

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Joseph J. Simons, Chairman
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson**

In the Matter of

**CIVIL INVESTIGATIVE DEMAND TO
INTUIT INC.,
DATED MAY 18, 2020.**

File No. 192-3119

**ORDER DENYING PETITION TO QUASH IN PART
CIVIL INVESTIGATIVE DEMAND**

By PHILLIPS, Commissioner:

Intuit Inc. petitions the Commission to quash in part a Civil Investigative Demand (CID) issued on May 18, 2020 (and served on Intuit on May 19, 2020), in connection with the Commission’s investigation into whether Intuit has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*¹

Specifically, Intuit requests the elimination of two of the topics designated in the CID for corporate investigational hearing testimony. *Petition*, at 2-3. Intuit seeks elimination of IH Topic 12, which seeks information about the benefits that Intuit has sought, claimed, or received from offering a free tax filing product as part of the “Free File Program” administered by the Internal Revenue Service (IRS). *Id.* at 2. It also seeks elimination of IH Topic 16, which seeks testimony about Intuit’s responses to the interrogatories served on it in both the May 18, 2020 CID and a

¹ The Commission initiated the Intuit investigation pursuant to a resolution to determine whether unnamed parties have been or are engaged in deceptive or unfair Internet-related practices, in violation of Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 52. *See Resolution Directing Use of Compulsory Process in Non-Public Investigation of Unnamed Persons, Partnerships or Corporations Engaged in the Deceptive or Unfair Use of E-Mail, Metatags, Computer Code or Programs, or Deceptive or Unfair Practices Involving Internet-Related Goods or Services*, File No. 9923259 (Aug. 1, 2016). The investigation also seeks to determine whether Commission action to obtain equitable monetary relief for injury to consumers or others would be in the public interest. *Id.*

prior CID issued on July 1, 2019. *Id.* at 3. For the reasons set forth below, we deny Intuit’s petition.

I. Background

Intuit offers two products that provide consumers tax-filing services for free—to those individuals who meet certain eligibility requirements. *Petition*, at 3. The first product is Intuit’s “IRS Free File Program Delivered by TurboTax.” *Id.* at 3-5. That product is offered as a result of Intuit’s participation, along with other electronic tax preparation and filing companies, in an IRS program to deliver free online tax software to low and middle-income consumers. *Id.* at 1-2. Intuit offers its Free File product via freefile.intuit.com. The second free product is Intuit’s “TurboTax Free Edition.” *Petition*, at 5-6. Intuit offers that product via its primary website, turbotax.intuit.com.

In May 2019, the Commission initiated an investigation into whether Intuit had engaged, or was engaging, in violations of the FTC Act. *Petition*, at 7. On July 1, 2019, the Commission issued the first CID to Intuit, seeking the production of documents and responses to interrogatories. On May 18, 2020, the Commission issued a second CID to Intuit seeking further documents and responses to interrogatories and requiring Intuit to designate a corporate representative to testify in an investigational hearing (IH) set for July 14, 2020. The second CID was modified several times to accommodate Intuit’s concerns and schedule. The most recent modification, on July 8, 2020, affected, among other things, the scope of IH Topics 12 and 16—the subject of Intuit’s current petition. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated July 8, 2020).

As modified, IH Topic 12 concerns Intuit’s involvement in the IRS Free File program, specifically: (a) preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market; and (b) the tax deductions or other tax benefits that Intuit has sought, claimed, or received for offering its Free File product. *Id.* at 2.

As modified, IH Topic 16 concerns the “substance, meaning of, and factual basis for” a subset of Intuit’s responses to the interrogatories served on it in the July 1, 2019 CID (namely, Interrogatory No. 2(a), 3(a)-(b), 4(a), 5(a), 5(e)), and the May 18, 2020 CID (Interrogatory No. 1, 2, 4(a)-(e), 13, 21, 22, 25). *Id.* at 3.

On July 7, 2020—the deadline date for challenging IH Topics 12 and 16, *see Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 29, 2020), at 1—Intuit transmitted by email to the Commission’s Acting Secretary its current petition to quash. *See Letter from David Gringer to April Tabor* (dated July 7, 2020). Intuit requested that the Commission “afford [its cover] letter, the accompanying Petition, and any written order in response with confidential treatment pursuant to 16 C.F.R. § 4.9(c).” *Id.* at 1. Intuit did not submit with its initial transmission a redacted public version of the petition that it sought to be treated as confidential, as required by Rule 4.2(d)(4) of our Rules of Practice, 16 C.F.R. § 4.2(d)(4). The following day, July 8, pursuant to the Acting Secretary’s notice of deficiency, Intuit submitted a redacted public version of its petition to quash.

