

# What Should You Do When the FTC Calls About Google?

On June 24, 2011, Google confirmed that the Federal Trade Commission opened a formal antitrust investigation against it. While the scope of the investigation has yet to be announced publicly, the FTC is likely investigating to determine whether Google has used its dominance in Internet search and advertising to stifle competition, and whether Google's actions cause harm to consumers.

## **What is the FTC going to do now and why does this matter?**

As part of its investigation, it is not only highly likely the FTC will contact advertisers, advertising agencies, and media buying companies, as well as ad publishing networks, lead generating companies, suppliers and users of Google's services, but that appears to have already begun. The purpose of these third party investigations by the FTC will no doubt be an attempt to find out how Google behaves in the market, all in hopes of finding support for their alleged antitrust violations. The FTC can contact you in a number of ways, detailed below. As the recipient of an FTC inquiry that is not purely voluntary, you are obligated to provide certain information to the FTC. The nature and extent of this information will vary depending on your company, your role in the market, your relationship with Google, and the FTC's investigation itself.

## **What kind of document requests or investigation might the FTC send to my company?**

The FTC has a range of investigative powers. With respect to third party investigations, in the context of the investigation of Google, the FTC will likely issue informal inquiry letters (also called "access letters"), subpoenas, and Civil Investigative Demands (CIDs).

### *Informal Inquiries*

Despite their name, informal inquiries are serious demands from the FTC. The FTC may send a letter (sometimes called an "access letter") that asks for a telephone meeting, or for an in-person meeting to obtain information from your company. These letters seek voluntary cooperation and are unenforceable requests for information. To further encourage voluntary cooperation, all information given to the FTC under an access letter will be given the same level of confidential treatment given to information received through the FTC's compulsory process. If you refuse to cooperate with an informal inquiry, you may later receive a subpoena or Civil Investigative Demand (CID).

### *Administrative Subpoenas*

The FTC may issue a subpoena, a form of legal compulsion, requiring the attendance and testimony of witnesses and/or the production of documents and information related to any matter under investigation. These subpoenas are judicially enforceable and may cover paper and digital records, as well as oral testimony from individuals. Those who fail to comply with a court's enforcement order of the subpoena may face contempt charges. Documents and information produced under a subpoena are treated as confidential by the FTC.

### *Civil Investigative Demand (CID)*

Like a subpoena, a CID can compel the production of existing documents or oral testimony. Unlike a subpoena, a CID may additionally require you to file a written report or

provide written answers to questions. A CID is also judicially enforceable, and those who fail to comply with a court's enforcement order of a CID may face contempt charges. Documents, information and any reports produced or prepared pursuant to a CID are treated as confidential by the FTC.

### **Subpoena or CID? Similar, yet different.**

Both subpoenas and CIDs are compulsory demands from the FTC (unlike an access letter, which is voluntary) that are judicially enforceable. Those who fail to comply may face contempt charges. Documents and information produced under subpoenas and CIDs are treated as confidential by the FTC.

The primary difference between a subpoena and a CID is the scope of the request. A subpoena requires the attendance and testimony of witnesses and the production of documentary evidence related to the matter under investigation. A CID has a broader scope; it is like a "subpoena plus" or a subpoena on steroids. Both subpoenas and CIDs may be used to obtain existing documents, records and oral testimony, however, a CID may additionally require the recipient file written reports or answers to specific questions from the FTC. The applicable statute also expressly authorizes the issuance of a CID requiring the production of tangible things, and provides for the service of CIDs upon entities not found within the territorial jurisdiction of the United States courts (subpoenas are generally limited to entities within the territorial jurisdiction of the United States courts).

### **Since the FTC has sent me an inquiry, does that mean I'm the target of an investigation?**

No, not necessarily. CIDs can be served on third parties who the FTC believes have important information as well as on targets of an investigation. The wording of the CID itself will often make it clear whether you, the recipient, are a target or potential target. If the wording is not clear, the issuing FTC staff member will be able to clarify. You or your attorney may ask the issuing FTC staff member directly, and we recommend you document the answer. In the Google investigation, some recipients of CIDs may not be direct targets of investigation, although it is not unheard of for the FTC to determine, after reviewing the results of its investigation, that third parties should be added to the 'target' list. That said, simply receiving a CID does not always mean you are or will be a target.

