals to improve transparency include (1) publishing data on CIDs; (2) providing additional business guidance; (3) issuing a monetary remedies policy statement; and (4) making assessment reports publicly available.

Publish Data on Civil Investigative Demands

Several of the comments argued that it would be useful to the public if the FTC published more data regarding consumer-protection related CIDs—specifically, how many CIDs are issued, pursuant to which resolutions, and how many remain open at the end of each year.¹² Commenters stated that providing more insight into the CID process, including how and why an investigation is initiated or closed, would help companies better understand the Commission's reasoning for its efforts, increasing both Congressional and consumer confidence in the agency. As it currently

"The FTC uses [its CID authority] deliberately and responsibly, avoiding unnecessary burdens on businesses and individuals and consistent with our obligations to enforce the law."

⁷ See, e.g., Lawson et al., *supra* note 5, at 7–9; Dixon, *supra* note 5, at 13; Harris et al., *supra* note 5, at 4–5.

⁸ *Id.*

⁹ Christine S. Wilson, FTC Commissioner, Remarks at the Federalist Society's Fireside Chat (Mar. 6, 2019), <https://fedsoc.org/events/fireside-chat-with-commissioner-christine-wilson-federal-trade-commission>; see also Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, Regulatory Review of Safeguards Rule, Matter No. P145407, at 1 (Mar. 5, 2019), https://www.ftc.gov/system/files/documents/public_statements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf (supporting the reduction of regulations and controlling compliance costs).

¹⁰ See Burke Kappler, *The FTC Takes Its Subpoenas and CIDs Seriously—And You Should, Too*, FED. TRADE COMM'N (Mar. 6, 2019), <https://loadtest.ftc.gov/news-events/blogs/business-blog/2019/03/ftc-takes-its-subpoenas-cids-seriously-you-should-too>.

¹¹ See, e.g., Lawson et al., *supra* note 5, at 13; Harris et al., *supra* note 5, at 4–5.

¹² See, e.g., ACT | The App Association, *supra* note 4, at 2.

stands, consumers or petitioners who submit complaints to the FTC rarely know the outcome of their efforts.¹³

The FTC has often noted to Congress its need for additional resources to more effectively carry out its authority under the FTC Act.¹⁴ Some commenters opined that increased transparency would allow Congress to better assess the FTC's use of resources.¹⁵ Such information would also provide Congress with confidence in knowing that the resources they allocate are being put to good use, and that the FTC would efficiently steward any additional resources it received.

Indeed, Chairman Simons and the Bureau of Competition recently launched a data project that tracks the duration of merger reviews and identifies causes of merger review delays to provide better information and accountability to the public.¹⁶ The data project tracks several merger review milestones including “when clearance is requested and obtained, when second requests issue, quick look submissions completed, important dates contained in timing agreements and when they trigger, dates of divestiture proposals, the certification of substantial compliances, and others.”¹⁷ Because merger review submissions cannot be publicly released due to HSR confidentiality requirements, the FTC intends to release aggregated data and analyze trends internally to improve accountability.¹⁸ A similar data tracking project could be developed within the Bureau of Consumer Protection.

Issue Additional Business Guidance

In addition to transparency in the CID process, commenters stated that the FTC should provide more industry guidance on emerging legal issues.¹⁹ With the vast majority of the FTC's enforcement actions (and, in areas like privacy and data security, all or virtually all enforcement actions) being resolved via settlement, rather than litigation, companies have to rely on consent decrees for guidance on how to best comply with FTC's expectations. Although these consent decrees can be helpful, their provisions usually reflect “fencing in” relief primarily applicable to a specific respondent rather than general Commission enforcement policy. More pointed guidance, especially as it applies to new media and technology, would help companies with their compliance efforts. According to one commenter:

When the Commission seeks to broaden its policy interpretations, or enforce preexisting policies in novel ways or in new areas, issuing some form of public guidance well prior to pursuing enforcement actions serves an important and valuable notice function, enabling responsible companies to take measure of their own practices and to make adjustments as needed to conform with the FTC's policy directives. This approach benefits not only companies subject to FTC oversight, but the Commission

¹³ See John Bergmayer, Comments of Public Knowledge, at 3 (Aug. 20, 2018), <https://www.publicknowledge.org/documents/public-knowledge-ftc-comments-on-competition-and-consumer-protection>; Computer & Commc'ns Indus. Ass'n, *supra* note 4, at 1.

