CLIENT ALERT

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

Jan.27.2012

On January 13, 2012, the Federal Trade Commission announced a number of proposed changes to Parts 2 and 4 of the Commission's Rules of Practice governing its investigatory process, "[e]specially in response to growing reliance upon and use of electronic media in document discovery." Given the challenges posed by the routine discovery of large, non-uniform, broadly dispersed volumes of electronically stored information ("ESI"), the Commission expressed its interest in making its "procedures more efficient and less burdensome for all parties." It claims the proposed changes will "expedite investigatory processes" and "keep pace with technology."

In many ways, the recognized need for reform of the Commission's investigatory process is likely welcomed by lawyers and parties involved in Commission investigations. For example, some may argue that the Commission historically has been hesitant to recognize the effectiveness and efficiencies that can result from advanced technologies used in modern e-discovery. The introduction to the proposed Rules, however, states that "searches, identification, and collection all require special skills and, if done properly, may utilize one or more search tools such as advanced key word searches, Boolean connectors, Bayesian logic, concept searches, predictive coding, and other advanced analytics." Nevertheless, the proposed Rules create additional requirements with which practitioners and parties before the Commission should familiarize themselves. Some of these may impose substantial risk and burdens.

Some highlights from the proposed changes specifically focused on the production of ESI include:

- Emphasizing the importance of cooperation, citing The Sedona Conference's Cooperation Proclamation, and noting that "the Commission expects all parties to engage in meaningful discussions with staff . . . in light of the inherent value of genuinely cooperative discovery" [Rule 2.4];
- Requiring parties to "meet and confer" with 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)];
- Permitting the Commission to require, through compulsory process, the production of "electronic media" for "inspection, copying, testing, or sampling" [Rule 2.7(i)];
- Conditioning extensions of compliance deadlines upon on a demonstration of continuing progress toward compliance [Rule 2.7(l)];
- Requiring additional detailed and specific information for privileged material withheld 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)];
- 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 proposed Rule amendments, 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 proposes to amend 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 a supervising attorney may be held responsible for another attorney's violations "if he or she orders or ratifies the other attorney's misconduct, or has managerial authority over the attorney." Further, the proposed amendments would allow the Commission to issue a public reprimand without a formal disciplinary proceeding. [Rule 4.1]

* * *

The proposed rule amendments are subject to comment until March 23, 2012.

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.
Phone: +1 202.624.2877
Email: jthomas@crowell.com