

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

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

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<b>In the Matter of</b> )	
)	
<b>Civil Investigative Demand Issued to</b> )	<b>File No. 211-0155</b>
<b>Retail Services &amp; Systems, Inc.</b> )	<b>REDACTED PUBLIC</b>
<b>d/b/a/ Total Wine &amp; More</b> )	<b>VERSION</b>
)	
_____ )	

**ORDER DENYING PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND**

**By BEDOYA, Commissioner:**

Retail Services & Systems, Inc., d/b/a Total Wine & More (“TWM”) petitions the Commission to limit the Civil Investigative Demand (“CID”) issued on February 23, 2023. The CID was issued in connection with the Commission’s investigation into whether a U.S. distributor of wine and spirits, Southern Glazer’s Wine and Spirits, LLC (“Southern”), or its affiliates have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act or engaged in discriminatory practices in violation of the Robinson-Patman Act. TWM is a retailer that purchases wine and spirits from Southern. *See* Petition App. A (CID) at 1.

TWM contends that two definitions in the CID are overly broad so that the CID seeks materials and information that are not relevant to the investigation and imposes an unreasonable burden and expense on TWM. Consequently, TWM asks “the Commission, as a threshold matter, [to] limit the definitions of ‘Distributor’ and ‘Relevant Products’ to Southern and the wines and spirits that Southern sells to TWM.” Petition at 5. Similarly, TWM asks the Commission to limit particular specifications that seek confidential and proprietary data and information to business involving Southern. TWM also asks the Commission to limit data specifications and specifications seeking “all documents” regarding particular issues to reduce the burden on TWM. Finally, TWM also asks the Commission to narrow the five-year timeframe for materials.

For the reasons stated below, the Commission denies the petition.

## I. BACKGROUND

The production, distribution, and sale of wine and spirits in the United States occur within a three-tier system created by the 21st Amendment and the Federal Alcohol Administration Act of 1935. Despite differences among state regulations for the distribution and sale of alcohol, the three-tier structure exists in every state. Wine and spirits are transferred from suppliers in the first tier to distributors in the second tier, and later transferred to retailers in the third tier. Suppliers include wine and spirit brand owners, manufacturers, and importers. Distributors purchase wine and spirits for wholesale and provide logistics and distribution services. Retailers sell wine and spirits to consumers for on-premises consumption (*e.g.*, a bar or restaurant) or off-premises consumption (*e.g.*, a liquor or grocery store).

Southern is a distributor in the second tier. TWM is a retailer in the third tier and purchases wine and spirits from Southern.

As described in the CID, Commission staff are investigating “[w]hether Southern Glazer’s Wine and Spirits, LLC or its affiliates have: (1) engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act . . . through . . . conduct, including exclusive dealing, tying, and related conduct; and/or (2) engaged in discriminatory practices in violation of the Robinson-Patman Act[.]” Petition App. A (CID) at 1. As part of the investigation, the Commission issued the CID to TWM on February 23, 2023.

Consistent with Commission Rule 2.7(k), which requires a CID recipient to meet and confer with Commission staff “to discuss compliance and to address and attempt to resolve all issues” regarding the CID, there have been numerous communications between TWM and FTC staff regarding TWM’s response to the CID. *See* Petition App. D (Statement of Counsel Under 16 C.F.R. §2.10(a)(2)).

On February 24, FTC staff sent an electronic courtesy copy of the CID to TWM’s General Counsel, Mr. Shaffer. Following an exchange of email, on March 13, TWM’s General Counsel, Mr. Shaffer, spoke with FTC staff. *Id.* at ¶ 4.b. On March 15, Mr. Weissman informed FTC Staff that TWM retained his firm as outside counsel, and following that notification, FTC staff extended the CID return date and the deadline to petition to limit or quash the CID to March 25. Staff also identified priority specifications for prompt responses from TWM. *Id.* at ¶¶ 4.c, 4.d. On March 22, FTC staff and counsel for TWM discussed TWM’s response to the priority specifications. *Id.* at ¶ 4.e. Two days later on March 24, FTC staff again extended the CID return date and the deadline to petition to limit or quash the CID to April 7, asking TWM to propose a comprehensive production plan and to produce material during the extension period. *Id.* at ¶ 4.f.

