

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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IN THE MATTER OF INTUIT INC.
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File No. 1923119

MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND

July 7, 2020

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INTUIT INC. PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND

Last year, more taxpayers

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commissioned by the IRS to compel, the FTC issued a second CID on May 18, 2020 that expands the investigation into a full-fledged audit of Intuit's relationship with the IRS, and even whether Intuit has ever sought or claimed a tax deduction for its charitable giving.

The new CID is incredibly burdensome. Counting subparties, it includes 166 interrogatories. There are broad document demands. And notwithstanding the new and unanticipated stresses of work in the COVID-19 environment, the staff seeks investigational hearings with at least eight different Intuit employees, and the CID includes a sixteen-topic corporate hearing notice that will require at least five Intuit employees to testify over several days. All this on top of the substantial burdens associated with the first CID, and all because Intuit had the temerity to participate in a voluntary federal program where it donated software to low and middle income taxpayers and adhered to the rules in doing so. Truly, no good deed goes unpunished.

Even though it believes the CID is unwarranted in scope and substance, Intuit has agreed to comply with nearly all of it because the evidence, when objectively considered, strongly exonerates it from any alleged wrongdoing.

In this Petition, however, Intuit respectfully requests only minor modifications to its corporate investigational hearing. First, that the Commission eliminate topic 12 of the investigational hearing which as modified by FTC staff seeks information about Intuit's relationship with the IRS, and even whether Intuit has ever sought or claimed a tax deduction for its charitable giving.

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constitutionally-protected right to petition the government.

Second Intuit requests that the Commission eliminate topic 16, which requires testimony on 211 interrogatory responses that Intuit has or will provide to the staff. While the staff proposed narrowing the request to fewer interrogatories, even as modified the topic remains incredibly overbroad and impermissibly intrudes on privileged communications.

After multiple, good-faith attempts at resolution, the staff has refused to withdraw the topics at issue, and Intuit is left with no recourse but to litigate the scope of the testimony sought. This motion is timely brought pursuant to 16 C.F.R. 10 because staff agreed to extend the deadline for a Petition to quasi July 7, 2020.

BACKGROUND

A. , Q W X L W P r o d u c t s H H

Intuit currently offers two free tax filing solutions to customers: IRS Free File Program Delivered by TurboTax which has the name suggests it is provided through the IRS and TurboTax Free Edition, a completely free product. R I I H U H G R Q , Q W X L W P r o d u c t s H H U F L D O Z H products provide for genuinely free tax filing; they have a different genesis and serve different segments of customers.

In 2002 the IRS established the Free File program, a public-private partnership between the agency and a consortium of online tax companies to offer free-filing software to a segment of the American public. See 0 H P R U D Q G X P R I 8 Q G H U V W D Q G L Q J 30, 2002), <https://www.irs.gov/pub/irs-soi/2002-free-online-electronic-tax-filing-agreement.pdf>.

The partnership ensured K L J K H U T X D O L W \ ' W D [V H U Y L F H V W K D Q W K H I R Q L W V R Z Q 3 P D [L P L] H > G @ F R Q V X P H U F K R L F H ' L Q O L J K W R

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3 S U R P G R P S H W L W L W - Preparation services. § 2, while allowing the IRS to stay out of the tax software business, as wished.

Pursuant to the terms of the agreement, the IRS assumes responsibility for the program and Intuit and program participants have no obligation to advertise or market it. Id. § VI.B. The IRS sets the criteria for eligibility for the program and the IRS Free File program. Your Federal Taxes for Free (last accessed July 4, 2020, <https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free>, structured so that the product can be used by at least 10% but no more than 50% of taxpayers eligible for FreeFile, see *Byers v. Intuit, Inc.*, 600 F.3d 286, 289 ±90 (3d Cir. 2010). 7 R X V H , Q W X software in the 2020 filing season, taxpayer must have an AGI of \$36,000 or less, be on active military duty with an AGI of \$69,000 or less, or be eligible for the Earned Income Tax Credit.

