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CIDs and Robinson-Patman Act Investigations: Lessons from the FTC-Total Wine Dispute

by Richard S. Snyder

The Federal Trade Commission averages more than one Civil Investigative Demand (***CID***) per day, but compliance disputes between the FTC and CID recipients rarely surface publicly. On October 20, 2023, the FTC publicly filed a Petition asking a federal court to compel Retail Services & Systems dba Total Wine and More (***Total Wine***) to comply with an FTC CID.

The FTC issued the CID to further its investigation into whether the largest wine and liquor distributor in the US, Southern Glazer's Wine (***Southern***), violated the Robinson-Patman Act by selling to Total Wine and other large chains at prices lower than what smaller retailers pay. Although the CID dispute settled before the court could issue a ruling, the case illustrates how companies can protect their interests when they receive a CID and provides insight into the FTC's handling of third-party CIDs in high-profile investigations.

The FTC's investigation into Southern began in 2022, likely with interviews of complainants (small retailers) and a CID to Southern. On February 23, 2023, the FTC issued nearly identical CIDs to ten of Southern's largest chain retail customers. The CIDs required Total Wine and nine other retailers to respond to two interrogatories, six data requests, and eleven document requests on or before March 25, 2023. The FTC served Total Wine with the CID on February 27, 2023.

During the meet-and-confer process with the FTC, Total Wine immediately raised concerns over the scope and breadth of the CID, and sought to (i) limit the scope of the CID to structured data and documents describing products it purchased from Southern, (ii) avoid custodial production of "all responsive documents" from the unstructured data (email, Word documents, etc.) of five high-level Total Wine executives, and (iii) limit the time period to 2020 onward, rather than 2018, as demanded in the CID.

Although FTC Staff granted Total Wine an initial extension of all deadlines for fourteen days, less than two weeks later, FTC staff refused further extensions unless Total Wine conceded key points. Recognizing an apparent impasse, Total Wine moved decisively to protect its procedural rights. FTC rules require CID recipients to move to narrow or quash a CID within 20 days of service, far more quickly than in ordinary civil discovery. Forced to concede key points to the FTC to obtain more time, Total Wine filed a Motion to Limit the CID with the FTC.

The Commission's denial of Total Wine's Motion to Limit, and its order to comply with the CID, were unsurprising. First, when the FTC issues a CID, it is signed by one of the Commissioners and reflects the thinking of FTC staff, management, and the Commissioners. In other words, a party filing a motion to quash or limit a CID asks the Commissioners to conclude that a CID prepared by staff and signed by a Commissioner was overbroad or otherwise flawed. Second, because FTC staff, management, and Commissioners' offices are in regular communication about high-profile investigations such as this one, FTC staff can be confident that the Commissioners will support their efforts to enforce the CID.

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Following the Commission's refusal to narrow the CID, Total Wine produced responsive materials and continued to meet and confer with the FTC on areas of dispute up until the FTC filed its Petition in federal court. The FTC benefits from persuasive, binding precedent favoring enforcement of CIDs in which "relevance" is defined broadly and with deference to the FTC's judgment on relevance and burden, unless that judgment is "obviously wrong." Although this legal standard favors the FTC, going to court introduces a substantial delay in the production of CID materials that may impede the FTC's investigation. This likely explains why the FTC chose to enforce its CID in the Eastern District of Virginia, the so-called Rocket Docket, even though the FTC has no presence in Virginia and Total Wine's headquarters are in Maryland. On December 18, 2023, before the court could rule on their papers, the FTC and Total Wine notified the court of their settlement in a Joint Motion to Stay the proceedings for 120 days so that the Parties can implement their agreement.

Who won?

Although the FTC's settlement with Total Wine is not public, the 120-day stay in proceedings to allow the Parties to implement their agreement suggests that Total Wine agreed to make a broad production of documents and data. The impending court hearing likely also pressured the FTC to finalize an agreement as well. The FTC has strong institutional reasons for requiring timely and complete compliance with CIDs, but also wants to avoid any judicial impairment of its CID enforcement authority.

The Monday Morning Quarterback

Nine other retailers' compliance with the CID made Total Wine's task more difficult. Both the Commission's denial of the Motion to Narrow the CID and the FTC's filing in court emphasized that Total Wine's resistance to the CID set it apart from the nine other retailers whose plans for compliance were acceptable to the Commission. When nine similarly situated companies have accepted the FTC's demands and agreed to incur the costs associated with compliance, both the FTC and the court may have reservations in granting relief from demands to which others agreed. This suggests parties in receipt of CIDs may benefit from consulting, *through counsel*, with other CID recipients to identify compromise proposals that may be acceptable to the FTC and reduce the burden of compliance with the CID.

Total Wine was unfairly faulted for failing to quantify the burden of compliance. The Commission's order denying the Motion to Narrow the CID faults Total Wine for failing to quantify its burden of producing both structured data and business documents. For example, the Commission refused to credit the burden of collecting and reviewing five years of unstructured data for five key employees because Total Wine did not assign a dollar number to that task. But the cost of unstructured data collection, review, and production can only be predicted after the producing party has already incurred the costs of collecting, processing, and running search terms across the documents. The FTC's refusal to credit, at all, the cost of production and review of hundreds of thousands, if not millions, of documents because Total Wine did not provide a full accounting and quantification of that burden may cause many to view the FTC as impractical.

The FTC can be faulted for failing to credit Total Wine's interest in protecting sensitive materials. The Commission's Opinion rejects Total Wine's desire to protect sensitive information raised in its Motion to Narrow the CID, stating that "as a general rule, the Commission is prohibited from disclosing any documents and information obtained through compulsory process." But exceptions to that rule may raise concerns for CID recipients. For example, if the FTC sues Southern, Southern's external counsel and certain in-house counsel likely would get access to the FTC's investigative files including all materials produced by Total Wine. Further, private claimants may file lawsuits against Southern and subpoena Southern or Total Wine to produce its CID production to the class Plaintiffs. Finally, if this case proceeds to trial, whether third-party evidence presented to the court is protected is entirely at the discretion of the judge, who is bound by precedent favoring public access to proceedings and filings.

CID recipients whose interests are not aligned with the FTC's case may face greater skepticism. Although the FTC repeatedly confirmed that Total Wine is not the subject of the FTC's investigation, the FTC may have believed that Total Wine may not fully support the FTC's investigation into Southern. First, Total Wine may have viewed the FTC's investigation into pricing and contract terms from Southern as disruptive to a key relationship. Second, Total Wine may have viewed the FTC's investigation as increasing Total Wine's legal risk. In its Reply filed with the court, the FTC wrote that "while Total Wine is not currently a target of the investigation, the Robinson-Patman Act is focused not just on sellers; the statute also makes it illegal for a buyer to knowingly induce or accept a discriminatory price."

Conclusion

The FTC's issuance of a CID as part of a Robinson-Patman investigation reflects the commitment of Commissioner Bedoya and others to revive the Act after a more than 20-year hiatus on FTC and DOJ enforcement. The FTC likely will bring enforcement actions arising under the Act this year. Although actions to enforce CIDs against third parties are not without precedent, this enforcement action suggests that where key FTC priorities are implicated, the FTC may require third parties responding to CIDs to produce more data, conduct broader searches for documents, and otherwise assume burdens atypical in most investigations.