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THE EVOLUTION OF THE JUSTICE DEPARTMENT'S POWER TO INVESTIGATE CIVIL VIOLATIONS OF THE ANTITRUST LAWS

Like any other plaintiff, the Antitrust Division of the Justice Department (the Department)\(^1\) must have adequate discovery opportunities to litigate successfully.\(^2\) However, the Department's


   General enforcement, by criminal and civil proceedings, of the federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including conduct of surveys of possible violations of antitrust laws, conduct of grand jury proceedings, issuance and enforcement of civil investigative demands, civil actions to obtain orders and injunctions, civil actions to recover forfeitures or damages for injuries sustained by the United States as a result of antitrust law violations, proceedings to enforce compliance with final judgments in antitrust suits, and negotiation of consent judgments in civil actions; criminal actions to impose penalties including actions for the imposition of penalties for conspiring to defraud the Federal Government by violation of the antitrust laws; participation as amicus curiae in private antitrust litigation; and prosecution or defense of appeals in antitrust proceedings.

28 C.F.R. § 0.40(a) (1979).

The Department is not the only governmental body to enforce the antitrust laws. The Federal Trade Commission (FTC) enforces the antitrust laws through administrative proceedings. The FTC is empowered to hold hearings to determine whether any party is engaged in "unfair methods of competition," Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1976), and practices that violate the antitrust laws constitute "unfair methods of competition." FTC v. Cement Inst., 333 U.S. 683, 689-93 (1948). The FTC may order that unfair practices be discontinued, 15 U.S.C. § 45 (1976), thereuby, in the case of antitrust violations, enforcing the antitrust laws.

Moreover, states enforce antitrust laws. A state may sue to recover compensation for injuries suffered from an antitrust violation. Georgia v. Evans, 316 U.S. 159 (1942). A state also has power to bring a parens patriae suit to recover compensation for injuries that natural person residents of the state suffer as a result of the violation. 15 U.S.C. § 15c (1976).

precomplaint discovery needs exceed those of a private litigant. Considerations of fairness necessitate that the government investigate thoroughly before filing a complaint, \(^3\) since merely commencing an action may affect a corporation and its shareholders adversely, and an investigation may reveal that bringing suit is inappropriate.\(^4\) Filing suit against a corporation generally causes the price of its stock to fall, especially if the corporation lists its stock on a national exchange.\(^5\) If discovery\(^6\) reveals that no antitrust violation has occurred, the suit can be discontinued, but the price of the corporation's stock may not return to its previous level.\(^7\) Moreover, once the public is aware the Department has commenced suit, fear of adverse public opinion if suit is discontinued may influence the Department to pursue a suit that discovery has revealed lacks merit. This would result in a futile trial that wastes the parties' resources and the court's time.\(^8\)

The Department can use the grand jury to investigate possible violations when it contemplates criminal action.\(^9\) However, the grand jury is not an available investigative tool when only civil action is contemplated.\(^10\) Prior to 1962, the Department had no satisfactory means for investigating suspected civil violations of the antitrust laws. In 1962, Congress expanded the Department's investigatory power. Experience in subsequent years revealed that the Department needed still greater investigatory power and in 1976 Congress provided the Department with increased investigatory

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7. Siegel, supra note 5, at 418; Note, supra note 5, at 242.
8. Attorney General's National Committee to Study the Antitrust Laws, Report 344 (1955) [hereinafter cited as Report]. This committee commented: "Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be difficult, if not impossible, and the result may be a futile trial exhausting the resources of the litigants and increasing court congestion." Id.
capabilities. This Note traces the evolution of the Department's power to investigate suspected civil antitrust violations.

**PRELIMINARY INVESTIGATIONS**

"Like any policeman the Antitrust Division of the Department of Justice must first detect crime before it can prosecute it." The Department has five ways of detecting antitrust violations: (1) Complaints about a company from competitors or consumers; (2) newspaper articles; (3) information referred to the Department by other governmental agencies; (4) antitrust suits brought by private parties; and (5) provisions of a consent decree or judgment previously obtained in a civil antitrust suit against a company that allow the Department to inspect the company's files or interview its employees to ensure that the company complies with the consent decree or judgment.

When the Department suspects an antitrust violation, a preliminary investigation is made to determine whether a full investigation is warranted. This preliminary investigation can entail: contacting the Federal Trade Commission (FTC) to avoid duplicating their efforts in pursuing this possible antitrust violation; studying public information; searching files to see whether the Department has previously compiled information on the suspected violator; contacting the Economic Policy Office of the Department to obtain information concerning normal competitive patterns in the industry; and interviewing complainants and others with information.

The Department's resources prevent it from pursuing every suspected violation. An additional factor the Department must consider is whether an activity that may violate the antitrust laws has sufficient impact upon the economy to warrant further action. If the Department decides to pursue the investigation, it orders a field investigation by its staff attorneys and the Federal Bureau of Investigation.

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11. A. Neale, supra note 1, at 374. One Department official commented that the Department does "not simply prosecute violations of the law, [it] first [has] to identify them, for antitrust crimes and violations are usually well concealed." Reeves, supra note 4, at 356.

12. Id. § 92.01[2][vi] (rev. perm. ed. 1978).

13. Id. § 92.01[1].

14. Id. § 92.01[3].

15. Id.

16. Id.
INVESTIGATIONS PRIOR TO 1962

Before 1962, the Department had four ways of obtaining information: 

1. It could ask prospective defendants to cooperate; 
2. It could conduct a grand jury investigation in those cases where criminal as well as civil liability could result; 
3. It could ask the FTC to investigate and turn over the information to the Department; 
4. It could file a civil complaint and then use compulsory discovery to gather information.

None of these methods is satisfactory. The first method requires a law enforcement agency to rely upon prospective defendants to furnish evidence, sometimes against their interests. Although some companies may cooperate, many do not. The inherent limitations in this situation led the Attorney General's National Committee to conclude that "a Government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities."

The second method is equally unsatisfactory. Grand juries investigate criminal violations of the antitrust laws. In a civil case, the Department may use evidence developed by a grand jury in the course of its criminal investigation. However, in United

20. REPORT, supra note 8, at 344.
21. See FED. R. CRIM. P. 7(a). The scope of the grand jury's investigatory power is vast. The Supreme Court has stated:

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.


22. Grand jury proceedings are secret. United States v. Rose, 215 F.2d 617, 628 (3d Cir. 1954). However, rule 6(e) of the Federal Rules of Criminal Procedure pro-
States v. Procter & Gamble Co., 23 the Supreme Court held that a grand jury is not a valid investigative tool when only civil action is contemplated. 24 The Court noted that Congress forbids the Department to use closed proceedings to obtain information for a civil antitrust suit. 25 Given this congressional policy against secret proceedings in civil cases, and of secrecy for grand jury proceedings, 26 the Court concluded that "using criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law." 27

vides: "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties." Fed. R. Crim. P. 6(e). This has been interpreted to allow the Department to use civilly evidence developed by a grand jury during a criminal investigation. See United States v. Diebold, Inc., 5 Trade Reg. Rep. (CCH) ¶ 61,831 (N.D. Ohio 1976).


24. Id. Certain violations of the antitrust laws, however, are subject to either criminal or civil penalties or to both. For example, § 1 of the Sherman Act subjects a violator to criminal action, Sherman Act § 1, 15 U.S.C. § 1 (1976); § 4 subjects this same violator to civil action, id. § 4, 15 U.S.C. § 4. In these cases, the decision whether to bring a criminal or a civil action lies with the Department. Given this choice, the Department may pursue a grand jury investigation without that action constituting an abuse of process. The Department has chosen, however, to eschew criminal prosecutions, except for clearly willful antitrust violations.

The Dept. has adopted the firm rule that criminal prosecutions [will be sought] only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing per se offenses—willfulness will be presumed. . . . Second, if the acts of the defendants show intentional violations—through circumstantial evidence or direct testimony, it appears that the defendants knew they were violating those laws or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.


