Inside FTC's New Rules For Investigations

Law360, New York (November 09, 2012, 11:48 AM ET) -- Effective Nov. 9, 2012, revised Federal Trade Commission rules went into effect concerning the procedures in Part 2 of the FTC's rules of practice, dealing with compulsory process, including civil investigative demands and subpoenas, and in Part 4, dealing with attorney misconduct. Among the revisions, the revised Part 2 rules codify existing FTC practices for the collection and production of electronically stored information, and they expand the FTC's requirements relating to the preparation of privilege logs.

Other revisions to Part 2 include changing the procedures applicable to parties seeking to quash a CID or subpoena, by imposing a detailed requirement that parties meet and confer with FTC staff prior to filing a petition to quash, and by removing one level of review for petitions to quash. The stated purposes of the amendments are to modernize the quality of FTC practices and to encourage increased cooperation in FTC investigations. We describe several of the more interesting revisions below.

Codifying Practices With Respect to Electronically Stored Information

In practice, CIDs and subpoenas issued by the FTC have long called for the production of electronically stored information. The FTC's new rules codify this longstanding practice, by making explicit recipients' obligation to produce ESI. The new rules broadly define the term "electronically stored information" to include any "data or data compilations stored in any electronic medium," and the rules make clear that ESI is included by default in requests for documentary material pursuant to compulsory process.

The new rules specify that ESI "shall be produced in accordance with the instructions provided by Commission staff regarding the manner and form of production." This, too, codifies the longstanding FTC practice of requiring ESI to be produced in a very specific form. Current FTC practice typically requires parties to produce ESI in a manner that includes more than 20 different fields of metadata.

As has been FTC practice, the instructions for production of ESI may be modified as a result of negotiations between the commission and the recipient of the compulsory process. In instances where no instructions are provided by the FTC, the ESI "must be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form."

Now that the obligation to comply with these technical instructions is explicit in the FTC regulations, it will be more important than ever to engage attorneys and vendors adept in matters of e-discovery. That is not only the case with respect to producing ESI in compliance with the compulsory process, but also, as discussed below, in negotiating the instructions for ESI as part of meet and confer efforts with the FTC.

Expanding Privilege Log Requirements

The revised rules in Part 2 create detailed requirements for parties that withhold or redact documents from productions based on claims of privilege. The new rules require parties to prepare a privilege log that includes, for each such document withheld or redacted, some eleven different fields of information including: the document's title, its date of creation, its date of sending, its author(s), its recipient(s), and a description of the factual basis supporting the claim of privilege.

While FTC CIDs and subpoenas have long required parties to prepare privilege logs, the new rules increase the level of detail over what the FTC has typically required. Three aspects of the amendments, however, give cause for hope that the new requirements will not unduly increase the practical burdens on parties. First, all but two of the 11 fields of information required in the privilege logs will be obtainable from metadata contained within the withheld or redacted documents; thus, so long as parties thoughtfully approach the privilege log preparation process, the great bulk of the preparation can potentially be automated.

Second, the new rules authorize FTC staff to modify the logging requirements as appropriate — and, as a matter of practice, the need for and the scope of privilege logs has historically been an area for

negotiation with staff. For example, the notice of rulemaking explicitly mentions the possibility that in appropriate cases, "allowing documents to be described by category" (so-called "Facciola-style" privilege logs) may be sufficient. Allowing such relief would go a long way toward reducing the tremendous burdens that privilege logs often impose on parties.

Third, the new rules follow the 2008 amendments to the Federal Rules of Evidence regarding the inadvertent production of privileged material, thereby reducing the risks of parties inadvertently waiving any applicable privileges through inadvertent productions.

Changing Procedures for Petitions to Quash or Modify Compulsory Process

Recipients of CIDs and subpoenas have the right to file petitions to have the requests set aside or to modified. The revised rules in Part 2 create three major changes to the procedures applicable to such petitions.

First, the revised rules require recipients of compulsory process to meet and confer with FTC staff as a precondition for filing a petition. "[A]bsent extraordinary circumstances, [the FTC] will consider only issues raised during the meet and confer process" when evaluating petitions to modify or quash. While the existing FTC rules already obligate parties to certify that they conferred with staff in an effort in good faith to resolve areas of disagreement prior to moving to quash or modify, the new amendments broaden this meet-and-confer obligation.