### **What do I do if I get an informal inquiry or "access letter?"**

An informal inquiry will ask you to produce documents and/or information related to an FTC investigation. The letter will state whether you are considered a target of the investigation or whether you are simply a third party from whom the FTC seeks additional information about an ongoing investigation. It will also likely give you a deadline by which to respond. You may reach out to the issuing FTC staff member to attempt to clarify or limit the scope of the information requested in the letter and depending on the timing and scope of the request, it is possible to negotiate a time frame that makes more sense to you, subject to concurrence of the FTC. These letters seek voluntary cooperation and are legally unenforceable requests for information. To further encourage voluntary cooperation, all information given to the FTC under an access letter will be given the same level of confidential treatment given to information received through the FTC's compulsory process. While there is no penalty if you choose not to respond, you can anticipate the FTC will follow up with a subpoena or a CID. There are pros and cons to voluntarily providing information to the FTC in response to an access letter. On the plus side, if you are not a target, it is less formal, the discussions are likely to be more amicable, less costly and often more expeditious. On the negative side, if any information requested relates to employees, suppliers, contractual arrangements, customers or customer information – in other words, any legal entity or person that is NOT the company receiving the access letter, voluntarily turning over such information may violate a policy, a contractual commitment or some other obligation owed to a customer or supplier—in essence, someone else. Furthermore, absent any clear company internal guidelines, what if the FTC issues additional access letters in other investigations—after all, you've been a cooperative corporate citizen providing few legal obstacles to giving them the information the FTC requests. Aside from now creating a potential full time job simply gathering information, distinguishing between when one should or should not produce information may proved difficult. There is no right answer here and often, in consultation with experienced and knowledgeable legal counsel, the specific facts will determine what makes sense to do in any given situation.

## Can I challenge a subpoena?

Yes. You may raise objections to a subpoena by filing a Petition to Limit or Quash. These petitions are resolved by a designated FTC Commissioner. That Commissioner may choose to limit the scope of the subpoena or quash (cancel, essentially) the subpoena as issued. The Commissioner may also choose to allow the subpoena to be enforced as issued, and require you to produce the requested documents and information. The Commissioner's ruling may then be appealed to the full Commission. In some cases, you may negotiate the scope of the request – time periods, materials or information covered, etc. – and you can also petition the FTC or a court for additional protective orders applicable to the materials you produce. There are a number of levels of protection that can be applied for and again, working closely with your legal advisors is a must.

## What happens if I fail to comply with a subpoena?

If you fail to comply with a subpoena (absent a successful challenge), the FTC may seek enforcement of the subpoena in Federal court. You, the subpoena recipient, have the opportunity to respond to the FTC's petition to enforce the subpoena. The Court may then enter an order requiring your compliance with the subpoena. If you refuse to comply with the court order, you will be subject to penalties for contempt of court.

## Can I challenge a CID?

Yes. Like a subpoena, the recipient of a CID may file a Petition to Limit or Quash and may also negotiate the scope and/or petition for protective orders, similar to the proceedings that apply to subpoenas. The FTC may likewise file a petition in Federal court to enforce the CID should you fail to comply. You must file your Petition the shorter of 20 days after the service of the CID or at any time before the response date specified in the demand, or within a period as defined in writing by the Commissioner named in the demand.

## When do I have to respond to the FTC?

The letter, subpoena, or CID will specify a date by which you must respond with the requested documents, information, or testimony. The federal rule governing subpoenas requires the issuer provide a reasonable time to

comply with a subpoena. In some cases, this can be as little as fourteen (14) days. In the case of a CID, the law requires the FTC to prescribe a response date that provides the recipient "a reasonable period of time" within which the materials demanded may be assembled and made available to the FTC. These time deadlines may be challenged or often negotiated and the FTC has discretion to grant extensions of time in which to respond. It is often necessary to do so.

