

Top Ten Steps to Take When the FTC Investigates Your Company's Privacy Practices

The Federal Trade Commission ("FTC") has emerged as the primary federal agency responsible for privacy and data security in the United States. When the FTC investigates a company's privacy or data security practices, the agency is acting in its law enforcement capacity. The FTC may conduct a nonpublic investigation through either informal or formal means. Informal investigations are typically conducted through "access letters," which are unenforceable requests for information that seek voluntary cooperation. Formal investigations are typically conducted through Civil Investigative Demands ("CIDs"), which are judicially enforceable demands for documents and written answers to questions. Refusal to cooperate with an informal inquiry typically results in the issuance of a CID.

There are many considerations to keep in mind when responding to an inquiry by the FTC. Assuming that your company has been served with a CID, here are our top ten suggestions for helping to bring the FTC's investigation to an early resolution based upon our collective 30 years of experience of representing companies in privacy and data security investigations:

1. UNDERSTAND.

Read the CID carefully. Jot down deadlines for production, for meeting and conferring with FTC counsel, and for filing any petitions to limit or quash the CID. Identify the "applicable time period" covered by the CID, the Commissioner who signed the CID, and the statutory authority under which the FTC is proceeding (set out in the accompanying blanket "resolution" authorizing the exercise of compulsory process). Research the FTC's authority to impose monetary penalties under the cited statutory authority. Highlight the CID's definitions. Differentiate between requests for "all" documents, on the one hand, and for documents "sufficient" to identify or describe a particular activity. Note the fact that documents submitted to the FTC are treated as confidential. And fully understand the certification that you or a business executive will be asked to execute upon completion of production.

2. PRESERVE.

As a recipient of a CID, you are now under an obligation to provide information to the FTC, and the associated duty to preserve evidence now attaches. Issue a litigation hold and instruct IT staff to suspend any scheduled systems maintenance that may affect relevant information.

3. COMMUNICATE.

Keep open communications between yourself and the FTC Staff. A simple "what is it that you are looking for" may yield insights that can help you understand their concerns, narrow the scope of the inquiry, and focus the company's response to the inquiry. Keep the Staff informed of any potential delays. Do not surprise them.

4. OFFER ALTERNATIVES.

If the CID in its current form proves to be too burdensome, develop and explore alternatives. These may include extending the deadline for completion of production, narrowing the scope of the inquiry by modifying definitions or specific interrogatories or document requests, sampling methods, and collaboration with Staff on search terms or parameters. An agreement to extend a production deadline may also include tolling the deadline for filing a petition to limit or quash the CID.



**TO ENSURE YOUR
COMPANY'S PRIVACY
HEALTH, PLEASE
CONTACT US TODAY.**

EMILIO W. CIVIDANES

202.344.4414

ecividan@Venable.com

STUART P. INGIS

202.344.4613

singis@Venable.com

5. READ.

Review the documents that you have identified as being responsive. Learn the story behind them. Review any answers to interrogatories drafted by others. Advise the general counsel or senior executives of potential legal issues arising from the documents and responses.

6. THEORIZE.

Equipped with the information that you have gleaned from the documents and draft responses, coupled with information from other sources (e.g., what the Staff has disclosed to you, the statutory authority under which the FTC is proceeding), identify potential legal theories under which the FTC could be proceeding against the company. This will help you anticipate the Staff's focus, develop a theory for the company's defense, and shape the context that should be provided for documents to be produced (see item 8).

7. CHOOSE WISELY.

Particularly when you have the flexibility to choose what information to produce (e.g., choosing documents "sufficient" to describe certain company operations), exercise your judgment. For example, in choosing documents "sufficient" to demonstrate the company's privacy training program, produce documents that answer the question that has been asked without raising new questions, which might lead to new areas of inquiry and prolong the investigation. Also, take steps to reduce the burden on the Staff. Although there are no hard-and-fast rules, the more time the Staff invests in its investigation of your company, the more likely the Staff is to want to establish a violation that justifies the time and effort it has invested.

8. CONTEXTUALIZE.

Reduce the potential for a misreading of the documents to be produced by explaining their context. What might at first blush look like a "smoking gun" to the FTC Staff may in fact be an innocuous set of communications that provides no support for any theory of liability contemplated by the Staff. If what needs explaining aren't facts but rather the application of the law to the facts, consider preparing and submitting a "White Paper" that explains the company's view of the law and the facts. Such legal briefs can help narrow the issues or theories under consideration.

9. CONTACT EXPERIENCED OUTSIDE COUNSEL.

In all candor, this one should be your first step. Experienced counsel can help the company navigate around the pitfalls inherent in an investigation. They can help preserve privilege over an internal investigation into the events that are the subject of the CID. Experienced counsel can act as a buffer with the FTC Staff, which usually views outside counsel as more independent of the client than in-house counsel. They may have interacted with the very same FTC counsel in a previous investigation, or defended another company in connection with an investigation of the same or a similar privacy practice. Experienced outside counsel are familiar with agency customs and are thereby able, for example, to reduce anxiety by explaining that the Staff's response that it "agrees to delay taking any action against your client for another 7 days" is not unduly adversarial but rather a bureaucratic means of extending deadlines without having to seek written changes to the CID, as otherwise required by the statute.

10. WAIT PATIENTLY.

FTC Staff's review of the documents and information produced by a company typically takes many months, often more than a year. After investing so much time and effort over an extended period of time to respond to the CID, it is very tempting after several months of silence to inquire regarding the status of the investigation. Resist the temptation. Time can often work to your advantage. For example, the FTC may accomplish through its settlement of another case some of the goals it had set out in connection with its investigation of your company. If you have followed steps 1-10, your patience may be rewarded with a telephone call from the Staff indicating that it has closed the investigation of your company.



1.888.VENABLE
www.Venable.com

Reprinted with the permission from the Association of Corporate Counsel (ACC) 2012
All Rights Reserved.