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and the Breakout session 3 D E G under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Investigative Powers in Practice

Breakout Session 2: Requests for Information – Limits and
Effectiveness
and
Breakout Session 3: Due Process in relation to Evidence
Gathering

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always engage staff in a compliance negotiation, seeking to modify the scope of the request and enlarge the time for response. Recipients of FTC CIDs are required to meet and confer with staff within fourteen days after receipt of process.³

4. None of the statutory provisions governing the use of compulsory process limits the agency's use of submitted information to a particular matter.

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- 5. The U.S. Agencies may issue compulsory process to third parties. The Agencies are always available to discuss a respondent's concerns about the scope of a particular request for information (RFI). They also seek to obtain the information that they need without imposing an undue burden on a respondent. When the Agencies issue compulsory RFIs, either in the form of a Second Request in a merger investigation or a subpoena or CID, they typically encourage the recipient to discuss the request and, indeed, recipients almost always engage the Agencies' staff in a compliance negotiation. Staff and counsel for the recipient often have extended discussions and agree to modifications and/or deferrals that ensure that the Agencies obtain the information that they need for their investigations, while minimizing - to the extent possible - the cost and burden on the recipient.⁴ Typically, staff and the recipient's counsel will examine the recipient's organizational chart and come to an agreement on a set of individuals whose files must be searched for responsive documents. The number and position of the search group individuals varies depending on the nature and complexity of the investigation. The process is generally the same whether the recipient is a potential defendant or a third party; however, the Agencies recognize that third parties are differently situated than potential defendants and therefore strive to an even greater extent to minimize their burden.
- 6. The same U.S. federal statutes that provide authority for the Agencies to obtain information from parties and third parties in civil investigations also provide for confidential treatment of submitted information.⁵ Thus, the Agencies have developed rules and policies for the treatment of information to ensure that, while they obtain

³ 16 C.F.R. § 2.7(k).

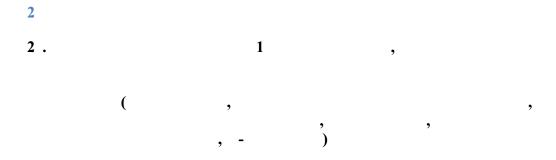
⁴ For example, in some situations, the Agencies will use a "quick look" review for investigations, which can further minimize burdens on the parties. See Division Manual III-43 ("When staff believes that

opportunity to make any objections to the subpoena or CID to the court to convince it to deny the Agency's petition for enforcement.

8. It is a criminal offense intentionally to withhold, misrepresent, conceal, destroy, alter, or falsify any documentary material, answers to written interrogatories, or oral testimony that is the subject of a CID.⁷ Where there is reason to believe that a CID recipient has intentionally withheld documents or information or has in any other way attempted to evade, avoid, or obstruct compliance with a CID, initiation of a grand jury investigation is an option.

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9. Parties responding to RFIs produce large quantities of data, almost exclusively in electronic format. The Division and the Commission have invested in litigation support services that are responsible for processing and loading the data received and putting it in an electronic review platform; the increasing amounts of data take additional time to load. The Division and the Commission encourage staff to negotiate modifications that limit the production of redundant or unnecessary information.



10. Successful challenges to CIDs are rare and generally have been limited to burden and relevance issues. A respondent to a CID from the FTC may not object to CID specifications by bringing an action in court without first availing itself of a potential administrative remedy.⁸ For this reason, challenges usually occur prior to any decision on the merits, but can be raised again on appeal of a final decision.

11. Each CID must state the nature of the conduct, activity, or proposed action under investigation and the provision of law applicable to the investigation. Several cases have involved challenges to the adequacy of the description of the investigation, but courts have fou