On March 30, FTC staff requested information from TWM before the next meet-and-confer discussion about TWM’s plans for production. *Id.* at ¶ 4.g. On April 3, TWM provided a letter summarizing TWM’s objections to the CID and provided limited material to respond to the priority specifications. *Id.* at ¶ 4.h, Petition App. B. On April 4, TWM and FTC staff held a series of extended discussions regarding the CID. Petition App. D at ¶ i. Also on April 4, FTC staff told TWM that the deadline for filing a petition to quash the CID would not be extended. On April 5, FTC staff sent a letter memorializing the April 4 discussions, which also stated that

TWM had not yet provided a comprehensive production plan and explained that on-going negotiations about the CID did not provide good cause to extend the petition deadline. Petition App. C. On April 7, TWM filed its Petition to Limit Civil Investigative Demand.

## II. ANALYSIS

Compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

### A. Relevance

In the context of an administrative CID, “relevance” is defined broadly and with deference to an administrative agency’s determination. *FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). An administrative agency is to be accorded “extreme breadth” when conducting an investigation. *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993). As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is broader and “more relaxed” than in an adjudicatory proceeding. *Invention Submission Corp.*, 965 F.2d at 1090. The Commission’s compulsory process need not be limited to information necessary to prove a specific charge; it can demand any documents or information “relevant to the investigation – the boundary of which may be defined quite generally” by the Commission. *Id.* The material sought need only be “reasonably relevant” to the agency investigation and an agency explanation that the information is relevant will be upheld where the agency’s explanation was “not ‘obviously wrong,’” *Texaco*, 555 F.2d at 876, 877 n.32. See *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp.2d 3, 5-7 (D.D.C. 2010) (agency compulsory process upheld where agency’s explanation of relevance was “not ‘obviously wrong’”), *aff’d*, 665 F.3d 1312 (D.C. Cir. 2011); *FTC v. Carter*, 636 F.2d, 781, 788 (D.C. Cir. 1980).

#### 1. The CID’s Definitions of Distributor and Relevant Products

TWM contends that two definitions in the CID are overly broad so that the CID seeks materials and information that are not relevant to the investigation. TWM explains that the CID defines “Distributor” to mean any distributor of any wine or spirit product and “Relevant Products” to mean any wine or spirit TWM has purchased or sold. TWM argues that, because the subject of the investigation is whether Southern has violated Section 5 of the FTC Act or the Robinson Patman Act, “TWM’s business activity unrelated to Southern has no relevance to an administrative investigation into Southern.” Petition at 3. Consequently, TWM petitions “the Commission, as a threshold matter, [to] limit the definitions of ‘Distributor’ and ‘Relevant Products’ to Southern and the wines and spirits that Southern sells to TWM.” Petition at 5.

Implicit in TWM’s argument is an assumption that what constitutes relevance for purposes of the investigation is bounded by information establishing a prima facie case for a

Robinson-Patman Act violation by Southern based on discriminatory wholesale prices or services for retailers. TWM’s narrow view of relevance to the Commission’s investigation is unjustified. In fact, on its face, the CID states that the investigation is not limited to possible violations of the Robinson-Patman Act; it states that the investigation also extends to whether Southern has “engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act . . . through unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitive, or exclusionary conduct, including exclusive dealing, tying, and related conduct[.]” CID at 1.

