

CLIENT ALERT

Proposed FTC Final Interim Rules Regarding Adjudicatory Proceedings

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On January 13, 2009, the FTC issued interim final rules amending Parts 3 and 4 of its Rules of Practice for Adjudicative Proceedings (16 C.F.R. Parts 3 and 4) (FTC Rules). The Rules were drafted to improve the efficiency of Part 3 proceedings, and, among other things, address the discovery of electronically stored information (ESI). The rules pertaining to ESI closely mirror the Federal Rules of Civil Procedure (Federal Rules) that went into effect on December 1, 2006. Although these are agency rules of practice, the FTC will likely seek guidance from the Federal Rules, the Committee Notes, and the evolving case law interpreting the Federal Rules. Key provisions of the FTC Rules include:

- Requiring the parties to identify the types and locations of ESI in their initial disclosures;
- Requiring the ALJ to hold an early scheduling conference that includes a discussion of ESI to be incorporated into a discovery plan;
- Requiring the parties to discuss ESI at a meet and confer that must take place within five days of the answer;
- Establishing a process for determining whether information that is "not reasonably accessible" due to undue burden or cost must be produced; and
- Requiring parties to specify the form of production for ESI, or in the alternative produce ESI in a form in which it is "ordinarily maintained or reasonably usable."

The FTC Rules, however, diverge from the Federal Rules with respect to inadvertent waiver of privilege. The Federal Rules provide a procedural mechanism for the return of inadvertently produced privileged information, leaving the substantive issue of waiver to the courts. By contrast, the proposed FTC Rules state that inadvertent production of privileged information will not waive privilege if the ALJ determines that the holder of the claim made reasonable efforts to protect the privilege. However, pursuant to new Federal Rule of Evidence (FRE) 502 the courts now have a uniform standard for determining waiver of inadvertently produced privileged information that also turns on the reasonable efforts of the producing party. Thus, while the mechanism by which a waiver determination differs under the Federal and FTC Rules, the analysis of waiver appears to be the same. The goal of the proposed FTC Rule on inadvertent waiver, similar to the goal of FRE 502, is to reduce the cost of privilege review. However, it remains to be seen whether either of these rules will result in significant cost savings or changes in the way that parties review for privilege.

Parties should be aware of their obligations under these new FTC Rules and plan accordingly. Although FTC adjudicatory proceedings have been somewhat rare, the Whole Foods decision suggests that such proceedings may increase in the future. Also, the fact that the Commission focused on ESI issues in the revised rules is consistent with the agency's heightened awareness and requirements for the production of ESI in all types of matters before the FTC. The agency has invested significant resources in technology and human capital to effectively deal with large-scale productions of ESI, which are not uncommon in merger and other antitrust investigations. Parties appearing before the FTC in any capacity should expect and be prepared to address ESI issues early and comprehensively.

The FTC Rules were originally published in the Federal Register on October 7, 2008. The original thirty-day comment period garnered eight comments from seven individuals and entities, although no comments were submitted on the revisions related to ESI. The final interim Rules are in effect as of January 13, 2009 and comments must be received on or before February 12, 2009. Additional information can be found at www.ftc.gov.

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