

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson

individual witnesses is unduly burdensome; and CIDs issued to Jeffrey Bezos and Andrew Jassy should be quashed as unduly burdensome given their positions with the company.

As set forth further below, we clarify the Commission's position on the rights of witnesses in investigational hearings. We do not accept that Amazon has sufficiently established as a general matter that the CIDs issued to the company or to individual witnesses present undue burdens in terms of scope or timing and we decline to limit the CID on these grounds. We do find, however, that certain "catch-all" provisions are not sufficiently particular under the Commission's Rules of Practice and we modify these. Moreover, consistent with Amazon's representations regarding issues in scheduling investigational hearings, we have set forth a protocol for efficiently establishing dates for future hearings. Accordingly, we grant the petition in part and deny it in part and order Amazon to comply consistent with the terms of the Order provided below.

B. The March 14, 2022, Business Insider article.

On March 14, 2022, the website *Business Insider* published an article titled, “Internal documents show Amazon has for years knowingly tricked people into signing up for Prime subscriptions.”⁵ The article’s subtitle quoted a former Amazon employee as stating, “We have been deliberately confusing.”

Relying on statements from current and former employees, as well as internal emails and documents, the article reported that, since 2017, Amazon itself had been concerned that its use of website design decisions may have led customers to feel as though the company manipulated them into signing up for Amazon Prime. *Insider* article, at 1. The article reported that “[i]n several cases, fixes for .004 Tw 0.94lf

addressed a concern regarding cancellation processes. As the article related, internal documents indicated that Amazon “intentionally drew out the process of canceling a Prime membership.” *Id.*, at 6. Under a project bearing the evocative title of “Iliad” – the classical epic describing the ten-year siege of the city of Troy– “Amazon created multiple layers of questions and new offers before a Prime member could cancel their subscription, in the hopes of reducing member churn.” *Id.* As with sign-ups, Amazon also received from Project Iliad data allowing definable and measurable results for Amazon. As one document reported, following the development of Project Iliad, “retention appears to be trending positively” as the number of cancellations dropped by 14% and fewer members navigated to the final cancellation page. *Id.*

C. The Commission’s Response and the June 2022 CIDs.

On April 19, 2022, staff issued a letter to Amazon regarding its productions of information in response to the March 2021 CID. This letter reminded Amazon to sign its responses to interrogatory questions in the CID under oath. The letter also directed Amazon to run additional search terms and to do so across a broader range of custodians. Finally, the letter identified certain deficiencies or areas for supplementation in Amazon’s interrogatory responses and requested that Amazon supplement these responses with additional information and document productions. *See* Letter from Jonathan Cohen, Counsel for the Federal Trade Commission, to Laura Kim, Counsel for Amazon (Apr. 19, 2022).

On June 30, 2022, the Commission issued the CIDs at issue in the instant petition, which consist of one CID to the company seeking testimony from one or more corporate representatives on four identified topics, answers to nine interrogatories, and productions in response to three requests for documents, plus seventeen CIDs to current and former Amazon employees for testimony. The subject matter of the June 2022 CID to Amazon sweeps more broadly across Amazon’s services than the March 2021 CID and clearly responds to the *Insider* article.⁷ *See* Civil Investigative Demand issued to Amazon.com, Inc., Matter No. 2123050 (June 30, 2022) (“June 2022 CID”). For instance, in the March 2021 CID, the subject of th()Tj0st h()Tj0s(c)4 (on(D)2 (, t)-2 (I

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specifications seeking testimony, interrogatory responses, and documents relating to the *Insider* article. June 2022 CID, at 2, 3, 4.

D. The July 2022 Modification Letter.

Following additional meet-and-confers, on July 22, 2022, staff modified and narrowed the June 2022 CID. *See* Letter from Jonathan Cohen, Counsel to the Federal Trade Commission, to Laura Kim and John Graubert, Counsel for Amazon (July 22, 2022) (“July 2022 Letter”). Among other modifications, staff extended the deadline for Amazon’s compliance to August 5, 2022, extended the deadline by which Amazon or certain individual witnesses could file petitions to limit or quash their CIDs and altered certain interrogatories and definitions. *Id.*, at 1-2.