26. See id. at 681 (citing Fed. R. Crim. P. 6(e)).

27. Id. at 683. However, the Department may believe a willful violation of the law has taken place and initiate a grand jury investigation, only to discover after the investigation has been completed that criminal prosecution is improper. A former chief of the Department acknowledged that this is unavoidable:

The decision whether to open a grand jury is not a decision that anything that comes out of the grand jury will be treated as a criminal case. We initiate a grand jury when there is some reason to believe that a criminal violation may have taken place. It is inevitable that in applying that standard we shall authorize a certain number of grand jury investigations which will in fact lead to civil rather than criminal prosecution. That is to be expected
There are additional roadblocks that preclude Department reliance on grand jury proceedings as a source of obtaining information for civil actions. Certain antitrust laws provide no criminal sanctions; thus, the Department cannot use a grand jury to determine whether a company has violated one of these laws. Furthermore, it is reprehensible to label individuals who may have committed only civil violations prospective criminal defendants. Thus the grand jury is both an inappropriate and insufficient source of information upon which to proceed civilly.

The Department also cannot rely on an FTC investigation to secure information necessary for determining whether to file suit. The FTC has jurisdiction to examine witnesses and compel the production of documents. Although the Department can request them to investigate corporations, the FTC has the authority to refuse the Department's request. If the FTC does comply with

from a policy of aggressive investigation of possible criminal conduct. The ultimate judgement on the merits whether to proceed criminally, civilly or not at all must await the conclusion of each investigation.


29. The Attorney General's Committee stated: "We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality." REPORT, supra note 8, at 345.
31. Id. § 6(c), (e), 15 U.S.C. § 46(c), (e).
32. H.R. REP. No. 1343, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2596, 2600. Section 6(e) of the Federal Trade Commission Act gives the Attorney General authority to request the FTC to investigate whether a corporation has violated the antitrust laws; it does not expressly mandate that the FTC comply with this request. See Federal Trade Commission Act § 6(e), 15 U.S.C. § 46(e) (1976). Other sections of the same Act, however, do impose a duty on the FTC to comply with certain requests by the Attorney General. Section 6(c) of the Federal Trade Commission Act empowers the Attorney General to request the FTC to monitor a corporation's compliance with an antitrust decree entered by a court. Further, § 6(c) provides that "upon the application of the Attorney General it shall be [the FTC's] duty to make such investigation." Id. § 6(c), 15 U.S.C. § 46(c). Congress phrased this provision to create a duty.

The different language in § 6(c) and (e) indicate that the FTC has discretion when the Attorney General requests it to investigate a possible antitrust violation pursuant to § 6(e). It is an accepted canon of construction that identical words in the same act should be construed similarly. See, e.g., Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 53 (2d ed. 1911); 2A C. SANDS, STATUTES
the Department's request, the prosecutorial and investigatory functions have been split. The Department's loss of control over the investigation has a deleterious effect on both the efficiency of the process and the ultimate success of the suit. Given the problems inherent in this approach, this third method of investigation has never been used.

The final investigatory method available to the Department is also inadequate. Once the Department files a complaint, compulsory discovery is an available investigative tool. This fourth method suggests the Department should file a complaint without knowing whether the Department can prove that a violation has occurred or even if a violation has occurred at all. Given the detrimental effect the mere filing of a suit has on a corporation, this is unfair to the innocent object of an unmeritorious suit. Moreover, this is not the purpose of discovery.

AND STATUTORY CONSTRUCTION § 53.01 (4th ed. 1973). When, however, different words are used, different meaning is presumed. H. BLACK, supra, § 54.

33. In addition, the FTC would have to expend its resources to investigate for the Department. Siegel, supra note 5, at 417; Note, supra note 5, at 241.


35. FED. R. CIV. P. 26-37.

36. A committee of federal judges asserted that the Department cannot substitute discovery for precomplaint investigation:

It is said that vague complaints in civil antitrust cases brought by the Government are unavoidable, because the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the courts to discover the facts. . . . The Rules of Civil Procedure relating to discovery are, of course, to be given the widest meaning and effect, and the processes of discovery there provided are in the nature of an investigation. But those rules have limitations and were not intended to make the courts an investigatory adjunct to the Department of Justice. . . . Investigations not related to issues presented for litigation in a pending court case, in civil matters, are no [sic] part of the judicial function, and the compulsory processes of the judicial system should not be made available for other than judicial purposes. If a plaintiff brings bona fide charges, it may discover such relevant evidence as the respondent possesses. It cannot pretend to bring charges in order to discover whether actual charges should be brought. Therefore, if, in the course of conferences prior to the trial of a civil action, a judge concludes that the Government . . . has no knowledge of charges of such specificity as to permit understandable and triable statement, trial should be postponed until the lack of particularization can be fully remedied, or the case should be dismissed.

In 1955, the Attorney General's National Committee, sensitive to the Department's lack of satisfactory means for investigating suspected civil antitrust violations, commented:

We recognize that the Department has been handicapped and accept the . . . conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails.37

In 1962 Congress was finally persuaded that the available means of investigation were inadequate and the Department was granted a "precomplaint civil discovery process."38

THE ANTITRUST CIVIL PROCESS ACT

On September 19, 1962, Congress enacted the Antitrust Civil Process Act (the Act).39 Congress intended to provide the Department with a device for obtaining sufficient information to determine "whether or not to bring a civil antitrust suit."40 The Act em-

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37. REPORT, supra note 8, at 344-45. See also notes 3-8 and accompanying text.
powered the Department to issue a civil investigative demand (CID) for documents relevant to an antitrust investigation. However, the CID was severely limited in scope. The Department could demand documentary material only, and it could not issue a CID to a natural person or to a party who was not under investigation even if the party possessed relevant documents.


42. Id. The Act defined “documentary material” to include, among others, “the original or any copy of any . . . record.” Id. § 2(g) (current version at 15 U.S.C. § 1311(g) (1976)). In Material Handling Inst., Inc. v. McLaren, 426 F.2d 90 (3d Cir.), cert. denied, 400 U.S. 826 (1970), the court found that “documentary material” encompassed addressograph plates. The court reasoned: “[I]t would be a subversion of the Act’s clear intent to allow a business entity to insulate its records from appropriate investigation by the use of modern information storage techniques.” Id. at 93.

43. Antitrust Civil Process Act, Pub. L. No. 87-664, § 3(a) (current version at 15 U.S.C. § 1312(a) (1976)). The conference committee approved restricting the issuance of CIDs to parties under investigation:

The purpose of the civil investigative demand bill is to provide the Department of Justice with a much-needed tool for the fair, effective enforcement of the antitrust laws.

While a limitation of the civil investigative demand procedure to companies “under investigation” may somewhat restrict the use of this procedure by exempting companies in no way involved in a subject under inquiry by the Department, the essential purpose of the bill is clearly still fulfilled, for the civil investigative demand procedure will be available to the Department where a company is involved in a matter under investigation by the Department.
The Department could issue a CID only when investigating a past or present antitrust violation. A CID was limited to documents relevant to a civil "antitrust investigation." The Act defined an "antitrust investigation" as "an inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation." An "antitrust violation" was defined as "any act or omission in violation of any antitrust law or any antitrust order." Thus, the Department could demand documents concerning activities that had violated or were violating an antitrust law or order; the Department was not empowered to issue CIDs to those suspected of future violations.

A CID recipient was required to make requested documents available for inspection and reproduction by the Department. If

H.R. REP. No. 2291, 87th Cong., 2d Sess. 3, reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2572, 2573-74. 45. Antitrust Civil Process Act, Pub. L. No. 87-664, § 3(a), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1312(a) (1976)). 46. Id. § 2(c) (current version at 15 U.S.C. § 1311(c) (1976)). 47. Id. § 2(d) (current version at 15 U.S.C. § 1311(d) (1976)). 48. In United States v. Union Oil Co., 343 F.2d 29 (9th Cir. 1965), the Department issued a CID to obtain documents relating to a proposed acquisition. The court set aside the CID, holding that the Department could not issue a CID to investigate a possible future antitrust violation. Id. at 30-31. 49. Antitrust Civil Process Act, Pub. L. No. 87-664, § 4(b), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1313(b) (1976)). If the recipient refused to make requested documents available, the Department could petition a district court to compel production. Id. § 5(a) (current version at 15 U.S.C. § 1314(a) (1976)). The Department could petition in any judicial district where the recipient resided, was found, or transacted business. If the recipient transacted business in more than one judicial district, the Department could petition in the judicial district where the recipient maintained his or her principal place of business or, with the recipient's consent, in any judicial district where the recipient transacted business. Id.

