

New FTC Rules Address Electronically Stored Information and Privilege Issues

October 1, 2012

The Federal Trade Commission (FTC) promulgated revised rules concerning its investigative procedures, which take effect on November 9, 2012. Several changes concern the treatment of electronically stored information (ESI) and the protection of privileged materials. To a large degree, these new provisions mirror those found in civil proceedings.

Section 2.4 announces the FTC's investigational policy encouraging "the just and speedy resolution of investigations" and "cooperation in its investigations." This policy is comparable to Rule 1 of the Federal Rules of Civil Procedure and of The Sedona Conference's "Cooperation Proclamation," which applies to ESI discovery.

Section 2.7 addresses the use of compulsory process via civil investigative demand (CID) or subpoena. Paragraph (i) provides the FTC with the right to "require the production of documentary material, or electronic media or other tangible things, for inspection, copying, testing, or sampling." Paragraph (j) goes on to provide the manner and form of production of ESI. Respondents are required to follow all instructions provided by the FTC absent written permission to do otherwise. In cases where the FTC does not provide instructions, the respondent must produce ESI "in the form or forms in which it is ordinarily maintained or in a reasonably usable form," similar to the rule in civil proceedings.

When the FTC serves compulsory process, Section 2.7(k) mandates a meet and confer session prior to the filing of a petition to quash or limit. If the respondent wishes to discuss ESI-related issues, a person familiar with ESI systems and methods of retrieval must attend the conference.

Section 2.11 addresses the protection of privileged information. Paragraph (a) sets forth the categories of information that must be contained in a privilege log. Additionally, paragraph (b) requires another mandatory meet and confer session "to discuss and attempt to resolve any issues associated with the manner and form in which privilege or protection claims will be asserted." Logging requirements may be modified at the meet and confer. Paragraph (c) addresses inadvertent disclosures and waiver, and generally adopts the familiar test found in civil proceedings.

These revisions "are intended to promote fairness, transparency, and efficiency in all FTC investigations." Their degree of success will largely depend on the participants embracing the meet and confer sessions and using those sessions to their best advantage.

The revised rules along with related commentary can be found [here](#).