¹⁴ See, e.g., Oversight of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 115th Cong. 1–2 (2018) (statement of Comm'r Rebecca Slaughter, FTC).

¹⁵ See ACT | The App Association, *supra* note 4, at 2.

¹⁶ D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues*, Remarks at GCR Live Antitrust in the Digital Economy, at 4–5 (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, e.g., Lawson et al., *supra* note 5, at 1–4 (suggesting that the Commission “use guidance as its primary tool for announcing new policy or enforcement positions”).

as well, because with relatively little expenditure of resources the Commission—through issuing guidance—can prompt voluntary changes in business practices. Subsequent enforcement actions could then be limited to firms that disregard the FTC’s public guidance.²⁰

Providing guidance is especially important at a time where the digital landscape is rapidly changing; guidance can provide companies quicker insight into how the FTC is thinking about a certain novel topic rather than companies having to wait for an enforcement action to inform an opinion of the agency’s position.²¹ The FTC has done commendable work in the area of social media and influencer marketing, for example, by issuing warning letters, updated Enforcement Guides, and a blog post explaining legal requirements.²² These guidance documents provide important transparency regarding the agency’s expectations.

In 2017, the FTC launched its Stick with Security initiative to provide companies with more guidance concerning the measures companies should take to secure data, which was based in part on lessons learned from investigations that staff closed without taking action.²³ While the FTC did not “disclose the identities of the targets of those matters unless there had been a public closing letter,” the agency issued the guidance believing “there is more we can do to explain for other companies the general principles that informed our thinking when we decided to close those investigations.”²⁴ The FTC could expand this initiative to highlight compliance principles stemming from closed investigations in other areas, such as advertising and financial practices.

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Provide Additional Guidance on “Reasonable” Data Security Practices

Commenters have suggested that the FTC provide additional guidance regarding “reasonable” data security practices.²⁵ In 2015, the agency released *Start with Security: A Guide for Businesses*, which provided data security best practices based on 50 of the agency’s data security settlements.²⁶ Specifically, the guidance provided ten suggestions for businesses, such as recommending that companies “control access to data sensibly” and “apply sound security practices when developing new products.”²⁷

Although the agency’s 2017 Stick with Security series provided more insight on reasonable data security practices from recent law enforcement actions and closed investigations,²⁸ the agency has not updated its guidance—for example, the 2012 Privacy Report²⁹—to reflect more recent

²⁰ See *id.* at 1.

²¹ *Id.*

²² See *id.* at 1–2.

²³ *Stick with Security: FTC to Provide Additional Insights on Reasonable Data Security Practices*, FED. TRADE COMM’N (July 21, 2017), <https://www.ftc.gov/news-events/press-releases/2017/07/stick-security-ftc-provide-additional-insights-reasonable-data>.

²⁴ Thomas B. Pahl, *Stick with Security: Insights into FTC Investigations*, FED. TRADE COMM’N (July 21, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/07/stick-security-insights-ftc-investigations>.

²⁵ Dixon, *supra* note 5, at 6.

²⁶ FED. TRADE COMM’N, *START WITH SECURITY: A GUIDE FOR BUSINESSES 1* (June 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>.

²⁷ *Id.*

²⁸ See, e.g., Thomas B. Pahl, *Start with Security—and Stick with It*, FED. TRADE COMM’N (July 28, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/07/start-security-stick-it>.