Any final order the court entered could be appealed pursuant to 28 U.S.C. § 1291 (1976). Antitrust Civil Process Act, Pub. L. No. 87-664, § 5(d), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1314(d) (1976)). If the recipient disobeyed a final order of the court, such disobedience was punishable as contempt. Id. Moreover, if the recipient willfully destroyed documents subject to a CID to avoid producing them, the recipient faced criminal penalties. Id. § 6 (current version at 15 U.S.C. § 1505 (1976)).

Documents produced by a CID recipient were placed under the control of the Department's designated custodian. Id. § 4(b) (current version at 15 U.S.C. § 1313(b) (1976)). The custodian's duties are detailed in regulations promulgated by the Department. 28 C.F.R. §§ 49.1-4 (1979). If the custodian did not perform his or her duties, the CID recipient could compel performance by petitioning the district court in the judicial district where the custodian's office was located for an order compelling performance. Antitrust Civil Process Act, Pub. L. No. 87-664, § 5(e), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1314(e) (1976)).

Only Department employees had access to documents received in response to a
there is an objection to the demand the recipient can petition a federal district court to modify or set aside the CID. A successful challenge could "be based upon any failure of [the CID] to comply with the provisions of [the] Act, or upon any constitutional or other legal right or privilege of [the recipient]."

To judge the validity of CIDs, the Act adopted the standards for determining the legitimacy of subpoenas duces tecum issued in grand jury proceedings. A CID could not demand documents privileged from disclosure, nor contain any requirement not permitted in a grand jury subpoena duces tecum. Moreover, a subpoena duces tecum issued to a corporation under investigation

CID. Id. § 4(c) (current version at 15 U.S.C. § 1313(c) (1976)); 28 C.F.R. § 49.3 (1979). The Senate proposed that any agency that administers antitrust laws have access to such documents. In conference, however, access was limited to Department employees. H.R. Rep. No. 2291, 87th Cong., 2d Sess. 3, reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2572, 2573. The conferees declared: "[T]he basic aim of the bill is not frustrated by denying the Department of Justice the right to make available to the Federal Trade Commission documents obtained by the civil investigative demand procedure." Id., reprinted in [1962] U.S. CODE CONG. & AD. NEWS at 2574.

50. Antitrust Civil Process Act, Pub. L. No. 87-664, § 5(b), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1314(b) (1976)). The CID recipient was required to petition within 20 days after service unless the CID had an earlier return date. Id. The recipient was required to petition a district court in the judicial district where the recipient resided, was found, or transacted business. Id. Any final order the court entered could be appealed pursuant to 28 U.S.C. § 1291 (1976). Antitrust Civil Process Act, Pub. L. No. 87-664, § 5(d), 76 Stat. 548 (1962) (current version at 15 U.S.C. § 1314(d) (1976)).


52. See id. § 3(c) (current version at 15 U.S.C. § 1312(c) (1976)).

53. Id. § 3(c)(2) (current version at 15 U.S.C. § 1312(c)(2) (1976)). The Supreme Court has stated:

Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege, . . . is particularly applicable to grand jury proceedings.

Branzburg v. Hayes, 408 U.S. 655, 688 (1972) (citations omitted) (footnote omitted); accord, United States v. Mandujano, 425 U.S. 564, 572 (1976). Thus, the Department had access to all documents except those protected by a "constitutional, common-law, or statutory privilege." A CID recipient could submit any documents believed privileged to the district court in camera. The district court would decide whether the documents were privileged from disclosure. See Amateur Softball Ass'n of America v. United States, 467 F.2d 312, 316 (10th Cir. 1972); In re Gold Bond Stamp Co., 221 F. Supp. 391, 399 (D. Minn. 1963), aff'd per curiam, 325 F.2d 1018 (8th Cir. 1964).

by a grand jury for a possible antitrust violation is required to satisfy the fourth amendment “test of reasonableness.” CIDs were held to this same standard. In addition, a CID could not be issued for an “improper” motive.

A CID was subject to certain other requirements. Requested documents had to be described “with such definiteness and certainty as to permit such material to be fairly identified.” A CID was required to “state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto.” Furthermore, the return date had

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55. See v. City of Seattle, 387 U.S. 541 (1967); Hale v. Henkel, 201 U.S. 43, 76 (1906). Corporations may claim fourth amendment protection against unreasonable searches and seizures, including those contained in a subpoena duces tecum. Id.

While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, . . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection. Id.

56. In one case, the court found a CID reasonable because the burden which is imposed upon [the CID recipient] is substantially the same as that which would inure to a litigant against whom the Government has commenced an action under one of the sections of the antitrust laws, and discovery proceedings under the Federal Rules of Civil Procedure were utilized. [Sic].

In re Gold Bond Stamp Co., 221 F. Supp. 391, 399 (D. Minn. 1963), aff’ed per curiam, 325 F.2d 1018 (8th Cir. 1964). The court’s ruling is reasonable because the Department could have filed suit for violation of the antitrust laws and then discovered these documents. This result avoids forcing the Department to engage in discovery fishing expeditions, a major reason for granting the Department CID power. See notes 3-8 supra and accompanying text.


If the [CID recipient] can establish that the investigation was launched not in a bona fide attempt to determine whether or not a violation occurred but rather to pay off a political debt or in response to outside political interference and pressure, this smacks of the type of abuse which would be condemned when tested by the standards applicable to the proper issuance of a subpoena duces tecum issued in aid of a grand jury investigation.


59. Id. § 3(b)(1) (current version at 15 U.S.C. § 1312 (b)(1) (1976)). This statement necessarily is in general terms. CIDs serve as investigative tools. The Department uses them to determine whether there has been an antitrust violation and, if so, the nature of the violation. Consequently, when preparing a CID, the Department often lacks sufficient information to draft a detailed statement. One court com-
to allow "a reasonable period of time within which the material so
demanded may be assembled and made available."\textsuperscript{60}

In federal district court proceedings involving CIDs, those
Federal Rules of Civil Procedure (FRCP) consistent with the
Act's provisions governed procedure.\textsuperscript{61} The FRCP provide district
courts authority to issue protective orders.\textsuperscript{62} Thus, issuance of a
properly framed protective order in appropriate circumstances is
consistent with the Act's provisions.\textsuperscript{63}

The Act greatly expanded the government's precomplaint in-
vestigatory powers by allowing CIDs to be issued in appropriate
instances. However, Congress limited the Department's CID
power until this new investigative tool could be further evalu-
ated.\textsuperscript{64} In 1976, after observing the operation of the Act, Congress

\textsuperscript{60} Antitrust Civil Process Act, Pub. L. No. 87-664, § 3(b)(3), 76 Stat. 548 (1962)

\textsuperscript{61} Id. § 5(e) (current version at 15 U.S.C. § 1314(e) (1976)). Discussing pro-
ceedings to modify or set aside a CID and the impact of § 5(e), one court stated:

\begin{quote}
By reason of the filing of the petition to modify or set aside the demand, the
action before the Court constitutes a proceeding under the law wherein the
Court is required to determine whether or not the civil investigative de-
mand should be enforced. Such determination is an adversary proceeding
and the Court must do more than rubber stamp the Attorney General's de-
termination of the validity of its own demand. . . .
\end{quote}

Section 5(e) of the Antitrust Civil Process Act makes the Federal Rules
of Civil Procedure applicable to any proceeding in a district court to modify
or set aside a civil investigative demand.