## How strict are the response deadlines?

The response deadlines for CIDs and for subpoenas are important and the FTC expects a quick response, but they are not set in stone. The FTC has discretion to grant extensions of time in which to respond to CIDs and to subpoenas, including reaching an understanding with the recipient that some material or information will be supplied within the stipulated time while additional materials or information can follow. Again, often when hardship or reasonable necessity is shown, the FTC will extend or modify the deadlines.

Typically the FTC is more interested in getting the desired information in a reasonable time than it is in keeping a particular response deadline. Remember, the FTC may not know how easy or difficult it is for you to gather the information, or how accessible or voluminous the materials or information you may have that is relevant. Additionally, the FTC must bring a petition in federal court to compel compliance, which takes a significant amount of time, so the FTC attorney or staff member is generally willing to grant extensions or work with your limitations, within reason. Do not expect long extensions, and one should make a diligent effort to comply with the FTC's time demands.

## Do I have to respond to the CID?

While under the applicable law you may decline to answer at first, this is generally not recommended. The FTC may petition the court to make you respond. The statute under which the FTC issues the CID gives the recipient a particular number of days in which to respond, and the burden is on the issuer—the FTC—to ask the court to enforce the CID if you do not respond.

### **Is there any ramification for criminal penalties?**

Yes. If you are the target of an investigation, information discovered in the course of the investigation may be used as the basis for criminal charges. The FTC may also use information gained from third parties who are not the target of a civil investigation as the basis for later criminal charges. If criminal liability is a concern, talk to your lawyer immediately.

### **Can I communicate directly with the FTC about the CID or subpoena I received?**

Yes. You or your attorney can call the issuing FTC staff member directly to discuss and attempt to limit the scope of the request, to clarify whether you are the target of an investigation or simply a third party from whom the FTC seeks information related to another investigation. It is a good idea for you or your attorney to have an open line of communication with the issuing FTC staff member about the investigation.

### **How long does the FTC investigation opened by the CID or the subpoena take?**

There are no time guidelines governing the FTC's review of the documents, testimony, and/or information the CID or subpoena recipient provides. In most cases where the FTC issues a third party CID, the third party's active involvement with the FTC lasts as long as it takes the party to challenge the CID, if they choose to do so, the FTC to enforce the CID, and/or the party to produce the documents and information. The FTC may conduct follow up investigation as necessary.

### **What happens to the information I give to the FTC?**

The information you give to the FTC is confidential and non-public while the investigation is ongoing. Information obtained from third parties, including information obtained voluntarily, is treated as confidential.

While the motions that you or the FTC bring in federal court to compel responses or limit the scope of a CID or subpoena are themselves public documents, confidential or proprietary supporting documents may be able to be filed or submitted under seal, or you may be permitted to

provide redacted versions of the filings or disputed documents in some cases. Should things progress to this stage in your case, we recommend speaking with a lawyer.

### **Will I know when the FTC investigation ends?**

Not necessarily. There is no requirement that the FTC alert third parties that the particular investigation is complete.

### **The document requests I received are very broad. How do I handle this?**

In general, the FTC will send a broad document request because they do not know how your company keeps files or electronic information, and wants to be sure that the types and forms of information it seeks will be covered by the request. However, with a very broad request, you, the recipient of the document request, are at risk for potential consequences of conducting an inadequate search or sometimes what may seem like an infinite and eternal search. You should immediately open up a dialogue with the FTC staff member to limit or narrow the request, and to discuss data retrieval issues, deadlines, your company's document and information retention systems, privileged information, and any other issues particular to your company. Sometimes, a simple "what are you really looking for?" can provide the needed dialog that limits the scope and depth to the materials and information the FTC really wants you to provide.