²⁹ FED. TRADE COMM’N, *PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE* (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326-privacyreport.pdf>.

data security enforcement or the increasingly complex online data landscape. Guidance in this area will help clarify the expectations for companies that collect and use consumer data. One commenter noted that clearer standards could be based on “FTC cases, industry best practices, NIST guidance, existing security audit knowledge, and other existing security tools.”³⁰

Additional guidance on the data security practices the FTC finds reasonable is especially important and timely in light of the Eleventh Circuit decision in *LabMD*³¹ striking the agency’s cease-and-desist order because it lacked sufficient clarity and precision to be enforceable. Given that the majority of FTC data security orders contain similar provisions, additional clarity would help define the type of data security practices the FTC considers reasonable.³²

Issue a Monetary Remedies Policy Statement

At present, the FTC’s methodology for calculating monetary remedies is not transparent. Companies involved in proceedings where the FTC seeks monetary remedies are left to guess at how the FTC approaches such calculations.

In 2003, the FTC issued a Policy Statement on Monetary Remedies in Competition Cases, outlining an analytical framework for the use of monetary remedies in federal court.³³ In 2012, the Commission rescinded the Statement believing it created “an overly restrictive view of the Commission’s options for equitable remedies.”³⁴ Instead, the Commission majority stated that the agency “will rely upon existing law, which provides sufficient guidance on the use of monetary equitable remedies,” and “will exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement.”³⁵ In the lone dissent, then-Commissioner Maureen Ohlhausen stated that the withdrawal ran “counter to the goal of transparency, which is an important factor in ensuring ongoing support for the agency’s mission and activities. In essence, we are moving from clear guidance on disgorgement to virtually no guidance on this important policy issue.”³⁶

³⁰ DIXON, *supra* note 5, at 6.

³¹ *LabMD, Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018).

³² Commenters also asked the agency to define in more detail what constitutes an unfair practice. Dixon, *supra* note 5, at 5 (“If the Commission were to use its existing authority to define in more detail what constitutes unfairness, it would go a long way to establish clearer standards for companies and produce better results for consumers. The specifics in the consent decrees in these cases do not yet accomplish these objectives.”). One commenter also advocated for the codification of the unfairness standard. *See* Berin Szóka, Comments of Tech Freedom Response to Issue 11, 16 app. at i (2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0024-155097.pdf.

³³ Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003), https://www.ftc.gov/system/files/documents/public_statements/410451/030804policystatementequitable.pdf.

³⁴ *See* Statement of the Commission, Withdrawal of the Commission’s Policy Statement on Monetary Remedies in Competition Cases, 1 (July 31, 2012), https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf.

³⁵ *Id.*

³⁶ *See* Statement of Maureen K. Ohlhausen, Dissenting from the Commission’s Decision to Withdraw Its Policy Statement on Monetary Remedies in Competition Cases 2 (July 31, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf; *see also* Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright, *FTC v. Cephalon, Inc.* 2 (May 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/645501/150528cephalonohlhausenwright1.pdf (noting that the withdrawal of the policy statement leaves firms “with no meaningful guidance on when they will be forced to disgorge their profits”).

On the consumer protection side, the clarity fares no better. Courts have questioned the FTC's efforts to calculate damages,³⁷ highlighting the need for additional guidance on how the agency calculates monetary remedies. Commenters have noted that the Commission has not provided sufficient guidance on whether equitable monetary relief should consider the value consumers received from the product or service at issue and whether sales to consumers who were not affected by the challenged conduct should be included, among other questions.³⁸

The ABA Antitrust Law Section has likewise called on the FTC to issue a policy statement setting forth the theories on which the agency seeks monetary relief.³⁹ Such a statement could provide greater clarity on how relief is tethered to the alleged violations of law and consumer harms. This guidance would provide the FTC with a standard baseline, while giving companies more assurance of the FTC's process. A monetary remedies policy statement can be a central output of the Remedies Task Force recently created by Chairman Simons.