II. Analysis

A. Timeliness of Intuit's Petition

On July 7, 2020, Intuit attempted to file its current petition. Intuit sought confidential treatment of the petition pursuant to 16 C.F.R. § 4.9.² Its attempted filing was rejected, however, because Intuit had failed to include a redacted version of the petition for public disclosure—as required by Rule 4.2 of our Rules of Practice. That rule provides that when a petition to quash is filed as confidential, “it will be rejected for filing pursuant to § 4.2(g), *and will not stay compliance* with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files * * * [a] redacted public version of the document that is clearly labeled ‘Public’.” 16 C.F.R. § 4.2(d)(4)(ii) (emphasis added).

Intuit attempted to cure this deficiency, by submitting a redacted public version, but it did so on July 8, the day after the deadline for filing had expired. Intuit's petition to quash is, therefore, procedurally untimely. *In the Matter of Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W.L. Gore & Associates, Inc.*, 151 F.T.C. 687, 689, 2011 FTC LEXIS 180, *4 (May 23, 2011).

Intuit's claim that its failure initially to include a redacted public version is justified by its request for confidential treatment of the entire petition, including any information that would identify the petitioner, *see Email from David Gringer to April Tabor* (dated July 8, 2020 at 9:26 AM), is contrary to our rules and precedent. Rule 4.2(d)(4) applies to “petitions labeled ‘confidential’ * * * [where the accompanying public s a r 2 4 2 . 5 (r) 2 5 1 . 7 (e) 2 5 2 . 5 (t) 2 4 s 8 (d

C. IH Topic 16

1. Attorney-Client Privilege

Intuit first challenges IH Topic 16 on privilege grounds. It claims that because its interrogatory responses were prepared with the assistance of counsel, providing testimony on the substance, meaning, and factual basis of those responses “would implicate privileged attorney-client communications made in the process of preparing those responses.” *Petition*, at 14. Intuit’s position is unusual: although interrogatory responses are often drafted with the assistance of counsel, “depositions typically provide an opportunity to further probe the facts elicited through interrogatories.” *English v. WMATA*, 323 F.R.D. 1, 26 (D.D.C. 2017); *see, e.g., FDIC v. Giancola*, No. 13-C-3230, 2015 WL 5559804, at *4 (N.D. Ill. Sept. 18, 2015); *FDIC v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *3 (N.D. Fla. Oct. 29, 2013).

At any rate, Intuit is mistaken. The attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Thus, “an objective fact iste

read (as Intuit apparently reads it) as holding that potential privilege concerns in corporate testimony about discovery responses justifies categorically striking down the entire inquiry—rather than dealing with privilege claims during the testimony on a question-by-question basis—we disagree with it as contrary to the weight of authority.

2. Overbreadth and Undue Burden

Finally, Intuit claims that IH Topic 16 is overbroad and unduly burdensome. *Petition*, at 15-16. It presses that claim even though the Commission staff already has agreed to reduce the number of interrogatory responses subject to corporate testimony—using Intuit’s own method of counting parts and subparts—from 211 interrogatories to 30. *Id.* at 15, 16. Intuit argues that, even as modified, IH Topic 16 “still lacks reasonable particularity because it does not identify with specificity the information sought,” and would be “requiring Intuit to prepare multiple corporate designees.” *Id.* at 16. We disagree.

Reasonable particularity “merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents.” *Nippo Corp./Int’l Bridge Corp. v. AMEC Earth & Environmental, Inc.*, No. 09-CV-0956, 2009 WL 4798150, at *3 (E.D. Pa. Dec. 11, 2009); *accord Inline Packaging, LLC v. Graphic Packaging Int’l, Inc.*, No. 15-CV-3183, 2018 WL 9919939, at *8 (D. Minn. Jan. 23, 2018). Intuit fails to point to any specific interrogatory where the language is so lacking in specificity as to make Intuit unable to prepare its corporate designee for testimony. Nor has our

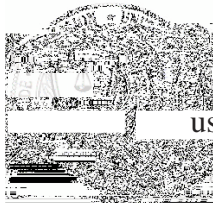
III. CONCLUSION

For the foregoing reasons, Intuit's petition to quash is denied.

IT IS HEREBY ORDERED THAT Intuit Inc.'s Petition to Quash in Part May 18, 2020 Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Intuit shall comply in full with the Commission's Civil Investigative Demand no later than Tuesday, September 8, 2020, at 9:00 a.m. (Pacific Time), or at such other date, time, and location as the Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.



ust 17, 2020