Even if we accept TWM’s representation that FTC staff told TWM that “the CID concerns only the Robinson-Patman Act aspects of [the] investigation of Southern,” information and materials regarding TWM’s business with distributors other than Southern are relevant to the Commission’s investigation. As courts have explained, the information demands in a CID need not be limited to the information necessary to prove a specific charge; instead, it can call for any documents or information relevant “to the investigation,” whose boundaries may be broadly defined by the Commission. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). Here, the Commission’s investigation must consider more than the facts to allege a prima facie case of a Robinson-Patman Act violation; among other things, it will also assess the merits of possible defenses under the Robinson-Patman Act, such as a good-faith attempt to meet an equally low price of a competitor, or to match the services or facilities furnished by a competitor. *See* U.S.C. § 13(b); *Falls City Indus. v. Vanco Beverage*, 460 U.S. 428, 439 (1983) (vacating lower courts’ rejection of meeting competition defense and criticizing lower courts’ lack of findings regarding competitors’ prices and the information available to the seller about those prices).

Thus, contrary to TWM’s contention, the information demands in the CID arising from applying the definitions of “Distributor” and “Relevant Products” beyond Southern and products sold by non-Southern distributors is well within the scope of the Commission’s investigation. These information demands are not “of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power” of the FTC. *Morton Salt*, 338 U.S. at 652.

## 2. Specifications 8 and 12 – 15

TWM also challenges the relevance of numerous specifications in the CID. For Specification 8, TWM argues that, because it is a retailer and not a distributor, the requested information about TWM has no bearing on the market in question, which is the wholesale distribution of wines and spirits. Petition at 14. For Specifications 12 – 15, TWM argues that “the data and information sought . . . has nothing to do with Southern.”

Again, TWM’s view of relevance misses the significance of the information to the Commission’s investigation. For each of the specifications, the information is germane to an element of a Robinson-Patman Act violation or potential defense. Consequently, we do not limit these specifications in the CID.

Specification 8 seeks consolidated, company-wide financial information for TWM, such as operating and net income.<sup>1</sup> TWM’s argument that this information is not relevant to the market in question misapprehends the subject of the Commission’s investigation under the FTC Act and Robinson-Patman Act. As described by the CID, the subject of investigation is Southern’s conduct. *See* Petition Exh. A at 1 (CID). Assessing Southern’s conduct under the Robinson-Patman Act requires examination of both the wholesale market where Southern operates and the retailers to whom Southern sells. That is, in a secondary line price discrimination case, the possible injury is to competition at the retail level, between favored and disfavored customers. Consequently, the information regarding TWM and the retail market is relevant to the investigation. The consolidated financial information sought by Specification 8 is relevant to examine the purpose, context, and effect of any discriminatory conduct.

Specification 12 seeks TWM documents about competition at the retail level. TWM objects to the Specification on the ground that the information “has nothing to do with Southern.” Again, the effect of possible discriminatory conduct by Southern occurs at the retail level. Information about competition at the retail level is relevant to the investigation.

Specification 13 seeks documents provided to TWM’s board and executive leaders regarding strategies for both the purchase of wine and spirits from distributors and their sale to consumers. Here again, the information is relevant to the investigation. Strategic planning documents are relevant to understand the operation of distribution and retail markets and TWM’s relationship with Southern and other distributors. Planning documents are likely to provide information regarding the types of distribution services, marketing services, and promotional programs that are provided and efforts to obtain particular – perhaps discriminatory – terms with distributors. Moreover, planning documents may inform the investigation about the downstream effect of distributor conduct, including diverted sales and competitive injury.

Specification 14 seeks data and information about facilities where TWM stores the products it purchases. Specification 15 seeks internal documents about TWM’s inventory strategies. The information sought by these specifications is relevant to the Robinson-Patman Act’s requirement that sales be “in commerce,” such that at least one of the compared transactions cross a state line. *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 195 (1974). The information also is relevant to assess a potential functional discount defense asserting that price differentials reflect distribution functions assumed by particular retailers. *See Texaco v. Hasbrouk*, 496 U.S. 543, 562 (1990).