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Make Assessment Reports Publicly Available

Consent decree compliance has been a particularly relevant point of discussion during the FTC's recent Congressional hearings, specifically concerning privacy and data security matters. Commenters have proposed that the FTC make audit reports of companies under consent decrees publicly available.⁴⁰ Audit reports, they argue, will not only provide another avenue of accountability for the FTC in its enforcement efforts, they also will hold companies under consent decrees accountable for their actions, potentially avoiding repetition of past wrongs.⁴¹

As commenters noted, audit reports are available via Freedom of Information Act requests but they are often heavily redacted, preventing companies and consumers from gaining information about a company's specific efforts.⁴² The challenge here would be balancing the public interest in holding companies accountable with the legitimate confidentiality concerns of companies reporting compliance. Too much disclosure would almost certainly create a disincentive for companies to report their compliance activities fully and completely to the FTC's Division of Enforcement.

Adopt Policies to Make the CID Process Less Burdensome

Several commenters asked the FTC to continue CID process reform.⁴³ In April 2017, Acting Chairman Ohlhausen created Working Groups on Agency Reform and Efficiency to improve processes and focus resources.⁴⁴ The groups were charged with considering factors intended to

³⁷ See, e.g., *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 8379308, at *2–9 (W.D. Wash. Nov. 10, 2016) (finding the FTC's calculations of monetary relief to be too high and ordering a notice and claims redress procedure).

³⁸ Lawson et al., *supra* note 5, at 10–11.

³⁹ ABA SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT, at 22 (Jan. 2017), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf. The Antitrust Law Section also recommended the FTC consider issuing an Informational Injury Policy Statement. ABA ANTITRUST LAW SECTION, SUPPLEMENTAL COMMENTS OF THE ANTITRUST LAW SECTION FOLLOWING THE FEDERAL TRADE COMMISSION HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY, at 26 (June 27, 2019), <https://www.regulations.gov/document?D=FTC-2019-0032-0010>. Commenters also called on the agency to provide more clarity on its “reason to believe” standard. See, e.g., Szóka, *supra* note 32.

⁴⁰ See Dixon, *supra* note 5, at 16.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See, e.g., Lawson et al., *supra* note 5, at 5–7; Szóka, *supra* note 32, at 3–6.

⁴⁴ *Process Reform Initiatives Are Already Underway at the Federal Trade Commission*, FED. TRADE COMM’N (Apr. 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade>.

improve efficiency and reduce regulatory burden. In creating the groups, Ohlhausen noted that it was the Agency's "duty" to carry out its mission "in the most effective and efficient way possible."⁴⁵

Later that year, the Commission announced further reforms to address CIDs in consumer protection matters to:

1. Provide plain language descriptions of the CID process and develop business education materials to help small businesses understand how to comply;
2. Add more detailed descriptions of the scope and purpose of investigations to give companies a greater understanding of the information the agency seeks;
3. Limit the relevant time periods to minimize undue burden on companies;
4. Reduce the length and complexity of CID instructions for providing electronically stored data; and
5. Increase response times for CIDs to improve the quality and timeliness of compliance by recipients, where appropriate.⁴⁶

Establishing a

reasonable relevant

time period a CID will

cover will allow for

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The agency also committed to adhere to its stated practice of communicating with investigation targets concerning the status of investigations at least every six months after they comply with a CID.⁴⁷

Despite these reform efforts, commenters asserted that the CID process is often over-inclusive, requiring immense company resources to develop a response and burdening the FTC with more information than is helpful or likely necessary.⁴⁸ This process is especially burdensome on small businesses, which often do not have the resources to engage outside counsel or the internal resources necessary to comply with FTC requests.⁴⁹

Tailoring FTC CID Requests

Commenters stated that the FTC CID process should be more tailored to the potential harms the FTC has identified, which would make it easier for companies to comply and focus the FTC's limited resources on efforts that will actually produce targeted investigative outcomes.⁵⁰ The FTC should also limit its CID requests to those individuals who are most likely to be involved in any alleged wrongdoing and to information that is directly implicated in the potential harms, rather than seeking "all documents" that "refer or relate" to a certain issue.⁵¹

