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- <u>ANALYSIS</u>

Companies Pushing Back Against FTC's Voluminous Records Requests

Total Wine & More argues the FTC has gone way overboard with document requests for the agency's probe of Southern Glazer's Wine and Spirits, one of its suppliers. Firms targeted or on the periphery of other inquiries also are complaining.



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Chris O'Malley

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What You Need to Know

- Seven companies have pushed back against the FTC's civil investigative demands over the last 12 months, compared with two in the same period a year earlier.
- The complaints have come from both targets of investigations and those on the periphery.
- The FTC declined to comment to Law.com but characterizes its requests as reasonable and related to inquiries.

A growing number of companies are blasting the Federal Trade Commission for going overboard with records requests related to its investigations.

The companies, ranging from the liquor store giant Total Wine & More to a chain of Chicago auto dealerships, say the requests under the Biden administration's FTC are far beyond the norm and overly burdensome. The complaints are coming from both targets of probes and nonparties dragged into inquiries.

Seven companies have pushed back against the FTC's civil investigative demands over the last 12 months, compared with just two in the same period a year earlier, according to FTC records.

Among them is Total Wine parent Retail Services & Systems, which was told by FTC staff it is not the target of an investigation.

However, in February the Bethesda, Maryland-based company received a <u>CID</u> related to the commission's investigation of distributor Southern Glazer's Wine and Spirits. The FTC is looking for possible price-discrimination violations in the beverage industry.

Among the eight pages of requests sent to Total Wine were 19 categories of questions, including nearly 100 subparts, seeking what the company said is sensitive and confidential information about "almost the entirety" of Total Wine's business over a five-year period.

The FTC's deadline from the time the legal department received the CID was only 28 days.

"The FTC has effectively asked TWM to turn over all data and documents in its possession, regardless of whether such data or documents have any connection to Southern," Stephen Weissman, a Gibson Dunn & Crutcher partner representing Total Wine, wrote in an April 7 petition to quash the CID following unsuccessful efforts to obtain a deadline extension.

"TWM's business activity unrelated to Southern has no relevance to an administrative investigation into Southern, and (FTC) staff has failed to offer any explanation otherwise," Weissman added.

These include the 27-state chain's gross and net profits, operating margins and business tactics.

"Simply put, an administrative investigation into a target company does not give the agency free rein to obtain whatever it wants from innocent third parties who transact business with the target company, nor does it reasonably permit an agency intrusion into business transactions with unrelated entities," Weissman wrote.

Neither Weissman nor TWM responded to requests for comment. The FTC declined to comment beyond what it has said in its CID-related correspondence.

The Total Wine request still appears to be pending on the FTC's website. The company told the commission it will continue to provide information, including a 31-page letter it sent the FTC in April related to the sale of more than 18,000 products.

TWM's brush with the FTC may be emblematic of what many other companies will face going forward as the Biden administration continues aggressive antitrust regulation.

The FTC is pursuing its Southern Glazer's Wine and Spirits probe under the Robinson-Patman Act, a Depression-era law meant to protect mom-and-pop stores from price discrimination. Lawyers say the FTC is most likely going to use RPA to pursue food and beverage companies, along with pharmaceutical firms that offer discounts to the largest retailers.

"I've been saying for a long time that Robinson-Patman has lain dormant for too long. It's just so easy to prove a prima facia case" relative to other antitrust approaches, said Christopher Finnerty, a partner in the Boston office of K&L Gates. "I think there is a heightened awareness that the Robinson-Patman Act is the soft underbelly and easier to attack."

Like them or not, CIDs are certainly a way for regulators to collect information about an industry and, unfortunately, "it's tough to argue it's a burden, especially if it (information) is digitally stored," Finnerty said.

Another justification by the regulator for seeking CIDs from non-targets of such a probe, besides its regulatory authority to do so, was mentioned in TWM's petition to quash.

"During two ... conferrals, (FTC) staff conceded that if Southern violated the Robinson-Patman Act, TWM might be a 'victim' of such violations."

In the case of another company hit with a massive CID, however, the FTC suggests customers were the victim. And the commission has flat-out rejected Leader Automotive Group's <u>petition to quash or limit disclosure</u>.

Last December, the Chicago-based chain of 18 franchised auto dealerships received a CID with 10 pages of questions. It sought such information as employee information, terms of numerous auto deals and the cost of additional products Leader's dealers sold, such as disability insurance. The FTC said it had reason to believe Leader is engaged in illegal sales and lending practices.

The probe wasn't necessarily a surprise for Leader. Last year, the FTC and state of Illinois reached a \$9.8 million settlement with competitor Napleton Automotive Group, alleging consumers were charged "junk fees" and engaged in discriminatory practices.

Early this year, Leader's outside counsel, Burke, Warren, MacKay & Serritella, engaged with the FTC and sought to limit the amount of data requested, involving multiple dealerships.

Leader argued the request was not properly served and should have been directed to each dealership rather than to the parent companies. And it said the CID was "unduly burdensome, overbroad, and threatened to disrupt or seriously hinder the company's normal business operations" as well as force it to hire a third-party discovery vendor.

In a February letter, the law firm admonished the FTC for contacting the company's corporate strategy manager directly rather than via counsel, accusing the agency of violating Model Rules of Professional Conduct. In addition, Leader's lawyers complained the commission contacted its vendors and informed them it was investigating the chain for "false and deceptive representations" and "unfair conduct."

"While we understand the FTC has some discretion in contacting third parties, it is highly prejudicial and disruptive to use this type of language when there has been no finding that the company engaged in any such practices," wrote Burke partner Elizabeth Pall.

The FTC denied the petition to quash but agreed to provide a deadline extension until March 17. But on April 20, the commission <u>filed a complaint</u> in U.S. District Court for the Northern District of Illinois, saying Leader "has made only partial productions of selective records and knowingly withheld responsive documents and information … impeding and delaying the commission's investigation."

The FTC contends it has the authority to demand the data, that its request is not too indefinite and that information sought is reasonably relevant to the investigation. "Leader has shown no basis for finding any undue burden ... and the available information about Leader's operations shows the information and material sought by the CID should be readily accessible and available."

The matter remains unresolved in court. Leader's operations manager did not respond to a request for comment from Law.com.

For many companies, Finnerty says, "it's a cost-benefit analysis when you get one of these (CIDs)."

Upon being served with an FTC subpoena, "evaluating both the response burden and the risks presented by the investigation needs to become a top priority," Nick Oberheiden, founding attorney of Oberheiden noted in a <u>client</u> <u>advisory.</u>

He said that responding to a CID is often "an extremely time-intensive endeavor" and that firms that receive one must begin response efforts promptly to not miss their deadline.

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