\textsuperscript{62} FED. R. Civ. P. 26(c).

\textsuperscript{63} In Upjohn Co. v. Bernstein, [1966] Trade Cas. (CCH) 82,807 (D.D.C.), the
Department had received documents containing trade secrets in response to a CID
and had finished its investigation and contemplated no further action. Under these
circumstances, the court decided that it was proper to place restrictions on the De-
partment's handling of the documents. Id. at 82,808.

\textsuperscript{64} Upon enactment of the Act, one Senator commented:

\begin{quote}
It is the intention of Senators who considered the bill [which became the
Act] that the remedies afforded by the bill shall make it unnecessary to con-
sider conferring additional authority on the Attorney General, as has been
requested from time to time, until such time as the bill, when enacted into
law, shall have been thoroughly tested and tried.
\end{quote}

concluded that the Department's power needed further expansion.  

**THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT**

In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the Amendments), expanding the Department's precomplaint investigatory power. By extending this power, the Department's enforcement of the antitrust laws is aided and there is less danger that unmeritorious suits which injure innocent defendants will be filed. The Department can now compel

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65. The Attorney General explained to Congress:

Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.

The refusal of industry sometimes to cooperate voluntarily in antitrust investigations, which gave rise to the Antitrust Civil Process Act, is the reason today that more effective civil discovery means are needed. The same reasons that supported enactment of the Civil Process Act speak for the Act's expansion.


67. Upon signing the Amendments into law, President Ford commented that the Amendments "will significantly expand the civil investigatory powers of the Antitrust Division. This will enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it will also better assure that unmeritorious suits will not be filed." Statement by the President on Signing H.R. 8532 Into Law, 12 WEEKLY COMP. OF PRES. DOC. 1423, 1424 (Sept. 30, 1976). The House committee concurred in the President's belief that the Amendments would prove a great benefit to antitrust enforcement. The House committee report stated:

[The Amendments] should be the instrument of more enlightened antitrust enforcement, since the thorough pre-complaint investigations this bill will authorize would in many cases disclose facts that would lead the [Department] to file no action whatsoever. In fact, this often happens with CID investigations under the present 1962 Act. The [Department's] figures reveal that approximately 1300 of the 1600 CIDs for documents it has issued since 1962 ultimately resulted in no action, and many of these 1300 investigations conclusively and clearly vindicated potential defendants.

In each of these many cases, the CID process has benefited everyone—the courts, the [Department], and the potential defendants. The more thorough precomplaint investigations that [the Amendments] will make possible will yield similar benefits in the future.
natural persons to turn over relevant information and documents and to give written and oral testimony. CIDs can be issued to investigate anticipated mergers or acquisitions prior to the occurrence of any violation. Further, the amended Act allows the Department to issue CIDs to any party possessing relevant information or documents, whether or not the party is under investigation.

Natural Persons

Under the 1962 Act, the Department could not issue CIDs to natural persons. The Amendments remove this restriction, enabling the Department to obtain documents from employees of a corporation when the documents are not retained by the corporation itself. Moreover, the Department can obtain information from shareholders of a close corporation, who may possess documents relevant to the investigation.

Deposition Authority

The Amendments grant the Department authority to compel a CID recipient to answer written questions or to appear for oral examination before a Department investigator. Under the Act, CID authority was limited to documentary materials only. The CID's expanded scope aids investigations where necessary information cannot be obtained from documents alone. Examination of documents may produce an ambiguous and inconclusive picture. Prior to enactment of the Amendments, only Department employees could inspect documents received in response to a CID.


69. Id. § 1311(c).
70. Id. § 1312(a).
71. See note 43 supra and accompanying text.
73. S. Rep. No. 803, 94th Cong., 2d Sess. 14-15 (1976). Because a recipient can base an objection to a CID upon a constitutional or other legal right or privilege, including the privilege against self-incrimination, see notes 90 & 91 infra and accompanying text, the fourth and fifth amendments are not violated.
75. See note 42 supra and accompanying text.
to the Amendments the Department was forced to rely upon a corporation's voluntary compliance with Department requests to question the corporation's officials and employees to eliminate ambiguities; often these corporations would not cooperate.\textsuperscript{78} Prior to adoption of the Amendments, the Assistant Attorney General for the Antitrust Division testified to Congress that granting the Department deposition authority would greatly alleviate this problem.\textsuperscript{79}

Allowing the Department deposition authority reduces waste. Prior to the Amendments, both the Department and the corporation under investigation wasted countless hours: The corporation had to find requested documents; the Department had to examine them. In a deposition, a question can be answered quickly, avoiding much of this cost.\textsuperscript{80}

Furthermore, deposition authority facilitates effective law enforcement. If a company has an unwritten policy that violates the antitrust laws, the Department needs deposition authority to prove that the policy exists;\textsuperscript{81} if a company destroys relevant documents

the Department may use documents received in response to a CID "in connection with the taking of oral testimony." 15 U.S.C. § 1313(c)(2) (1976). Thus, the Department can examine documents and then question witnesses to resolve ambiguities.

If documents were produced in response to a CID issued under the Act, they could not be disclosed to third parties. Under the amended Act, if the Department issues a second CID to obtain the same documents, this time free of any prohibition against disclosing them to third parties "in connection with the taking of oral testimony," the CID recipient may be entitled to an order prohibiting such disclosure. Aluminum Co. of America v. United States Dep't of Justice, 444 F. Supp. 1342 (D.D.C. 1978). Because the CID recipient had relied upon the statutory prohibition against disclosure in effect when initially producing the documents, the CID recipient would not have had a "meaningful opportunity to object to possible disclosure to third parties." \textit{Id.} at 1347.

\textsuperscript{78} H.R. 39 Hearings, supra note 76, at 26 (statement of Thomas E. Kauper).


\textsuperscript{80} Two witnesses at the Senate hearings commented: "Allowing documentary discovery but not pre-complaint oral depositions puts a perverse premium on the most burdensome form of legal communication—as firms receiving CIDs often delay and then unload truckloads of documents on a stretched-out antitrust Division staff." \textit{The Antitrust Improvements Act of 1975: Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 146, 147 (1975) (statement of Ralph Nader and Mark Green) [hereinafer cited as \textit{S. 1284 Hearings}]; accord, H.R. REP. No. 1343, 94th Cong., 2d Sess. 23, 24 (letter from Ass't Att'y Gen. Thomas E. Kauper), \textit{reprinted in} [1976] U.S. CODE CONG. & AD. NEWS 2596, 2618.

\textsuperscript{81} Commenting on the Department's need for deposition authority, the House committee stated:

[W]hile the [Department] can compel the submission of documents during
before receiving a CID, depositions are needed to obtain the information previously contained in the documents. The Department’s deposition authority thus serves two important functions: It enables the Department to resolve ambiguities and to obtain information not otherwise available.

Right to Counsel

“CID recipients have an unlimited right to counsel while preparing their responses to CIDs for documents and answers to written interrogatories.” If the Department demands an oral examination, counsel may accompany the CID recipient and advise him or her during the examination. Congress had considered a more limited right to counsel for CID recipients, but rejected this proposal, granting CID recipients the same right to counsel for depositions as is granted for depositions taken under the Administrative Procedure Act or the Federal Trade Commission investigations of possible Sherman Act violations, documents may be inconclusive by themselves, or non-existent. Corporations have become very sophisticated about not creating or preserving documentary evidence. In such cases, oral testimony and answers to written interrogatories offer the only means of ascertaining the relevant facts.


82. Generally, before issuing a CID, the Department seeks information informally. Although federal law prohibits destruction of documents requested in a CID, it prohibits such destruction only after the CID is received. See 18 U.S.C. § 1505 (1976). Thus, a potential CID recipient can destroy relevant documents after learning of an informal investigation but before receiving a CID. Because the documents no longer exist, the Department needs deposition authority to obtain the information they contained. H.R. REP. No. 1343, 94th Cong., 2d Sess. 23, 24 (letter from Asst Att’y Gen. Thomas E. Kauper), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2596, 2618-19. Cf. Fracano, How Trade Association Executives Can Limit Their Exposure to Antitrust Division Discovery Procedures, 22 ANTITRUST BULL. 365, 373-75 (1977) (suggesting that trade associations diminish vulnerability to CIDs by reducing amount of records they keep, giving all records to accountants and members of association).