### **Am I required to preserve documents once I receive an investigative request from the FTC?**

Yes. Under the law, the duty to preserve evidence attaches when a person with ownership, custody, or control of such evidence should reasonably anticipate that the evidence may be needed for a matter that is or may be subject to (or actually in) litigation. Under the Federal Rules of Evidence, if a party fails to preserve relevant evidence, that party may face sanctions or may risk the entry of a default judgment against it. While the FTC does not have certain forms of sanctions available to it until it files a case, CIDs and administrative subpoenas are enforceable in court.

As soon as you are aware that the FTC seeks information from your company, you should implement immediate steps to preserve information and materials in all forms and formats, on all media, to the extent it may be covered by

the demand. You should take these steps even as a third party that is not the target of an FTC investigation. You can implement a litigation hold on documents, and take reasonable steps to preserve information. Where possible, you can stop the routine destruction of responsive documents and records, and inform your employees and/or other custodians of these relevant documents of their continuing obligation to preserve this material. Keep in mind that what once was a purely paper-based process may now be all or partially digital, so IT staff is a key part of the preservation process. Once you have implemented this retention or destruction prevention policy, follow up to ensure compliance.

You should work with legal counsel to prepare a realistic and efficient response plan. The types and range of files to be searched and produced will depend on the scope of the FTC's request. Ensure that your legal counsel understands the structure of your document and information management systems from the beginning so they can best help you prepare a response plan.

### **Do I need to produce hard copies of all of the documents requested?**

Not necessarily. The form and manner in which you maintain your relevant records will generally govern the form in which the documents need to be produced. The volume and nature of documents will also be a factor. In some cases, the FTC will simply want to interview or depose a knowledgeable member of your company. In others, the FTC will only seek written responses to questions. Where the FTC does seek documents and electronic data, you can explain your records practices to the FTC and work together to determine the best way to produce the documents. In some cases, data compilations will satisfy FTC demands, but others may require the actual data. The FTC offers resources on data and document production, including best practices guides, on its website.

### **What about privileged documents or private information?**

Documents submitted to the FTC are treated as confidential. However, it is advisable to discuss privilege and privacy issues with the FTC staff member in charge of the investigation or request right away. You may agree to waive privilege claims in some instances, or to produce a log of privileged documents. The FTC may agree to accept

a list of individual custodians of particular documents and the types of documents they maintain, and then will decide which custodian's files to examine.

### **What kind of information will the FTC be looking for?**

Google has not disclosed the details of the investigation. In a press release, Google said that the FTC's concerns were "still unclear." While we cannot say with certainty what the FTC will examine in the course and scope of this investigation, based on what we are able to determine, we expect the FTC will focus on Google's method of displaying search results, and likely into the advertising links tied to each Google search request. In the past, competitor websites contended that Google's system unfairly drives up advertising prices or blocks ads when it views a company as a competitive threat. We anticipate the FTC will seek information related to the following topics from advertisers and media companies:

- your financial and contractual relationships with Google regarding the cost and placement of ads, commissions, pricing;
- any limitations in your contract with Google that limit your ability to contract with other search providers;
- any contractual provisions or actions that could limit Google's competitor's access to consumers;
- information regarding Google's practices on vertical integration into comparison of goods and services, or into direct sale of goods and services through Google searches;
- the ways in which Google determines advertising prices;
- the ways Google ranks search results and the related advertisements;
- the objectivity of Google's search results;
- any manipulation of Google's search result;
- details about the workings of PageRank, Google's system for rating the usefulness of a website;
- Google's sponsored links, or AdSense Program;
- information about the advertising market, other advertisers, meaningful competition.

FTC investigations are serious matters, with potentially serious consequences and implications, and even if you are a third party and even if the FTC advises that you are not currently a target in the investigative proceedings, you should take any request for information—access letter, subpoena or CID—from the FTC seriously and consult your attorneys immediately. While many companies already have procedures to deal with such demands, those are usually reserved for routine regulatory and law

enforcement inquiries that may be systemic to the company's business. These types of proceedings are not your typical investigation and care should be exercised so that you are neither unduly burdened, nor unduly prejudiced, should you need to resort to more formal challenges to preserve or protect your materials, your information and your rights.

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