The conference must take place within 14 days of receipt of the CID or subpoena, or before the deadline to file a petition to quash — whichever deadline comes first. The new meet-and-confer obligation requires parties to include "personnel with the knowledge necessary for resolution of the issues relevant to compliance with compulsory process" in the conference. As examples of such persons, the new rules list "individuals knowledgeable about the recipient's information or records management systems" and individuals "familiar with [the recipient's] ESI systems and methods of retrieval."

Second, the revised rules provide that petitions to modify or quash be limited to no more than 5,000 words (corresponding to approximately 15 double-spaced pages), exclusive of supporting papers. Petitions that fail to comply with this limit will be automatically rejected by the secretary of the FTC. Third, the new rules alter the FTC's practices for considering petitions to quash or modify. Previously, these petitions would be reviewed by a single FTC commissioner; then, if the petitioner was not satisfied with that commissioner's decision, the petition would be reviewed by the full five-member commission. Under the new rules, however, petitions will go directly to the full five-member commission for review.

The revised rules concerning compulsory process highlight the importance of actively engaging the FTC through meet-and-confer efforts to discuss issues of burden and potential areas for narrowing. The 14-day time limit for the initial meet and confer session and the requirement that, absent exceptional circumstances, issues raised in a petition to quash must have been discussed in the meet-and-confer process place a premium on counsel quickly identifying the issues which might form the bases for a petition and being able to articulate such issues in the meet-and-confer process.

Termination of Document Preservation Obligations After 12 Months of No Contact

A most welcome change in the new rules is a provision that, if a CID or subpoena recipient goes 12 months without receiving any written communication from the FTC as to the status of the investigation, the recipient is formally relieved of any obligation to continue preserving information or documents. The purpose for this new rule is the FTC's recognition that investigations sometimes go cold for long stretches of time and that, in such situations, CID and subpoena recipients are often afraid to contact the FTC for a status report at the risk of reanimating an otherwise forgotten investigation.

At the same time, however, the cost and energy required by complying with a "document hold" notice is substantial. Thus, the FTC's new rules allow CID and subpoena recipients that go 12 months without any

written communications from the FTC to suspend their document retention obligations "for purposes of responding to the Commission's process."

Importantly, the notice of rulemaking explains that the new FTC rule "does not lift any obligation that parties may have to preserve documents for investigations by other government agencies, or for litigation." Thus, the practical effect of the new rule change might be less than desired, since parties that are subject to compulsory process by the FTC are sometimes also subject to parallel investigations or litigations by other agencies or individuals.

Nevertheless, this new rule is a welcome change, and the FTC should be commended for promulgating a rule that recognizes both the burden of preservation on parties, and that CID and subpoena recipients are occasionally left in limbo by matters that slip through the cracks or are otherwise long dormant.

Attorney Discipline Rules

Although the majority of the new rule changes apply to Part 2 of the FTC's rules of practice, one of the most interesting aspects of the amendments involves the revisions to Part 4. The revisions to Part 4 create a mechanism for the FTC to discipline attorneys who appear before it.

Whereas the FTC has historically only had the power to issue sanctions and refer cases of misconduct to local bar authorities, under the new rules, the FTC may now "publicly reprimand, suspend, or disbar from practice before the Commission" any attorney who engages in unethical conduct before the FTC, or any attorney who engages "in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation." How this power will play out in practice remains to be seen.

Conclusion

Consistent with the stated goal of increasing cooperation, the revisions to the FTC's rules of practice emphasize the need for recipients of compulsory process to explore with the commission whether a cooperative resolution of disputes associated with such compulsory process may be reached.

The practical effect of these revisions is that a recipient of an FTC CID or subpoena must quickly ascertain the potential burdens or issues with compliance and engage the FTC on these issues. In addition, the revised rules make it more important than ever for recipients of compulsory FTC process to engage attorneys and vendors with sophistication and experience in e-discovery.

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