

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of)	
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)	
CIVIL INVESTIGATIVE DEMAND TO Abbott Laboratories,)	File No. 221-0168
DATED JAN. 27, 2023.)	
)	

ORDER DENYING PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

By BEDOYA, Commissioner:

Abbott Laboratories (“Abbott”) petitions the Commission to (1) extend by 21 days the deadline to file their Petition to limit the FTC’s Civil Investigative Demand served on January 27, 2023, *see* Pet. Appx. A (“CID”), or, in the alternative, (2) limit the CID by narrowing its substantive and temporal scope. The Commission served its CID in connection with its investigation into potential violations of Section 5 of the FTC Act, 15 U.S.C. § 45, by collusion or coordination in bidding for WIC Infant Formula Contracts. For the reasons set forth below, we DENY the Petition.

I. Background

Abbott is a health care company that markets pharmaceuticals, medical devices, and nutritional products. It is the leading manufacturer of infant formula in the United States: Abbott controls 48 percent of a highly concentrated market dominated by just three manufacturers.¹

Over half of U.S. infant formula sales are made through the U.S. Department of Agriculture’s (“USDA”) Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”), which provides free infant formula to low-income families with infants.²

¹ *See* Julie Creswell and Madeleine Ngo,

State agencies that administer the WIC program bid out multi-year contracts to infant formula suppliers, where the winning bidder becomes the sole infant formula supplier for that contract period. The manufacturer offering the lowest average net price wins the contract in this bidding regime. While the rebates paid by the WIC contract holders are substantial, studies show that WIC contracts create a lucrative “spillover effect” on the manufacturer’s non-WIC sales of infant formula.³ Although the boost in non-WIC sales motivates manufacturers to win WIC contracts, it may also create incentives to engage in collusive or coordinated market allocation, whereby incumbent WIC contract holders agree not to bid against each other so that they can continue enjoying dominant positions in non-WIC markets in their respective states. A 2015 USDA study examining WIC bidding between 2003 and 2013 identified patterns potentially indicative of non-competitive bidding for WIC formula contracts.⁴ Abbott is one of only three manufacturers that have bid on WIC contracts since 1996.⁵

In 2022, the Commission initiated an investigation into whether any participant in infant formula markets has engaged in collusion or coordination with any other market participant regarding the bidding for WIC contracts. On January 27, 2023, pursuant to this investigation, the Commission issued the CID to Abbott that is the subject of this Petition. Pet. Appx. A. The CID seeks information about Abbott’s WIC bidding and sales, as well as information related to its non-WIC infant formula business, during the timeframe from January 1, 2016, to present. *Id.* The timeframe of the request would capture multiple WIC bidding cycles, since each state generally solicits bids only once every three to four years in cycles that do not perfectly overlap.⁶

Since the issuance of the CID, FTC staff have met and conferred with Abbott on multiple occasions, with Abbott expressing “objections to the substantive and temporal scope of the CID” from an early date. Pet. Appx. B at ¶ 14. On February 14, 2023, Abbott told staff that it was “considering a petition to quash the CID to the extent that it seeks documents and information

³ See, e.g., Victor Oliveira *et al.*, *The Infant Formula Market: Consequences of a Change in the WIC Contract Brand*, 124 U.S. Dep’t of Agric. Econ. Research Servs. at 20 (Aug. 2011), available at

https://www.ers.usda.gov/webdocs/publications/44900/6918_err124.pdf (“Oliveira 2011”) (finding when states changed contract brands, the new contract manufacturer’s market share increased by an average of 74 percent); Rui

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that relate to non-WIC sales[.]” Letter from E. Takashima to A. Reeves (dated Feb. 16, 2023).
Staff responded by letter two days

The Commission's Rules of Practice generally require a CID recipient to file any petition to quash or limit within 20 days of service. 16 C.F.R. § 2.10 (a)(1). A petitioner seeking an extension of its deadline to file such petition must show "good cause," supported by "an adequate evidentiary basis." *In re Civil Investigative Demand to Liberty Auto City, Inc.*, dated April 12, 2022, FTC File No. 222-3077, at 3 (June 13, 2022) (citing 16 C.F.R. § 210(a)(1) and *United States v. Morton Salt Co.*, 338 U.S. 632, 653–54 (1950)). "Good cause" is established when a petitioner can "identify compelling reasons for an extension" and can "show that the deadlines cannot reasonably be met despite [the party's] diligence." *Id.* at 3; *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011).

Abbott has failed to show good cause for the Commission to extend the time to file its Petition. Abbott suggests that it needs additional time for its Petition because it cannot yet "fashion its own proposal" for a reasonable scope of non-WIC production. Pet. at 2. However, Abbott had all the information it needed to make its arguments in this Petition before the deadline. The grounds for challenging a Commission CID are limited to the determination of whether the agency has exceeded its authority, whether the CID itself is "too indefinite," whether "the information sought is reasonably relevant," and whether, on the whole, the CID is "not . . . unreasonable." *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652–63 (1950). Abbott has presented staff with its objections and how it wishes to limit the CID's scope on multiple occasions during the meet and confer process, and via this Petition, and requires no additional time to assess its arguments under *Morton Salt*. See Pet. Ex. 1 (setting forth Abbott's objections to non-WIC and pre-2020 documents).