86. Commenting upon an early proposal, the Department stated: “A major objective of the bill [which became the Amendments], the production of oral testimony, would be obtained by a somewhat modified Administrative Procedure Act process providing the presence of the witness’ counsel in a limited role with a restricted right to raise objections.” Department of Justice Report (Mar. 5, 1975), reprinted in H.R. 39 Hearings, supra note 76, at 185, 185 (emphasis added).


88. 5 U.S.C. § 555(b) (1976). This statute provides in pertinent part: “A person
Thus precedents under these authorities are helpful in
determining the scope of a CID recipient's right to counsel.

Right to Refuse to Comply with a CID

A CID recipient's refusal to answer a question or produce re-
quested documents will be upheld only if a constitutional or other legal right or privilege, including the privilege against self-
incrimination, provides a basis for refusal. A refusal to answer

compelled to appear in person before an agency or representative thereof is entitled
to be accompanied, represented, and advised by counsel . . . .” Id.

In Wanderer v. Kaplan, [1962] Trade Cas. (CCH) 77,159 (D.D.C.), the court
found that applying the Administrative Procedure Act to FTC investigations mandates that: (1) The person under investigation has the right to have counsel present when testifying; (2) counsel have the right to object to improper questions; (3) counsel have the right to present on the record the grounds for objection; and (4) counsel have the right to advise the witness of the propriety of answering a question. Id. at 77,160-61. A CID recipient's right to counsel encompasses these essentials. For further discussion of the right to counsel in administrative hearing, see Annot., 33 A.L.R.3d 229 (1970 & Supp. 1977).

89. 16 C.F.R. § 2.9 (1979). This rule provides that a witness may have counsel accompany and advise him or her. Counsel may object to questions and advise the witness of the propriety of answering a question. Counsel may state the grounds for the witness' refusal to answer a question. However, counsel may not interrupt exami-
nation of the witness to object to the investigation, to subpoenas that produced the witness, or to the FTC's authority to investigate. Id. In Mead Corp., 62 F.T.C. 1467 (1983), the FTC examined the scope to be given the right to counsel in FTC investi-
gations. In a criminal trial, the defendant has the right to representation by counsel. U.S. CONST. amend. VI. The FTC distinguished its investigations from criminal trials:

"The Federal Trade Commission could not conduct an efficient investigation
if persons being investigated were permitted to convert the investigation
into a trial.” In its very nature, an investigative hearing is an ex parte, not an
adversary, proceeding. The purpose of an investigation is to obtain informa-
tion, and it is the Commission which has the primary responsibility for
deciding what information it needs and from what sources it should be elic-
ted.

62 F.T.C. at 1470. (quoting Hannah v. Larche, 363 U.S. 420, 446 (1960)). The FTC
further reasoned: “A reasonable balance must be struck between two legitimate inter-
ests, that of administrative efficiency in conducting non-public pre-adjudicative inves-
tigations and that of proper representation by counsel of witnesses compelled to
 testify in such investigations.” Id. at 1469. The FTC noted the dangers involved in
allowing counsel to participate: Opportunities to delay or obstruct the investigation
may arise and some lawyers may seize them. Id. at 1470. However, the FTC deter-
mined: “If dilatory or obstructionist tactics should be encountered, they must be
dealt with sternly. But, to deal with such tactics, it is neither necessary nor desirable
that the right to counsel be denied.” Id. Based upon this reasoning, the FTC promul-
gated its rules concerning the right to counsel in FTC investigations. See id. at 1472 n.5.

90. 15 U.S.C. § 1312(i)(7)(A) (1976). The Amendments have modified the proce-
dure for petitioning that existed under the Act. Now, the Department may extend, in
writing, the time a recipient has to file a petition to modify or set aside a CID. Id. §
based on an assertion of the privilege against self-incrimination must yield, however, if the Department grants the recipient immunity and then orders him or her to testify.\footnote{1979} An improper refusal to answer questions or produce documents is subject to judicial action. The Department can petition a United States district court for an order compelling compliance.\footnote{92}

The amended Act affords other protections for CID recipients. All grand jury subpoena and subpoena duces tecum standards continue to apply to determine the validity of a CID. Section 1312(c)(1) provides that if, in a grand jury investigation, the Department cannot obtain documents or information with a subpoena or subpoena duces tecum, the Department cannot obtain these documents or this information with a CID in a civil investigation.\footnote{93}

Section 1312(c)(2) provides that "standards applicable to discovery requests under the Federal Rules of Civil Procedure"\footnote{94} apply to CIDs only to the extent that they are appropriate to and consistent with the amended Act’s provisions and purposes.\footnote{95} To ascertain which civil discovery standards apply to determine the validity of a CID, legislative history must be examined.

The language of section 1312(c)(2) must be analyzed carefully. This section provides that those civil discovery standards equiva-
lent to grand jury subpoena or subpoena duces tecum standards, modified to take into account differences between civil and criminal investigations, apply to determine the validity of a CID. However, because of the similarity between a criminal investigation and a civil antitrust investigation, modification will rarely change the standard. Rather this provision furnishes a "safety valve" to allow a court flexibility in rare instances only.

In addition, section 1312(c)(2) provides that those civil discovery procedural dictates appropriate to and consistent with the amended Act's purposes and procedural dictates apply. In its report, the House committee explained the reason for this provision:

The 1962 Antitrust Civil Process Act expressly incorporated the "grand jury subpoena" standard of protection for CID recipients. But that Act did not clearly authorize CID objections under the "civil discovery" standard set forth in this bill. Instead, section 5(e) of the 1962 Act merely provided that "the Federal Rules of Civil Procedure shall apply to any petition under this Act." But this language is ambiguous: It is not clear whether it makes the "civil discovery" standards available only if civil discovery is attempted in the course of and ancillary to court disputes over CIDs, or whether, in addition, it means that CID recipients can raise the same objections to CIDs that civil litigants can raise against civil discovery requests. Legislative history and court decisions under the 1962 Act fail to provide guidance. Thus, in order to resolve this doubt in favor of protecting CID recipients, the Committee adopted the express language of section [1312(c)].

Consequently, CID recipients will be permitted to premise objections not only on the basis of precedents under the 1962 Act, but also on the basis of precedents under the grand jury subpoena standard and the civil discovery standard as well.96

Although the committee decided that civil discovery standards apply to determine the validity of a CID in appropriate cases, it understood that these standards are not always applicable.97 The amended Act states that to be applicable, civil discovery standards must be "appropriate and consistent with the provisions and purposes [of the amended Act]."98 The committee report adds that

98. 15 U.S.C. § 1312(c)(2) (1976) (emphasis added). The House committee noted: "[T]he application of civil discovery standards [must] be 'appropriate' and 'consistent' with the purpose of [the amended Act], which is to increase the effect-
Civil discovery standards that conflict with the amended Act's procedural dictates are not "appropriate and consistent with the provisions" of the amended Act. Therefore, civil discovery standards that conflict with the amended Act's procedural provisions do not apply to determine the validity of a CID.