Setting a Benchmark for the Time Period for CID Requests

Commenters also have asserted that FTC CIDs seek information for a longer time period than is necessary to properly determine whether wrongdoing has occurred.⁵² Establishing a reasonable

⁴⁵ *Acting FTC Chairman Ohlhausen Announces Internal Process Reforms: Reducing Burdens and Improving Transparency in Agency Investigations*, FED. TRADE COMM'N (July 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/07/acting-ftc-chairman-ohlhausen-announces-internal-process-reforms>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Lawson et al., *supra* note 5, at 7.

⁴⁹ ACT | The App Association, *supra* note 4, at 2.

⁵⁰ Lawson et al., *supra* note 5, at 6–7.

⁵¹ *Id.*

⁵² *Id.*

relevant time period will allow companies to be more targeted in their responses, giving the FTC a better understanding of the exact issues it is looking to address.

Part of this effort also involves setting reasonable presumptive time periods. As one commenter noted, the FTC's Model Second Request for antitrust merger investigations currently incorporates a default two- or three-year period, depending on the circumstances.⁵³ The FTC, in 2017, announced a similar three-year period for consumer protection CIDs.⁵⁴ Taking further steps to emulate the Second Request presumptive two- or three-year period would be welcome. If an investigation likely requires information for a longer time period, the FTC could extend that period as necessary. Commenters also asked the Commission to increase response times "where the agency has requested a large volume of materials and the respondent is producing materials on a rolling basis."⁵⁵

Limiting Privilege Log Requirements

Commenters stated that the FTC should adopt a policy against requiring respondents to produce a full by-document privilege log, especially when an investigation does not have a direct connection to information that is likely to be privileged.⁵⁶ Compiling privilege logs can be a burden, some with limited usefulness to the FTC if the information provided is not pertinent to the agency's investigation.

Tips for Efficient Investigations and Results

Though several commenters have asked for agency investigative and transparency reforms, improved efficiency depends not only on the agency but on the parties' cooperation with agency officials. If parties drag their feet in responding to information requests and submitting timely white papers, agency investigations will be slower. The following lists a few tips on working with the FTC staff efficiently and effectively.

- **Be Responsive and Diligent.** If you receive a CID, do not sit on your hands until the deadline is looming. Reach out within your company right away to ascertain the types and quantities of documents at issue and to drill down on the facts. According to Chairman Simons:

A poor practice is not providing the staff information or access to documents in a timely manner—in other words, jamming the staff. This goes along with creating an atmosphere of distrust. . . . Meet with the staff early and be diligent in responding to their concerns. When the staff raises a concern with you, address it. Ignoring it is not likely to make the concern go away.⁵⁷

Also, diligently build in time to fully inform staff, management, and the Commissioners. Submit white papers at least a week before your meeting(s). This is especially true at the Commission level. Often times, Commissioners receive white papers within 24 hours of meetings, providing little time to analyze the issues from the respondents' perspective.

⁵³ *Id.* at 6.

⁵⁴ Scott Shaffer, *FTC Reforms Aim for More User-Friendly Investigations*, ADVERTISING LAW BLOG (Dec. 11, 2017), <https://www.olshan.com/blogs-Advertising-Law-Blog,ftc-reforms-aim-for-more-user-friendly>.

⁵⁵ Lawson et al., *supra* note 5, at 6.

⁵⁶ *Id.* at 6–7.

⁵⁷ Joseph Simons & Svetlana Gans, *Interview with Joseph Simons, Chairman, Federal Trade Commission* 9, ANTITRUST SOURCE (Feb. 2019), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/at-source-february2019/feb19_simons_intrvw_2_18f.pdf.

