



Court Orders Warn Against Foot-dragging in Government Investigations

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Two recent orders arising out of the FTC's investigation of condom-manufacturer Church & Dwight serve as a stern warning to companies that believe that simply ignoring a government investigation will make it go away.

On October 29, 2010, Magistrate Judge John M. Facciola of the federal district court in Washington, D.C. gave Church & Dwight two weeks to respond to the entirety of a Civil Investigative Demand ("CID") and subpoena that the FTC issued in early 2009.¹ The FTC issued the CID as part of an investigation into the marketing and distribution practices of Church & Dwight, the maker of Trojan condoms, which the FTC alleges to hold a 70% share of the U.S. condom market.² The FTC's investigation centers on whether Church & Dwight monopolized the condom market by paying retailers large promotional allowances on the condition that the retailers dedicate a certain percentage of their shelf space to Trojan condoms.³ Thus, the CID that the FTC issued centered on Church & Dwight's distribution practices including pricing, discount, and sales information for condoms, information on marketing programs, and information on the competitive landscape in the condom market.

Instead of cooperating with the FTC staff to narrow the scope of the CID—as targets of government investigations typically do—Church & Dwight refused to cooperate with the subpoena. It sent a detailed list of objections after the CID's initial compliance deadline and—instead of complying within a new deadline that the FTC set—filed a motion with the Commission to quash the CID.⁴ Church & Dwight took particularly aggressive positions

in its response to the CID and motion to quash—it refused to produce *any* documents located in Canada, it balked at the CID's requirement that it redact materials only for attorney-client privilege, and it refused to produce information relating to products other than condoms. The Commission denied Church & Dwight's motion as untimely. The FTC staff then filed a motion in federal court to enforce the subpoena and CID, which resulted in the order requiring full compliance.⁵

But even a court order could not persuade Church & Dwight to comply with the CID. Church & Dwight insisted on redacting documents to exclude information not relating to condoms and moved the court to stay its October 29 order to allow it to pursue an appeal.⁶ Church & Dwight claimed that the court's interpretation of D.C. Circuit precedent regarding the breadth of CIDs raised important legal issues, which justified

relieving it of its obligation to produce unredacted documents until the appeal was resolved.⁷ The court rejected this argument, denied Church & Dwight's motion, and granted the FTC's parallel motion to require full compliance with the CID or to show cause why it should not be held in civil contempt for not doing so.⁸

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The Church & Dwight order serves as a reminder to companies that face governmental investigations—whether by the FTC, DOJ, or a state attorney general—that early cooperation is usually the most effective way to minimize the time, expense and business disruption entailed in the investigation. If Church & Dwight would have pursued an early negotiation strategy, it likely could have reduced the number of custodians it had to

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search and the amount of information that it had to turn over. As a practical matter, many CIDs are written in boilerplate form, with the expectation that the government staff attorneys will negotiate the actual scope with the target's counsel. Moreover, negotiations over document-production requests may provide the company receiving the CID with insight into the theories that the government is pursuing in its investigation. This is especially true if the CID recipient is not a party to the investigation. Finally, at least before the FTC, motions to quash are rarely if ever successful,⁹ in part because the movant must convince the Commission to quash the very CID that it issued. Especially in light of these odds, companies would be wise to learn from the experience of Church & Dwight that cooperation is often the most effective way to minimize the burden of government investigations.

1 *FTC v. Church & Dwight Co., Inc.*, Misc. No. 10-149 (EGS/JMF), 2010 U.S. Dist LEXIS 115202, at *18 (Oct. 29, 2010).

2 Court Orders Subpoena, CID Compliance in Condom Investigation, 773 FTC:Watch at 1 (Nov. 8, 2010).

3 *Church & Dwight*, 2010 U.S. Dist LEXIS 115202, at *1.

4 *Id.* at *3.

5 *See id.*

6 *FTC v. Church & Dwight Co., Inc.*, U.S. Dist. LEXIS 135977 (Dec. 23, 2010).

7 *Id.* at *3-7.

8 *Id.* at *14.

9 The publication, FTC: Watch, which tracks activities at the FTC, states that it is unaware of any successful petition to quash before the FTC in the past 30 years. 773 FTC:Watch at 3.



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