Although participants have no obligation to advertise the program, IRS, Independent Assessment of the Free File Program - Appendix A: The Economics of IRS Free File 35 (Sept. 13, 2019), <https://www.irs.gov/pub/newsroom/02-appendix-a-economics-of-irs-free-file.pdf>

Intuit has invested 56 million in recent years on growing Free File usage. During the 2019 filing season, Intuit invested \$1.5 million in its Tax Time Allies campaign to broadly promote cost tax filing services, including FreeFile, which resulted in more than 700,000 taxpayers clicking on ads that directed them to up to seven

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taxpayers clicked on those email reminders, bringing them directly to the landing page for
, Q W X L W H H offering. In the end, approximately 1.2 million Americans filed their 2018
taxes using , Q W X L W H H offering, accounting for more than 50 percent of all FreeFile use
see IRS, Independent Assessment of the Free File Program 26 (Oct. 3, 2019),
https://www.irs.gov/pub/newsroom/01_free-file-programassessment- S G, 15 65

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Documents/2018\$ 5 & \$ 5 & B 9 R O X P > H @ S V G L V H V W L P D W H G > W K D W @ D S
taxpayers 32 percent) [can] meet the filing re T X L U H P H Q W V > X V L Q J R Q O \) R U P
million taxpayes did just that last year.

The TurboTax commercial site features important services that cannot be offered through
W K H) U S H B L P G X H W R W K H U H , [D P] S O U X & H R V P X y B n W n as I R U P H U O
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one-third of all American taxpayers or that more taxpayers used to file for free than all other methods of free tax preparation combined

In short order, Intuit received notice that the FTC had begun investigating whether the company had engaged in, or was engaged in,

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See Letter from Tejasvi Srimushnam to Intuit, dated May 9, 2019. Notably, Intuit is unaware of any customer who had complained to the FTC about these issues before that date.

C. The FTC Staff ¶ V ([SDQGLQJ , QYHVWLJDWLRQ RI , QWXLW

Afte U UHFHLYLQJ QRWLFH RI WKH) 7 & ¶ V LQYHVWLJDWLRQ

& RPPLVLRQ ¶ V ILUVWH & DQGLD , QXHVWLJDWLRQ. The Request - X

CID included 45 separate interrogatories, counting subparts, along with 24 document requests (again

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its investigation. *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977); see also *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1977).³ The test for the relevancy of an administrative subpoena

... is whether the information sought is reasonably relevant. *WR WKH DJH'Q Fha' N L Q T X L U*

WR V D \ D O - W n f R i n g J a g e n d e s Z a e l e g i t i m a t e r i g h t t o s a t i s f y t h e m s e l v e s t h a t c o r p o r a t e b e h a v i o r i s c o n s i s t e n t *Z L W K O W Z E D W K H S X V E S E C F v. A r o W o u b g &*

Co., 584 F.2d 1018, 1030 (D.C. Cir. 1978) (quoting *Morton Salt Co.*, 338 U.S. 652), the

L Q I R U P D W L P R Q E W I R G X H K X D W H E X W Q R W H [F H V U G L Y Y H D Q W U W K H S

L Q T X i n a C o f 2 0 N e e O ! € € s € 3 t g € „ f • @ ! ! ú f > S 3 p „ f > S 0 5 @ • € ° à C , ! ¼ ^ ! ð ` 0 p E , (g € ê H {

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imposed on individuals and associations against the significance of the . . . interest in

disclosure, *id.* (quoting *AFL-CIO v. FEC*,) G ' & & L Uheparty

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seeking the discovery must show that the information sought is highly relevant to claims or

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not provided any rationale for why such sought or obtained tax benefits would be relevant, let alone highly U H O H Y D Q W W R L W V L Q Y H V W L J D W L R Q L Q W R , Q W X L W online tax software. Thus, at the very least, the FTC should quash this part of topic 12 as violating the First Amendment privilege.