### **3. Materials and Information from 2018 and 2019**

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<sup>1</sup> TWM suggests, but does not expressly argue, that the information sought by this Specification should be limited because it seeks “confidential, sensitive, and proprietary data.” Petition at 5. As a general rule, the Commission is prohibited from disclosing any documents and information obtained through compulsory process, including proprietary business and sensitive customer information. *See* 15 U.S.C §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a). Thus, the mere fact that a subpoena or CID requires production of confidential or sensitive business information is no basis for noncompliance. *See FTC v. Dresser Industries, Inc.*, No. 77-44, 1977 WL 1394, at \*5 (D.D.C. Apr. 26, 1977) (citing cases).

TWM argues that Specifications 3, 12-13, and 15-16 should be limited in time frame to no more than three years, asserting that information from an earlier period is not relevant. Petition at 16. TWM explains that, if the FTC were to seek an injunction against Southern, the Commission would need to challenge current conduct – and it contends that “[h]istorical information . . . before January 2020 . . . does not reflect Southern’s current business practices and has substantially less probative value than more recent information[.]” *Id.* We disagree that information before January 2020 sought by the CID is not relevant to the investigation and we do not limit the time frame identified in Instruction I.1.

First, TWM does not actually claim that the requested information is *not* relevant; TWM claims only that the information regarding the earlier period is *less* probative. Second, information sought in a CID need only be relevant to the investigation; it is not required to be the basis for a subsequent lawsuit. *See Westside Ford v. FTC*, 206 F.2d 627, 632 (9th Cir. 1953) (“The standards of materiality or relevancy are far less rigid in an ex parte inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceedings.” (quoting *Hagan v. Porter*, 156 F.2d 362, 365 (9th Cir. 1946); *FTC v. Gibson Prods. Of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1978) (“We hold that, as long as the material is reasonably relevant to the alleged violations, it can be discovered by subpoena, regardless of whether it concerns current or past conduct.”)). Third, a longer time period is more likely to enable data analysis to reduce noise and distortion and a longer time period increases the likelihood that data or information will reflect natural experiments of infrequent events, such as the entry or exit of rival firms.

## **B. Claims of Overly Broad Specifications and Undue Burden of Compliance**

In the course of contesting the Commission’s requests for information about non-Southern distributors and products not purchased from Southern, TWM asserts that the definitions of “Distributor” and “Relevant Product” unduly increase TWM’s burden to comply with the CID. TWM then asks the definitions be limited to address an undue burden. TWM also asks that the scope of particular specifications be limited to specific Southern products to reduce the burden. Petition at 15. In addition, TWM contends that specifications that ask TWM to produce “all documents” are “overbroad and unreasonably burdensome.” Petition at 5, 9, 15-16.

“[B]roadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant.” *Adams v. FTC*, 296 F.2d 861, 867 (8th Cir. 1961). Similarly, as the D.C. Circuit has noted, “[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.” *Texaco*, 555 F.2d at 882; *FTC v. Shaffner*, 626 F.2d, 38 (7th Cir. 1980) (“Needless to say, any subpoena places a burden on the person to whom it is directed. Time 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.”). “Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco*, 555 F.2d at 882. For such a showing, the CID recipient bears the burden of showing that the CID imposes an undue burden. *See FTC v. Standard American*,

*Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (appellants have the burden to show unreasonableness of the Commission’s demand and make a record to show the “measure of their grievance rather than [asking the court] to assume it.”) (citing *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 217-18 (1946)).

### 1. Data Specifications

In connection with its relevance challenge to the CID’s definitions, TWM argues that the resulting burdens for production are extensive and disproportionate to the needs of the investigation. In particular, TWM points to the burden associated with complying with Specification 10, which seeks product-level data about sales of wine and spirit products TWM purchased from distributors. Petition at 11-13. TWM’s petition explains that TWM purchased more than 18,000 products from Southern and that producing weekly sales data for a small sample of products took TWM employees hundreds of hours to pull, review, and validate. Petition at 12. That the data may be voluminous and include many rows of data, standing alone, is insufficient to establish undue burden. *See Texaco*, 555 F.2d at 882 (observing that “the breadth complained of is in large part attributable to the magnitude of the producers’ business operations” and rejecting claim of undue burden.).