Abbott attempts to blame staff for its failure to propose modifications to the CID's scope. Pet. at 1; see Pet. Appx. B at ¶ 21. Abbott falsely claims that staff "have not offered a credible

Submission, 965 F. 2d at 1090. Each specification falls comfortably within the Resolutions cited in the CID, which permit FTC staff to, among others, investigate whether a collusion or coordination in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or any other statutes or rules enforced by the Commission, has occurred.⁸

As noted in recent economic literature, non-WIC business information is relevant to understanding the market relationship between WIC contracts and non-WIC sales, including any spillover effects between WIC contracts and non-WIC sales.⁹ Such information may also be needed to evaluate, for example, whether WIC contract holders had incentives not to bid against each other and which specific WIC bidding opportunities may have been tainted by coordination or collusion. Accordingly, the documents and information related to Abbott's non-WIC business are highly relevant to the Commission's investigation and comfortably meet the investigative purpose. *Accord FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011) (establishing that the information may "'not [be] plainly irrelevant' to the investigative purpose").

Abbott appears to contend that a CID recipient need not produce responsive information that could illuminate unlawful conduct and its harmful effects, unless and until that conduct has been conclusively shown through other evidence. *See* Pet. at 5. This contention is meritless. There is no requirement for the Commission or its staff to conduct investigations in phases. *FTC v. Church & Dwight Co., Inc.* is instructive here. The petitioner objected to a CID and subpoena for documents on the grounds that they sought information regarding the company's sales in Canada, even though the applicable compulsory process resolution stated that the Commission was investigating Church & Dwight's conduct in the United States. 747 F. Supp. 2d at 4–7. The district court overruled that objection, noting that the Commission was not required to "prove what it is investigating as a condition of the legitimacy of the investigation it is conducting[.]" *Id.* at 6 (citing *Texaco*, 555 F.2d 862). The court accepted the Commission's explanation that information from Church & Dwight's Canadian subsidiary would "assist

C. Abbott Has Failed to Demonstrate Any Undue Burden or Unreasonableness

Finally, Abbott asks the Commission to limit its CID on the grounds that its requests for non-WIC and pre-2020 information creates an undue burden on the company. Pet. at 5–6. The Commission also rejects this request.

A petitioner seeking to limit or quash a CID based on undue burden must show that the CID “threatens to unduly disrupt or seriously hinder normal operations” of the petitioner’s business. *Texaco*, 555 F.2d at 882. The burden must be significant because “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Id.* “Broadness alone is not sufficient justification to refuse enforcement of a subpoena,” particularly when that breadth “is in large part attributable to the magnitude of the [company’s] business operations.” *Id.* A petitioner must “ma[ke] a record that would convince [the Commission] of the measure of their grievance rather than ask [the Commission] to assume it.” *Morton Salt*, 338 U.S. at 654; *see Texaco*, 555 F.2d at 882 (“The burden of showing that the request is unreasonable is on the subpoenaed party.”); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (“The subpoenaed party must not merely utter the claim; it must persuade us.”).

Abbott has failed to present any evidence of undue burden. It is not enough to assert, as Abbott does, that it would have to produce “millions of documents” at the cost of “millions of additional dollars in attorney’s fees and costs.” Pet. at 5. The sheer volume of requests cannot “itself establish that the CID is overbroad or imposes undue burden.” *In re March 19, 2014 Civil Investigative Demand Issued to Police Protective Fund, Inc.*, FTC File No. 132-3239, at 7 (May 22, 2014); *see Jim Walter Corp.*, 651 F.2d at 258 (“Absent a showing of disruption, the sheer number of documents sought does not demonstrate [undue burden].”). Additionally, while Abbott would need to identify “legacy systems and predecessor custodians” to gather some documents requested, this is well within the ordinary burden associated with responding to government investigations. *See Police Protective Fund*, FTC File No. 132-3239, at 7 (“It is not enough merely to assert . . . that gathering, copying, and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have.”); *Liberty*, FTC File No. 222-3077, at 5 (“To the extent the asserted burdens stem from [Petitioner’s] own document practices . . . such burdens cannot excuse [Petitioner] from compliance with the CID.”); *Letter Ruling re Civil Investigative Demands Issued to D. R. Horton, Inc. and Lennar Corp.*, FTC File Nos. 102-3050 & 102-3051, at 6 (Mar. 9, 2010) (“Burden caused by Petitioners’ own organizational design cannot excuse them from compliance with the CIDs.”).

Further, “expense alone cannot constitute burdensomeness, where it is a concomitant of a broad, but valid, investigation.” *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff’d*, 636 F.2d 781 (D.C. Cir. 1980). Abbott has not shown that the incremental burden of producing the disputed categories of information, over and above the burden of complying with the CID in all other respects, is undue. Nor can Abbott demonstrate that the cost of responding to the CID is too high “relative to the financial position” of the company when “measured against the public interest of this investigation.” *Id.* The Petition is devoid of any information about Abbott’s financial or other resources available for complying with the CID. Abbott’s position as a Fortune

100, multi-billion-dollar¹³ company suggests that, even if its unsubstantiated claim of “millions