Civil discovery standards must be appropriate and consistent with both the provisions and purposes of the amended Act. The

Section 1312(c)(2) does not incorporate those requirements of the FRCP that conflict with the amended Act. Incorporating them would place the Department in an untenable position: If the Department followed the procedure dictated by the FRCP, the Department would violate the amended Act; if the Department followed the procedure dictated by the amended Act, the Department would violate the amended Act as read to include all procedures dictated by the FRCP. The Department could not proceed. The committee stated "That is why section 1312(c)(2) requires that objections against CIDs raised under the discovery provisions of the Federal Rules of Civil Procedure be 'appropriate' and 'consistent with the provisions' of the Antitrust Civil Process Act." Id. at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 2607. Thus, if the Department obeys the amended Act's procedural dictates, the CID recipient cannot object to the Department's procedure.
terms "provisions" and "purposes" must have independent meaning or the statute would be redundant. Thus, in addition to those standards that conflict with the amended Act's procedural dictates, certain substantive civil discovery standards do not apply to determine validity of a CID. The House committee report furnishes guidance in evaluating which substantive civil discovery standards do apply. The report details restrictions on CIDs that the committee thought desirable. These restrictions are designed to prevent unreasonable and oppressive demands. They restrict a CID from being too broad and sweeping or from being used to secure privileged communications. These restrictions also ensure that the CID not involve too great a burden of compliance. The demand must be limited to a reasonable time period, sufficiently detailed to inform the recipient what is demanded, be relevant to a specific investigation, and be issued in good faith. For each of these restrictions, the report supplies precedents.

Each precedent cited involves a challenge to a grand jury subpoena or subpoena duces tecum, or a CID whose validity was determined under these same standards. None of the precedents concerns a civil discovery request. Thus applying only those substantive civil discovery standards that are equivalent to grand jury subpoena and subpoena duces tecum standards provides the substantive restrictions on CIDs that the House committee desires.

This is appropriate. Only those substantive civil discovery standards that correspond to grand jury subpoena and subpoena duces tecum standards should apply to CIDs. These substantive standards balance the need for effective law enforcement against the need for freedom from unreasonable demands. Civil discov-

100. It is presumed that Congress intends each word it uses to have meaning. See, e.g., Abbot v. Bralove, 176 F.2d 64, 66 (D.C. Cir. 1949); H. BLACK, supra note 32, § 54.


103. Aluminum Co. of America v. United States Dep't of Justice, 444 F. Supp. 1342, 1346 (D.D.C. 1978); H.R. REP. No. 1343, 94th Cong., 2d Sess. 7-8, reprinted in
Every standards are designed for civil trials, which are formal, adversary, adjudicatory proceedings. Civil trials have detailed pleadings that define the issues. CIDs are designed for investigations, which necessarily must be broader in scope. Thus the standards of materiality and relevancy can be stricter for civil discovery than for an investigation to determine whether a statute has been violated and many restrictions upon discovery should not apply to CIDs.

CIDs aid civil antitrust investigations as subpoenas and subpoenas duces tecum aid grand jury investigations. A determination whether a demand contained in a CID is reasonable properly should be made in a manner similar to that for determining whether a demand contained in a grand jury subpoena or subpoena duces tecum is reasonable. Grand jury subpoena and subpoena duces tecum standards are designed to invalidate unreasonable and

[1976] U.S. CODE CONG. & AD. NEWS 2596, 2602 (“[T]he need for effective law enforcement must be balanced against the rights of businesses and individuals to be free from unwarranted and unreasonable government intrusion.”).

104. See, e.g., FTC v. Gibson Products, Inc., 559 F.2d 900, 904 n.9 (5th Cir. 1978); FTC v. Texaco, Inc., 555 F.2d 862, 873-74 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); Westside Ford, Inc. v. United States, 306 F.2d 627, 632 (9th Cir. 1953); Hagen v. Porter, 156 F.2d 362, 365 (9th Cir.), cert. denied, 329 U.S. 729 (1946); FTC v. Green, 252 F. Supp. 153, 156 (S.D.N.Y. 1966). To commence and conduct an investigation, whether by a grand jury of a possible crime or by an administrative agency of a possible civil violation, an offense and an offender need not be known; the case-or-controversy requirement applicable to civil discovery does not apply to these cases. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). See also Blair v. United States, 250 U.S. 273, 282 (1919); Hale v. Henkel, 201 U.S. 43, 65 (1906). All that is inquired into is whether a violation of a statute has occurred, and it is by this standard that materiality and relevancy are judged. FTC v. Texaco, Inc., 555 F.2d 862, 873-74 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977). The court in Texaco stated:

Where, as here, no complaint has yet been formulated and the issues have therefore not yet been crystallized, some courts have concluded that an attenuated standard of relevance is appropriate. In our view, however, the better approach is simply to recognize that in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case. Accordingly, the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.

Id. (emphasis in original) (footnote omitted).

oppressive investigatory demands and are sufficiently protective of the rights of CID recipients.

The House committee, while recognizing that CIDs and grand jury subpoenas should satisfy similar standards, acknowledged that the nature of a civil investigation differs from that of a criminal investigation and opined that standards for judging a civil investigation may differ from those for judging a criminal investigation:

Thus, the grand jury subpoena standard, tailored as it is to reflect the broader scope and less precise nature of investigations, may in this one respect seem to be a more appropriate standard for antitrust investigations than a rigidly-applied, post-complaint civil discovery standard would be. Yet it seems equally inappropriate to apply only a criminal, grand jury standard to civil investigations, conducted under the [amended Act].

The House committee did not elaborate on the need for different standards for civil and criminal investigations. Possible justifications for broad investigatory powers in the criminal context include society's great stake in detecting and punishing violations of the criminal law, and prevention of the harsh consequences that inure to a defendant when criminal charges are erroneously filed. When, however, the civil investigation concerns a suspected antitrust violation, these same policies justify the need for a thorough investigation.

106. The limitations on the scope of a subpoena duces tecum may be summarized as follows. It must not be too broad and sweeping. The documents sought must have some materiality to the investigation. The subpoena must be limited to a reasonable time. The documents must be described with sufficient definiteness so that the witness may know what is wanted. The burdensomeness of compliance must not be too great. A subpoena may not be used to secure privileged documents.

The tests of reliance and materiality are tests "of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial."


107. Most of these standards have constitutional origins, and stem from the Fourth Amendment prohibition against "unreasonable searches and seizure." But such subpoenas must also conform to Federal Rule of Criminal Procedure 17(c), which provides that a court may quash or modify the subpoena—or, under this bill, a CID—if compliance would be "unreasonable or oppressive."


108. Id. at 11-12, reprinted in [1976] U.S. CODE CONG. & AD NEWS at 2605.
Standards used to judge civil antitrust investigations should parallel those used to judge criminal investigations. Except in rare cases, the policy considerations that delineate the scope of a grand jury subpoena or subpoena duces tecum apply equally to the context of a civil antitrust suit. Therefore, to determine whether a substantive civil discovery standard should apply in judging a CID, one must determine whether it is equivalent to a grand jury subpoena or subpoena duces tecum standard.

The legislative history in the Senate furnishes support for this construction of section 1312(c)(2). After passage in the Senate of the bill which became the Amendments, Senator Hart read a statement of intent and effect into the Congressional Record. Regarding applicability of the substantive standards of the FRCP to CIDs, he stated:

The purpose of including [section 1312(c)(2)] is to make available to CID recipients the appropriate substantive standards limiting discovery under the Federal Rules of Civil Procedure. Those standards, which may be found in Rule 26(c), authorize a court to protect a person from oppression or undue burden. . . . [O]ther standards in Rule 26(c) such as annoyance and embarrassment, which are appropriate concerns in the discovery context where information may readily become public, are not valid concerns under the CID statute. . . .

. . . We view the FRCP standard [in section 1312(c)(2)] as essentially incorporating the "oppressive" and "burdensome" standards of Rule 26(c). So limited, this standard is consistent with the purposes underlying the Act. . . .

The Senator commented: "[S]uch a limitation is already embodied in the grand jury standard." Senator Hart stated that only FRCP substantive standards equivalent to grand jury subpoena and subpoena duces tecum standards apply to determine validity of a CID. The House committee viewed section 1312(c)(2) as
incorporating grand jury subpoena and subpoena duces tecum standards but suggested these criminal standards may need to be modified in the civil context. As discussed previously, however, the policies delineating the scope of grand jury subpoenas and subpoenas duces tecum are equally applicable in the antitrust context in most instances. Thus it would seem this modification provision would have little practical effect and except in rare instances the same result would be reached under Senator Hart's and the House committee's views of section 1312(c)(2).

