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CLIENT ALERT

FTC Finalizes Changes to Rules Governing Investigatory Procedures, Primarily to Address Issues Regarding Electronically Stored Information

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On September 27, 2012, the Federal Trade Commission published final revisions to the Commission's Rules of Practice governing its investigatory process (16 CFR Part 2) and attorney discipline (16 CFR Part 4). Spurred in large part by the challenges posed by discovery of electronically stored information, the Commission explained that the final rules will "update and improve the Commission's Part 2 investigation process by accounting for and incorporating modern discovery methods, facilitating the enforcement of Commission compulsory process, and generally increasing efficiency and cooperation." After the Commission published its proposed revisions on January 23, 2012, a number of individuals and organizations, including Crowell & Moring, submitted public comments regarding the FTC's proposed amendments. While the Commission adopted the bulk of the proposed rules changes without modification, it agreed that "some of the proposed rules can be modified to better reduce the burdens of the Part 2 process without sacrificing the quality of the investigation." Accordingly, the Commission's modifications to the proposed rules include (1) a revision of the privilege log specifications to decrease the burden on respondents, while still accounting for staff's need to effectively evaluate privilege claims; (2) extending the deadline for the first meet and confer to decrease the burden on recipients of process and their counsel; and (3) implementing a "safety valve" provision allowing parties showing good cause to file a petition to limit or quash before any meet and confer has taken place.

Revisions to Proposed Rules Based on Public Comments

The original proposed amendments required additional detailed and specific information for withheld privileged material to be provided on a privilege log, which must be attested by the lead or supervising attorney responsible for asserting the privilege claims [Rule 2.11(a)]. This amendment largely was adopted as proposed, but the staff responded to certain concerns raised by commenters in the final rule by permitting respondents to (1) append a legend to the log enabling them to more conveniently identify the titles, addresses, and affiliations of authors, recipients, and persons copied on privileged material; (2) more conveniently identify authors or recipients acting in their capacity as attorneys by identifying them with an asterisk on a privilege log; and (3) forego providing the number of pages or bytes of a withheld document, and instead provide document control numbers.

Regarding the "meet and confer" process, the proposed rule would have required parties to "meet and confer" with FTC staff within ten days after receiving compulsory process to "address and attempt to resolve all issues" relating to document production and the assertion of privilege, and limiting consideration of petitions to quash to issues raised during such "meet and confer" sessions [Rule 2.7(k)]. In response to concerns raised by commenters, the final rule extends the timeline for the initial "meet and confer" to 14 days and also provides that the deadline for the first conference may be further extended to up to 30 days. In addition, the final rules set forth a so-called "safety valve" provision allowing parties showing good cause to file a petition to limit or quash before any "meet and confer" has taken place. Whereas the proposed rule stated that the "Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and

will consider only issues raised during the meet and confer process," the final amendment allows for an exception to this requirement upon a showing of "extraordinary circumstances."

While the Commission declined to modify the proposed rule permitting the Commission to require, through compulsory process, the production of "electronic media" for "inspection, copying, testing, or sampling" [Rule 2.7(i)], it acknowledged certain concerns and suggested methods for minimizing the risks and burdens posed by the final rule. For example, it explained that any testing method employed by the Commission would be specifically tailored to the needs of the particular investigation, and bounded by the nature and scope of the investigation. This acknowledgement should help respondents to negotiate the scope of initial requests that expose the respondent to undue risk and burden. Further, the Commission acknowledged concern about protecting privileged material in the course of such inspection, copying, testing and sampling, and suggested that parties raise such concerns with staff during meet and confer sessions and discuss whether methods may be employed to allay any burden attendant to the production of privileged material, such as implementation of independent "taint teams" to segregate privileged material obtained under this rule in a manner that is duly respectful of its protected status. Finally, the Commission noted that a respondent finding such means ultimately unavailing can petition to limit or quash compulsory process.

Summary of Final Rules Amendments

Some additional highlights from the proposed changes that were adopted in the final rule that specifically focus on the production of ESI include:

- Emphasizing the importance of cooperation, noting that the "revision was meant to more accurately account for the complexity and scope of modern discovery practices" [Rule 2.4];
- Conditioning extensions of compliance deadlines upon a demonstration of continuing progress toward compliance [Rule 2.7(l)];
- Incorporating a standard addressing waiver for inadvertently produced privileged material, including subject matter waiver, similar to Federal Rule of Evidence 502 [Rule 2.11(d)]; and
- Limiting a party's continuing duty to preserve documents to one year after receiving the last written communication from the Commission or staff [Rule 2.14(c)].

Additional provisions adopted in the final rule, of note to FTC practitioners, include:

- Codifying "longstanding agency policy and practice" by expressly providing that the staff may at times disclose the existence of a non-public investigation or identity of respondent to potential witnesses, informants, or other third parties [Rule 2.6];
- Prohibiting counsel from engaging in "obstructionist tactics" during depositions and hearings, including consulting with a witness on any issue other than privilege while a question is pending [Rule 2.9(b)];
- Eliminating the two-step process for petitions to quash by having the Commission rule on such petitions in the first instance within 30 days [Rule 2.10]; and
- Delegating to the General Counsel the authority to initiate enforcement proceedings for noncompliance with Hart-Scott-Rodino second requests (under 15 U.S.C. §18(g)(2)) or Commission orders requiring access (under 15 U.S.C. §49) – without a formal recommendation by staff and vote by the Commission [Rule 2.13].

Finally, the Commission adopted amendments to Part 4 of its Rules governing attorneys practicing before the Commission to provide for disciplinary action where an attorney engages in conduct deemed "obstructionist, contemptuous, or unprofessional," or knowingly or recklessly provides false or misleading information to the Commission or its staff. The amendments provide a new framework for assessing attorney misconduct, and specifically note that an attorney may be held responsible for another attorney's violations "if the attorney orders, or with knowledge of the specific conduct, ratifies the conduct" or if a "supervisory attorney knew of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action." Further, the adopted amendments allow the Commission to issue an order to show cause before issuance of an attorney reprimand in all cases, and to provide an opportunity for a hearing prior to imposition of any sanction where there are disputed issues of material fact to be resolved. [Rule 4.1]

The rule revisions will take effect on November 9, 2012 and will apply to all investigations, unless the Commission or certain Commission officials determine, with respect to a pending investigation, that the application of an amended rule would not be feasible or would create an injustice.

Meeting with FTC Staff Regarding E-Discovery Issues

In addition, on September 27, 2012, Crowell & Moring lawyers were invited to speak at a half-day workshop with FTC staff members to discuss a broad range of e-discovery issues. The meeting was a rare and valuable opportunity to describe the challenges faced by companies that receive discovery demands from the agency, and to engage in dialogue with FTC staff regarding the obstacles they face in dealing with producing parties. We hope that this interaction not only facilitated understanding about the challenges for parties on each side of the negotiating table, but also inspired creative solutions to address those issues.

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Click here for a copy of the final rules, along with a detailed summary of changes. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1 202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com