As particularly relevant here, the letter modified the topics for testimony by a corporate representative of Amazon. The letter replaced the four testimonial specifications in the June 2022 CID with three main topics that staff expected to address over three consecutive days of testimony: the Prime enrollment process, the Prime cancellation process, and “All issues other than Prime enrollment and cancellation.” *Id.*, at 2. The letter then provided an expanded and detailed list of specific subtopics for testimony within each of these three main topics. *Id.*, at 2-5. Examples of these subtopics include “Testing, studies, and surveys” relating to both Prime enrollment and Prime cancellation, *see id.*, at 3, 4, and “Material changes to the flow that Amazon implemented or considered” relating to both Prime enrollment and cancellation. *See id.*, at 3, 4. In addition, for each main topic and day of testimony, staff included a “catch-all” subtopic that allowed staff to seek testimony on

Any additional topic or topics covered by the [June 2022 CID], which require no more than two hours of testimony during the day, and that we identify with reasonable particularity two weeks before this portion of the examination.

Id., at 3, 4, 5.

E. Witness representation during investigational hearings.

Also in July 2022, a new issue developed with respect to Amazon’s counsel Covington & Burling (“Covington”) and investigational hearings. According to Amazon, starting with communications on July 7 and 11, 2022, the investigating FTC staff took issue with the fact that Covington represented both Amazon the corporation and individual employees of Amazon. *Petition*, at 13. Amazon states that staff premised this objection on the Commission’s Rule of Practice 2.7(f)(3), which limits attendance at investigational hearings to certain specified individuals, including counsel for the person being examined. 16 C.F.R. § 2.7(f)(3); *see also* *Petition*, at 13. According to Amazon, staff stated that an attorney engaged in joint representation of other parties could not qualify as counsel for the person being examined, even if the witness identified that lawyer as his counsel and expressed a desire for the attorney to be present. *Id.*

Amazon further states that the company and staff had multiple discussions in-person, by letter, and by email, during which staff changed its positions. *Id.*, at 13-14. According to Amazon, after conceding that joint representation was permissible, staff then asked Covington lawyers representing both the company and individual witnesses to sign nondisclosure

agreements prohibiting discussion of testimony from individual hearings with other witnesses, a request Covington declined. *Id.*, at 14-15. Amazon alleges that staff then required Covington to agree as a condition of attendance “that its appearance and involvement in the investigational hearing is limited to its representation of the witness and the witness’ interests.” *Id.*, at 15. Amazon states that staff informed Covington that if it did not so agree, Covington lawyers would be asked to leave the hearing room and if they refused, would be removed for trespassing on government property. *Id.*

These discussions “came to a head”

For relief, Amazon asks the Commission to quash staff's interpretation of Rule 2.7(f)(3) and the witness's right to counsel in investigational hearings. Amazon also asks that the Commission quash or limit the June 2022 CID

entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.” 5 U.S.C. § 555(b). Courts have followed the APA by enabling and supporting witnesses’ selection of counsel, even where that counsel may be jointly representing other clients or witnesses. *See, e.g., SEC v. Csapo*, 533 F.2d 7, 11-12 (D.C. Cir. 1976); *Backer v. Commissioner*, 275 F.2d 141, 144 (5th Cir. 1960). Consistent with these principles, the Commission’s statute and rules plainly provide a right to “be accompanied, represented, and advised by counsel.”