In addition, TWM’s claims fail to reflect the results of negotiations with FTC staff; during a series of discussions on April 4, staff offered to defer the production of data in eight states where TWM does not purchase from Southern, defer production of data for products not distributed by Southern, and defer production of weekly data in favor of monthly data. *See* Petition App. C (April 5, 2023 letter from Altumash Mufti to Stephen Weissman) at 2; Petition at 12 n.4, 13 n.6. Also, staff explained that the Specification asked only for data as it is kept in the ordinary course and that TWM’s internal quality checks on the data to be produced were unnecessary. *See* Petition App. C at 2. When, on April 4, staff did not extend the deadline for filing a petition to limit or quash the CID, TWM withdrew from discussions regarding these offers and filed the instant Petition on April 7. Although there was no final agreement on the proposed deferred productions at the time TWM filed its Petition, the offers to defer production of data sought by Specification 10 substantially reduce the burden, and likely would result in a compliance obligation for this Specification that mimics TWM’s proposed limitation on the definition of Relevant Products: that is, limits the production to include only those products sold by Southern.<sup>2</sup>

To support its claims of an undue burden that would “unduly disrupt or seriously hinder” its normal business operations, TWM provides the Declaration of Thomas Kooser, TWM’s Chief

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<sup>2</sup> TWM misplaces its reliance on arguments that deferring production may lead to unreasonable burdens in the future. Petition at 13 n.6. The reasonableness of a burden is evaluated with reference to whether where compliance would disrupt normal business operations [REDACTED]

[REDACTED] it is not at all evident that any future productions – if demanded – would compete for resources with the identified initiatives. TWM has provided no basis to assess any claimed burden on future business operations.

Technology Officer [REDACTED]

[REDACTED] Yet, as already discussed, FTC staff proposed relief for Specification 10 to address burden. Staff's position that data be provided as it is kept in the ordinary course and staff's clarification that the FTC did not demand TWM's internal quality check, *see* Petition App. C (April 5, 2023, letter from Altumash Mufti to Stephen Weissman) at 2 (discussing Specification 10), likely mitigate the burden associated with the other data specifications. Consequently, we find that the data specifications in the CID do not impose an undue burden on TWM.

## 2. Specifications seeking "all documents"

TWM fails to show that Specifications 3, 12-13, and 15-16 that seek "all documents" impose an undue burden. Mr. Kooser's Declaration addresses only the burden of complying with Specifications asking for data. Mr. Kooser's Declaration does not address Specifications seeking documents. *See* Petition App. D (Declaration of Thomas Kooser). Consequently, TWM provides only conclusory statements in its Petition, which is insufficient to demonstrate an undue burden or evidence that compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *See Texaco*, 555 F.2d at 882.

Further, FTC staff "have repeatedly stated [they] are prepared to address burdens associated with requests for 'all documents' with custodian and search term proposals, but Total Wine has not provided any." Petition App. C (April 5, 2023, letter from Altumash Mufti to Stephen Weissman) at 4. And TWM states that it wishes "to discuss with Staff the nature and scope of searches of the Company's files in response to specifications requiring production of 'all documents related to' a broad range of topics, including the appropriateness of word searches of certain custodians' files." Petition at 15. We encourage FTC staff and TWM to continue discussions to resolve the burdens associated with these specifications.




**III. CONCLUSION**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Retail Services & System, Inc.'s Petition to Limit Civil Investigative Demand be, and hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** Retail Services & System, Inc. shall comply in full with the Commission's Civil Investigative Demand no later than **June 16, 2023**, or at such other date as the Commission staff may determine.

By the Commission.



April J. Tabor  
Secretary

SEAL:  
ISSUED: May 19, 2023