II. TOPIC 16 OF THE INVESTIGATIONAL HEARING REQUEST INTRUDES ON ATTORNEY -CLIENT COMMUNICATIONS AND IS OVERBROAD

Next, topic 16 should be quashed because it intrudes impermissibly on attorney-client communications and attorney work product and because it seeks testimony that is overbroad and unduly burdensome to Intuit

A. Topic 16 Seeks Privileged Communications

Attorney-Client Privilege is the oldest of the privileges for confidential communications known to the common law. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Both FTC regulations, 16 C.F.R. § 2.7(a)(4), and the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b)(1), recognize that attorney-client communications can accordingly be withheld from discovery.

TRSLF VHHNV WHVW La \ Hwithheld from discovery.

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areas of work product and attorney-client privilege (including protection for a protective order).

Under s W D I I ¶ V S U R S R R C P R O C P R O C L O F E D W I L a subset of interrogatories. However, the privilege applies equally to a subset of the

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explained in meet-and-confer negotiations, no person could educate others across that scope of information and be able to speak knowledgeably about such breadth of content.

Indeed, courts have rejected as overbroad Rule 30(b)(6) topics indistinguishable from topic 16, because they lack the requisite particularity. See, e.g., *Integra Bancorp. v. Fidelity & Deposit Co. of Maryland*, No. 3-11ev-00019-RLY-WGH, 2014 WL 109105, at *3 (S.D. Ind. Jan. 10, 2014) (listing cases) (overruling objections to protective order issued in response to 30(b)(6) topic calling for testimony on responses to 24 interrogatories). In this case, such an overbroad line of inquiry would also be unduly burdensome to Intuit, by requiring it to put forward somewhere between eight and ten witnesses to satisfactorily cover the topics of both & , ' V I Q W U R J D W R U L H V

Even with such modifications, the proposed protective order has the same defects. Though restricted to a smaller subset of interrogatories, topic 16 still lacks reasonable particularity because it does not identify with specificity the information sought. The modification would also still result in undue burden, by requiring Intuit to prepare multiple corporate designees on a wide range of topics. As modified, the topic still covers 30 interrogatories, including subparts, U D Q J R Q , Q W X L W ¶ V X V H R I V X E M H F W D G Y R H e W u b v T a Q J N H \ Z R U G V Z H E V L W H G H V L J Q R I I H D W R X I Q W X L D W Q G P D U E B I Q Q 3 U I R G X B W O , Q W X L W ¶ V S R Q Y l i v e L i n e R e q u i s i t i o n . Q U H O D W H

\$ V , Q W X L W K D V H [S O D L Q H G W R D E V R X G W X L D M ¶ V L I Q L W H Z I U R K J H responses, it may do so during the individual investigative hearings. It does not need a separate Investigative Hearing centered around those responses.

CONCLUSION

Intuit respectfully requests that its Petition be granted, and the Commission should limit its Second CID in the manner described above.

Respectfully submitted,

Dated: July 7, 2020

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MEET AND CONFER STATEMENT

Pursuant to 16 C.F.R. § 2.7(k), counsel for petitioner conferred with counsel for the Commission on several occasions in a good effort to resolve the issues relating to the scope of investigational hearing topics in the Second CID raised in this petition. Meetings took place by telephone between D. Reed Freeman, David Gringer, Blake Roberts, and Ben Chapin (counsel for petitioner) and Ian Barlow, Frances Kern, James Evans, Rebecca Plett, and/or Bryan Cowell (counsel for the FTC) on May 27, 2020 at approximately 10:00 AM ET, June 4, 2020 at approximately 09:00 AM ET, and June 17, 2020 at approximately 01:00 PM ET. Counsel for petitioner and for the FTC also had extensive email communications during that period, and up to July 6, 2020. Although staff agreed to several modifications of the Second CID, the parties were not able to reach an agreement as to Topic 12 and Topic 16 of the investigational hearing demand of Intuit. The staff has not explained to counsel for petitioner why it was unwilling to withdraw the topics.

David Gringer

CERTIFICATE OF SERVICE

I hereby certify that, on July 7, 2020, the foregoing petition to quash was served by electronic mail to the following:

Office of the Secretary
600 Pennsylvania Ave. NW
Washington, D.C. 20580
electronicfilings@ftc.gov

Acting Secretary April Tabor
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atabor@ftc.gov

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