To be sure, the ability of a witness to select counsel for purposes of an investigational hearing is not unlimited. One potential limitation arises from the Rules of Professional Conduct and an attorney’s ethical duty to avoid undisclosed conflicts of interest. Should such a conflict arise among an attorney’s clients, that attorney must either disclose and seek the consent of the clients or withdraw from the representation.⁹ *See, e.g., D.C. R. Prof. Conduct 1.7, 1.13.*¹⁰

Second, the FTC’s investigating staff has the ability to control attendance at investigational hearings in order to prevent delay or

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investigation. Any counsel selected by a witness for an investigational hearing must limit participation to those activities necessary for representation of the witness being examined, consistent with counsel's obligations under applicable rules of professional conduct. Of note, it would be inappropriate for counsel representing a witness to lodge objections on behalf of another party's or witness's interests, with one exception. The rules of professional conduct require both the questioning attorney and defending attorney to prevent the witness from intruding upon a third party's privilege. *See* D.C. R. Prof. Conduct 4.4, cmt. [1] ("Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."). It is consistent with the FTC's rules that a witness may be instructed not to answer any question that may intrude upon a third party's privilege. 16 C.F.R. § 2.9(b)(2) ("Counsel may instruct a witness not to answer only when necessary to preserve a claim of protected status.").

If counsel for the witness at an investigational hearing violates any of the Commission's rules – for example, by engaging in argumentative or speaking objections, instructing the witness to refuse to answer on grounds other than protected status, or purporting to object on behalf of a third party at the deposition – the Commission's rules provide the hearing official authority to address this conduct. *See* 16 C.F.R. § 2.9(b) (referencing 16 C.F.R. § 4.1(e)).¹¹ We admonish

In support, Amazon proffers a declaration from Mark England, a Senior Corporate Counsel at Amazon. *Petition*, Ex. 2. Mr. England states that in order to respond to the June 2022 CID, Amazon will need to consult with numerous individuals from various internal groups. *Petition*, Ex. 2, ¶ 7. These groups will “likely” include individuals from 21 different internal units he identified. *Id.* Mr. England added that, “while it is difficult to predict the precise number of hours it would take to comply with the June 30, 2022, CID,” Amazon’s projection of the burden is shaped by the effort it supplied to respond to the March 2021 CID. *Id.*, ¶ 8. For that CID, Mr. England stated that Amazon reviewed “hundreds of thousands of pages” of documents and consulted with “dozens” of “extremely busy individuals with substantial normal job responsibilities,” some multiple times. *Id.*, ¶¶ 9-10. As he describes, the scope of the CID is “complicated” because it

may be that the expanded scope of the June 2022 CID requires Amazon to consult many more offices and employees than it did in responding to the March 2021 CID, but this is a result of the scope of the operations related to the alleged practices at issue.

Relatedly, Amazon also protests the compliance obligation imposed by the CID, repeatedly describing it as “unduly burdensome.” *Petition*, at 11, 16, 18. But compulsory process does not become unduly burdensome and thus subject to limitation unless compliance “threatens to unduly disrupt or seriously hinder normal operations” of the recipient’s business. *Texaco*, 555 F.2d at 882. Indeed, “[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.*, and courts accept that “[t]ime must be taken from normal activities and resources must be committed to gathering the information necessary to comply. Nevertheless, the presumption is that compliance should be enforced to further the agency’s legitimate inquiry into matters of public interest.” *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980). Accordingly, the test for undue burden “is not easily met.” *Texaco*, 555 F.2d at 882.; *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986).

The responsibility for demonstrating undue burden falls on the party claiming it and must be established with more than conclusory or unsupported statements. *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (appellants have the burden to show unreasonableness of

In addition to a general challenge to the scope of the June 2022 CID, Amazon also raises two specific claims of burden. First, Amazon objects to Interrogatory 1's request for Amazon to identify the number of consumers who became "Nonconsensual Enrollees" and "Diverted Cancels," observing that these terms were not included in the March 2021 CID and arguing that the terms require a subjective analysis of consumer intent and are also "argumentative." For these reasons, Amazon asserts they present an undue burden, particularly in light of the expanded scope of the investigation. *Petition*, at 17

documents that exist have been produced”). But to the extent Amazon or its employees have generated or retained records or information responsive to this interrogatory – including personal knowledge of such messages – they must produce those records and/or related information as directed. *Maryland Cup Corp.*, 785 F.2d at 479 (explaining that “all relevant information within the company’s control is subject to the [agency’s] subpoena power,” including information that “exists in the minds of the supervisors and workers,” and that the company must “seek[] out that information”).