- ***Extensions for Responding to CIDs Are Often Granted.*** It is a good idea to come to the meet and confer with a proposal for a rolling production and why the deadlines you propose are reasonable. Also, providing staff with at least some of the information on the CID return date demonstrates good faith.
- ***Be Prepared for Common Questions.*** Be prepared to discuss the organization of the company, location of relevant documents, and principal custodians. Also, be prepared to identify custodians who should be excluded, and explain why.
- ***Be Knowledgeable About Your Company Data.*** Take full advantage of the required meet-and-confer process by learning about the type and scope of responsive data that your company possesses. Come to the meet and confer prepared to discuss the substance of the case. Know how and where your company documents are stored, including electronic data. This is your opportunity to educate the staff about the information that your company possesses to potentially narrow the scope of the information request.
- ***Be Respectful of the Process.*** Do not skip over the agency staff directly to their Division management, Bureau management, an individual Commissioner, or the Chairman. The first question you will receive will be, “What did Staff say?” Staff is the first-line decision-maker in the process—whether it is on a simple matter such as a production extension, or on a more complicated one such as the final terms of a settlement agreement. As Commissioner Wilson recently stated, “Chain of command matters and generally works.”⁵⁸
- ***Don’t Raise Novel Issues with Management.*** In a similar vein, don’t “save” all of your best (or novel) arguments for management. According to Chairman Simons:

Failing to make all your arguments to the staff, and then running to the Bureau Director to try to get the investigation closed when he is hearing your arguments for the first time, is a bad idea. The Bureau Director will have no idea what the staff thinks of those arguments because the staff hasn’t heard them before either. This does happen, and it creates a big mess. It’s the worst when you get to the Bureau Director’s meeting, and the staff is completely uninformed, they don’t have your documents, they haven’t heard your arguments, and they’ve been unable to test them.⁵⁹

- ***Be Respectful of Staff and Management (Including Commissioners).*** One would think this is common sense, but there have been several instances where company representatives disrespected staff, management, and even Commissioners at meetings. Being condescending never pays off.

The Bureau of Competition recently issued several practice tips that are equally applicable to working effectively with the Bureau of Consumer Protection. One blog post provided key tips on effective written advocacy that include clarity, brevity, and timeliness.⁶⁰ Another blog post focused on the importance of not misrepresenting key facts of your case:

We welcome zealous representation of clients. We expect that counsel practicing before the Commission will “play hard” on behalf of their clients. But Commission rules require fair play, so that Commission decisions are made on the basis of sound evidence. It is better to acknowledge and

⁵⁸ See Wilson, *supra* note 9.

⁵⁹ See *supra* note 57.

⁶⁰ See Daniel Francis, Bureau of Competition, *Persuading on Paper: Written Advocacy to the FTC’s Bureau of Competition*, FED. TRADE COMM’N (July 23, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/07/persuading-paper-written-advocacy-ftcs-bureau>.

address difficult facts, or to concede that your information may not be perfect, than to conceal or misrepresent the facts or overstate your knowledge.⁶¹

An additional blog post focused the importance of companies taking their compliance reports seriously.⁶² In sum, working effectively with agency staff boils down to treating people as you want to be treated in return.

Conclusion

The FTC's mission statement envisions a balancing between protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices while, at the same time, taking steps to ensure that the regulatory burden does not bog down legitimate business activity. An investigation, by its definition, predates any determination of wrongdoing and should be undertaken in the most efficient manner possible. To its credit, the Commission is well-aware of this balancing requirement, as is most apparent from agency statements. This ongoing assessment should continue and efforts should be made to act on credible recommendations intended to improve the process. Parties can also do their part to make agency investigations more efficient, such as by diligently producing documents and being responsive to agency staff. ●

⁶¹ Bruce Hoffman & Heather M. Johnson, *Joining the Issues on the High Road*, FED. TRADE COMM'N (May 13, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/joining-issues-high-road>.

⁶² Roberta Baruch & Bruce Hoffman, *Compliance Reports: Reinforcing a Commitment to Effective Orders*, FED. TRADE COMM'N (Mar. 11, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/compliance-reports-reinforcing-commitment-effective>.