Senator Hart detailed seven factors to be considered in determining whether a FRCP substantive standard applies to determine validity of a CID. These factors emphasize that the na-

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1. See text accompanying notes 102-108 supra.
   [1] In deciding which grounds are in fact “appropriate and consistent” for application to CIDs, the following factors are important and should be taken into account:

   (1) Investigations— unlike pre-trial discovery and litigation—are not adversary or adjudicatory;

   (2) Pre-trial discovery and litigation have different purposes, a narrower scope, and more clearly-defined issues than investigations have;

   (3) Parties to pre-trial discovery and litigation are clearly identified, while there are no parties in investigations—possible antitrust wrongdoers are seldom firmly identified until way late in the investigation;

   (4) Parties in pre-trial discovery and litigation have certain rights with respect to notification, participation, intervention, confrontation, and cross-examination, whereas there are no such rights (even for targets) in investigations;

   (5) Narrow, technical, or merely procedural objections which frustrate expeditious [sic] civil antitrust investigations are normally not “appropriate and consistent”;

   (6) Relevance in an investigation may be different from relevance in.
ture of an investigation differs from the nature of pretrial discovery and litigation. Thus, the validity of a CID, an investigative tool, should be determined using standards for investigative tools like grand jury subpoenas and subpoenas duces tecum rather than by using standards for discovery devices.\textsuperscript{115}

Representative Railsback criticized Senator Hart’s statement of intent and effect as an attempt to emasculate section 1312(c)(2):

The statement of intent [by Senator Hart] now suggests that the Senate adopted the House language because it was essentially meaningless. The House report explains the language. It should be emphasized that the provision embracing the Federal rules would incorporate by reference any new developments thereunder, generally shows greater sensitivity to matters such as trade secrets, and would permit in appropriate cases protective orders and orders conditioning compliance upon the advancement of costs.\textsuperscript{116}

The Representative indicated three areas that he believed would not receive adequate protection from section 1312(c)(2), as interpreted by Senator Hart and the House committee. However, as interpreted by Senator Hart and the House committee, section 1312(c)(2) affords adequate protection from unreasonable investigatory demands. Representative Railsback’s first concern was ensuring protection for trade secrets. However, under the Act trade secrets received protection.\textsuperscript{117} Section 1312(c)(2), as interpreted by Senator Hart and the House committee, continues this protection by allowing CID recipients to object to oppressive and burdensome demands.\textsuperscript{118} His second concern was that CID recipients should be able to obtain protective orders in appropriate cases. Section 1312(c)(2), as interpreted by Senator Hart and the House committee, allows a CID recipient to obtain a protective order

\textsuperscript{7} Civil antitrust investigations are nonetheless investigations and they are in most respects close [sic] to grand jury investigations than they are to pre-trial discovery or litigation.

\textsuperscript{Id.}

\textsuperscript{115} Senator Hart stated: “The application of the grand jury standard has been regarded since 1962 as appropriate in the CID context because of the investigative character of the Department’s pre-complaint inquiry.” \textsuperscript{Id.}

\textsuperscript{116} Id. at H10,303 (daily ed. Sept. 16, 1976) (remarks of Rep. Railsback).

\textsuperscript{117} See notes 63 & 101 supra.

\textsuperscript{118} In Aluminum Co. of America v. United States Dep’t of Justice, 444 F.
in such instances.

Representative Railsback’s final concern was ensuring that CID recipients receive the protection provided by orders condition ing compliance upon advancement of costs. Reading section 1312(c)(2) to import the procedural protections of the FRCP allows such orders. These orders have a substantive effect when a private party brings suit.\textsuperscript{119} An order to advance a sum sufficient to cover costs might deter a private party with limited resources from bringing suit. However, such an order should not deter the government with its vast resources. In the case of a CID, such an order serves as a procedural device. Section 1312(c)(2), as interpreted by Senator Hart and the House committee, allows FRCP procedural dictates to govern procedure, so long as they do not conflict with the provisions or purposes of the amended Act. Thus an order conditioning compliance with a CID upon advancement of costs would be permitted under the amended Act.

Although section 1312(c)(2) as interpreted by Senator Hart and the House Committee does address each of Representative Railsback’s concerns, apparently the Representative believed this interpretation is inadequate because new developments under the FRCP are not expressly incorporated into section 1312(c)(2). He was also disturbed because he believed that section 1312(c)(2), as so interpreted, is meaningless. However, this is not the case.

Congress designed both 1312(c)(1) and (c)(2) to afford adequate protection from oppressive and unreasonable demands contained in a CID, an investigative tool. Section 1312(c)(1) exists to allow a court to test a CID for oppressiveness and unreasonableness, by

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\textsuperscript{119} Cf. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (state statute that requires posting of bond for costs before stockholder may bring derivative suit has substantive effect and must be complied with in federal court).
standards developed for testing criminal investigations. The consequences of the Department's inability to procure some types of information generally will equate in severity with the consequences to a grand jury's inability to investigate fully. Thus the "safety valve" modification provision of section 1312(c)(2) should not, except in rare cases, lead to a different result for a CID as opposed to a grand jury subpoena or subpoena duces tecum. Rather this subsection is intended to remind courts that these standards cannot be lifted from the criminal context and applied to CIDs in the civil context haphazardly, without regard for any differences in the two situations. In addition section 1312(c)(2) provides procedural safeguards for CID recipients, such as protective orders that prohibit the Department from publicly disclosing material received in response to a CID or orders conditioning compliance upon the advancement of costs.

To summarize, a CID recipient may refuse to answer a question or produce requested documents based upon a constitutional or other legal right or privilege. The essence of the legal rights and privileges provided by the amended Act is that a CID cannot contain a demand not permitted by a grand jury subpoena or subpoena duces tecum. In rare cases, however, a CID may be judged by a harsher standard. Moreover, the amended Act provides certain procedural safeguards for CID recipients.

Transcript of Oral Examination

The Department may issue a CID to compel appearance of a witness at an oral examination. At the end of the oral examination, the witness, who may have counsel present, has an opportunity to examine the transcript and correct errors. The investigator conducting the examination notes all changes and reasons given for them. For a reasonable fee, the investigator will furnish the witness, and only the witness, a copy of the transcript. However, for "good cause" the Assistant Attorney General for the Antitrust Division may limit the witness to inspection of the official transcript. Prior to enactment of the Amendments, the Assistant Attorney General suggested that the witness would be able to receive a copy of the transcript except in very limited circumstances.
The House committee stated that “good cause” may exist “in investigations where there is a possibility of witness intimidation, economic reprisal, or the ‘programmed’ formulation of a common defense by possible co-conspirators who ‘tailor’ their testimony to match the evidence held by the government.”125 “This ‘good cause’ transcript access test is identical to the transcript access provisions of the Administrative Procedure Act, 5 U.S.C. § 555(c), which governs investigations by all federal agencies.”126 Thus precedents under that statute can aid courts in determining whether good cause exists.

Third Parties

The Department may issue a CID to any party possessing relevant information or documents, whether or not the Department is investigating that party.127 Under the Act, inability to issue CIDs

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To elucidate this further, the House committee cited United States v. Rose, 215 F.2d 617 (3d Cir. 1954), which involved an individual seeking to obtain a copy of his grand jury testimony to prepare a defense to a perjury charge. The court noted that five objectives necessitate maintaining secrecy for grand jury proceedings: (1) Preventing escape by those under investigation, (2) protecting the grand jury from outside influence, (3) preventing witness tampering, (4) encouraging individuals with knowledge of a crime to come forward, and (5) protecting accused defendants who are later exonerated. See id. at 628-29. The court concluded that “[s]ince all the defendant desires is a transcript of his own testimony, the sanctity of that which transpired before the Grand Jury is hardly in question. In addition, such disclosure would not subvert any of the reasons traditionally given for the inviolability of Grand Jury proceedings.” Id. at 630 (emphasis in original). Citation of this case in the House committee report suggests that the committee determined that “good cause” to deny a witness a copy of his or her transcript in a civil antitrust investigation should be determined in a manner similar to that used in the grand jury context.