2. Staff’s “catch-all” requests for testimony are not sufficiently particular in the context of this case.

Amazon next argues that the CID’s requests for testimony from the corporation, as modified by the July 2022 Letter, are not “reasonably particular” in Tw 15.(ul)-heeo(“)4 ()TJ0 Tc 0 rei4 (ont)-2

C. Amazon has not sufficiently supported its challenges to the CIDs for testimony from individual witnesses.

1. Amazon has not established that the schedule for testimony from witnesses other than Jeffrey Bezos and Andrew Jassy presents an undue burden.

Turning to the CIDs issued to individual witnesses, Amazon raises a general claim that staff imposed an unreasonable burden by requiring that all of these hearings be completed before September 20, an accelerated schedule that, according to Amazon, did not allow sufficient time to prepare. *Petition*, at 23-25. For example, Amazon claims that in some cases, an individual’s investigational hearing was scheduled only five days after counsel received notice. *Id.*, at 24. Amazon therefore asks for the schedule to be extended to allow the hearings to be completed no later than October 21, 2022. *Id.*, at 25.

To facilitate effective preparation of the witnesses, we will grant this portion of the petition and extend the deadlines for responses, and in Section III we provide guidelines to enable staff and counsel for Amazon and the witnesses to develop a hearing schedule that ensures staff can obtain the information it needs within an expeditious but reasonable time frame.

2. Amazon has not supported limiting or quashing the CIDs issued to Messrs. Bezos and Jassy.

Finally, Amazon argues that undue burdens are presented by CIDs for testimony issued to Mr. Bezos, Amazon’s Executive Chairman and former CEO, and Mr. Jassy, Amazon’s current President and CEO. *Petition*, at 25. In support, Amazon cites cases applying the “apex doctrine,” a concept developed under the Federal Rules of Civil Procedure to limit depositions of high-ranking officers and executives based on concerns that such depositions are burdensome, are cumulative or duplicative of testimony from other witnesses, or are unnecessary because they call for detailed, first-hand knowledge these officers may lack. *Id.*, at 25-26 (citing *United States ex rel. Galmines v. Novartis Pharms. Corp.*, No. 06-3213, 2015 WL 4973626, at *1 (E.D. Pa. Aug. 20, 2015); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374 MMC, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007)).¹⁹ Based on the “apex doctrine,” Amazon requests that these CIDs be quashed. In the alternative, Amazon asks that these hearings be postponed until after all other hearings, and that the testimony be limited to those subjects that staff can show

¹⁹ Amazon also cites *Amazon.com, Inc. v. Comm'r*, 108 T.C.M. (CCH) 588 (T.C. 2014). In that case involving tax deficiency claims against the company, the court applied logic similar to the “apex doctrine” to quash a *trial* subpoena issued to Mr. Bezos as cumulative and burdensome. As discussed above, the “apex doctrine”

they have been unable to obtain from other witnesses despite their reasonable efforts.²⁰ *Petition*, at 26.

IT IS FURTHER ORDERED THAT, to the extent provisions in the CID have not been limited or quashed, these provisions remain valid and enforceable.

IT IS FURTHER ORDERED THAT, pursuant to Commission Rules of Practice 2.7(f)(3) and 2.9, 16 C.F.R. §§ 2.7(f)(3), 2.9, a witness in an investigational hearing is entitled to be accompanied by counsel, even if that counsel jointly represents other parties or witnesses, *provided that* selected counsel is not subject an undisclosed and unconsented conflict of interest, and that selected counsel limits