A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony. 5 U.S.C. § 555(c) (1976). In In re Neil, 209 F. Supp. 76 (S.D.W. Va. 1962), the court interpreted a prior, though essentially similar, statutory provision and concluded “the witness should be furnished a copy of the transcript of his testimony without being subjected to any unreasonable conditions.” Id. at 79.

127. 15 U.S.C. § 1312(a) (1976). One court interpreted the amended Act as preventing the Department from issuing a CID to obtain documents from “any third
to parties not under investigation deprived the Department of sources possessing important information. Third parties, such as competitors, suppliers, customers, and employees, often have essential documents and information. They may possess expertise necessary for an understanding of a highly specialized or technical market. In addition they may know of antitrust violations not recorded in any document.

The Department's ability to compel third parties to turn over documents and information may result in third parties voluntarily furnishing the Department with documents and information. If the Department did not possess this power, these third parties might fear retaliation by the party against whom they are supplying documents and information. However, because the Department can compel production of this material, third parties have a valid excuse for voluntarily supplying information: They thus avoid the issuance of a CID which conceivably could encompass a much broader range of materials than those supplied voluntarily.

Miscellaneous

Under the Act, the Department could not issue CIDs to investigate proposed mergers or acquisitions. However, the Amendments allow the Department to issue CIDs to investigate "activities in preparation for a merger, acquisition, joint venture, party—such as an adversary in a lawsuit—who might have obtained possession of [the investigated party's] documents other than in the ordinary course of business." United States v. GAF Corp., 5 TRADE REG. REP. ¶ 62,015, at 74,351 (S.D.N.Y. 1978). This court reasoned that the Department cannot issue a CID "to obtain from one party to a treble damage suit certain documents its adversary has furnished it pursuant to pretrial discovery." Id. at 74,349.


129. Trade associations are particularly valuable targets for CIDs. They have detailed market data that the Department needs. H.R. REP. No. 1343, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2596, 2602. One Department lawyer wrote: "Trade associations are excellent sources of information about their members' business practices, sales, revenues, market shares, and other business facts. For that reason, trade associations can expect to be frequent recipients of antitrust CIDs . . . ." Reeves, supra note 4, at 356-57. See generally Fricano, supra note 82.


131. Id. at 15.

132. United States v. Union Oil Co., 343 F.2d 29 (9th Cir. 1965). See note 48 supra and accompanying text.
or similar transaction, which, if consummated, may result in an antitrust violation.” 133 The Department needs the power to enjoin those activities that would violate the antitrust laws. Divestiture after consummation is generally not an adequate remedy: It takes a long time, and it is extremely difficult to undo a transaction once it has taken place. 134

The Amendments remove the Department’s authority to issue CIDs to investigate violations of the Federal Trade Commission Act 135 and unfair trade practices. 136 This authority served no purpose. 137 The FTC, which prosecutes these violations and practices, has its own investigative capabilities. The Department should not investigate for the FTC. 138

While the Department may disclose information obtained pursuant to a CID to Congress, 139 documents received in response to a CID, answers given to written interrogatories, and transcripts of

133. 15 U.S.C. § 1311(c) (1976). Referring to Union Oil Co., the House subcommittee chairperson asked: “One issue is sharply defined by the bill [which became the Amendments]: Should a lower Federal court’s construction of the act that has reduced the use of CIDs in investigating mergers as possibly violative of the Clayton Act, be reversed?” H.R. 39 Hearings, supra note 76, at 14 (statement of Rep. Rodino). Congress answered “yes.”

An early version of the Amendments would have allowed issuance of a CID to investigate “any activities which may lead to any antitrust violation.” H.R. 39, 94th Cong., 1st Sess., § a, H.R. 39 Hearings, supra note 76, at 4. Commenting upon the breadth of this language, the Assistant Attorney General for the Antitrust Division stated:

[The major emphasis is on mergers and joint ventures. If there is concern about the breadth of that language, I don’t think we would be terribly concerned if it were so confined to eliminate any notion that what we are trying to find out is whether somebody is thinking about violating the antitrust laws. This is not what we have in mind.

The circumstances in which this is used would be where the parties propose a transaction which they are going to implement, and have announced they are going to implement at a later date. That is our major concern, and that would be largely mergers and joint ventures, conduct subject to the coverage of section 7 of the Clayton Act.

Id. at 28 (statement of Thomas E. Kauper). See id. at 54-55 (Justice Department’s suggested amendments to H.R. 39).

134. Id. at 29 (statement of Thomas E. Kauper).
138. Id. However, the Department may make available to the FTC documents and information obtained in response to a CID. Under the Act, it could not do so. See note 49 supra. The FTC may use such documents and information in investigations and proceedings. 15 U.S.C. § 1313(d)(2) (1976).
oral examinations are exempt from the Freedom of Information Act. Thus CID recipients need not fear undue publication of confidential materials furnished in response to a Department request.

CONCLUSION

To enforce the antitrust laws efficiently, the Department needs the power to obtain information at the start of its investigation of a suspected violation. Without such power, the Department will waste its limited resources in pursuing a suspected violation which either may not even be a violation or may not warrant further Department action. In addition, the more information the Department has, the better it is able to determine how to proceed against the suspected violator.

Moreover, a suspected violator who is innocent is better protected if the Department can obtain information early in its investigation than if it cannot. If the Department charges an innocent suspect with violating the antitrust laws, the reputation and finances of this suspected violator may suffer. However, if the Department only investigates this suspected violator, this is less likely to occur. Thus a suspected violator who is innocent benefits by the Department investigating and convincing itself of the investigated party's innocence, rather than filing suit and making this determination later.

To become convinced of the suspected violator's innocence, the Department must have power to investigate thoroughly. How-

140. Id. § 1314(f).
141. 5 U.S.C. § 552 (1976). The Freedom of Information Act mandates that federal agencies make their records available to the public, except in certain limited instances. Records protected from disclosure include: Certain national defense or foreign policy secrets; records of an agency's internal personnel rules and practices; particular classes of matter exempt by statute; privileged and confidential trade secrets and commercial or financial information; interagency and intra-agency materials that would be unavailable in litigation to nonagency parties; files on individuals, if their disclosure would constitute an unwarranted invasion of personal privacy; investigatory records compiled for law enforcement purposes within certain criteria established by statute; certain reports prepared for agencies that regulate or supervise financial institutions; certain information concerning wells. Id. § 552(b).

Though material obtained in response to a CID may fit within the investigatory records exemption, the Department sought an exemption from the Freedom of Information Act for such material. The Department believed the certainty of exemption would improve compliance by CID recipients, since they would know that any material provided by them would not be turned over to third parties pursuant to a Freedom of Information Act request. See H.R. 39 Hearings, supra note 76, at 27-28 (statement of Thomas E. Kauper).
ever, the Department’s power must be limited: Each time the Department investigates, it intrudes into people’s lives. A proper balance needs to be reached between the Department’s investigatory power and the public’s right to freedom from governmental intrusion.

Prior to 1962, the Department’s means of investigating a suspected violation of the antitrust laws before filing suit were inadequate. In 1962, Congress passed the Act, giving the Department limited power to issue CIDs. This narrowly circumscribed power needed further expansion in order for the Department to perform adequately its investigatory function. In 1976, Congress enacted the Amendments, expanding the Department’s precomplaint investigatory power. This should enable the Department to enforce the antitrust laws more efficiently without tarnishing the reputation of innocent suspects.

The balance between the Department’s power to investigate and the public’s right to be free from governmental intrusion has shifted over the years in favor of greater power for the Department. The question now is whether the Amendments have set the balance aright. Senator Hart, one of the sponsors of the Amendments, believed they have. He commented: “We are confident that the provisions of the amended [Act] strike a fair balance between the rights of persons under investigation and third parties against unreasonable Government intrusion and the need for effective and efficient enforcement of the antitrust laws.”

Whether Senator Hart’s assessment is correct can only be tested by the operation of the amended Act.

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