

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

**COMMISSIONERS:     Edith Ramirez, Chairman  
                          Jon Leibowitz  
                          Julie Brill  
                          Maureen K. Ohlhausen  
                          Joshua D. Wright**

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<b>In the Matter of</b>	)	
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	)	
<b>DECEMBER 12, 2012 CIVIL INVESTIGATIVE</b>	)	
<b>DEMAND ISSUED TO THE WESTERN</b>	)	<b>File No. 012 3145</b>
<b>UNION COMPANY</b>	)	
<b>AND</b>	)	<b>March 4, 2013</b>
<b>NOVEMBER 5, 2012 CIVIL INVESTIGATIVE</b>	)	
<b>DEMAND ISSUED TO LONNIE KEENE,</b>	)	<b>Redacted Public</b>
<b>MONITOR, STATE OF ARIZONA V.</b>	)	<b>Version</b>
<b>WESTERN UNION FINANCIAL</b>	)	
<b>SERVICES, INC.</b>	)	

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**ORDER DENYING PETITION TO QUASH  
CIVIL INVESTIGATIVE DEMANDS**

**By OHLHAUSEN, Commissioner:**

Western Union Company (“Western Union”) has filed a petition to quash civil investigative demands (“CIDs”) issued by the Federal Trade Commission (“FTC” or “Commission”) to Western Union and to Mr. Lonnie Keene, an independent monitor appointed pursuant to Western Union’s settlement of money laundering charges by the State of Arizona. *See Arizona v. Western Union Financial Services, Inc.*, No. CV 2010-5807 (Ariz. Super. Ct. Maricopa Cnty. Feb. 24, 2010). For the reasons stated below, the petition is denied.

**I.     BACKGROUND**

Over the past several years, money transfers have become the payment method of choice for those seeking to defraud consumers in the U.S. and abroad. There are several reasons for this development. First and foremost, a money transfer through companies

like Western Union or MoneyGram is essentially the same as sending cash. Thus, consumers have no chargeback rights, as they would have if they had paid by credit card. A money transfer also enables the perpetrators of a scheme to get consumers' funds quickly. Indeed, a money transfer can be picked up by the recipient within a matter of minutes at multiple locations virtually anywhere in the world, rather than a single designated location. In many instances, the recipient is not even required to provide identification. All of these factors make it extremely difficult for the FTC and other enforcement agencies to identify and take action against perpetrators of frauds that employ money transfers.

The FTC continues to receive a high volume of complaints about fraudulent and deceptive practices that rely on money transfers as the method of payment. In 2012 alone, the FTC's database of consumer complaints ("Consumer Sentinel") received more than 102,000 complaints from consumers who lost money through a fraud-induced money transfer, with reported losses exceeding \$450 million. In the same 5n(ploy)28( m)100(os]o 0 nM8]TJu

fraud-induced money transfers. In June 2012, FTC staff requested that Western Union voluntarily provide the FTC with reports produced by a monitor appointed pursuant to an agreement with the State of Arizona that settled charges that Western Union’s money transfer business was being used to facilitate human smuggling or narcotics trafficking.

After Western Union refused to provide the reports voluntarily,<sup>3</sup> the Arizona Attorney General sought an order clarifying that the terms of the settlement were broad enough to allow Arizona to share the Monitor’s reports with the FTC.<sup>4</sup> The reports had been filed under seal (and therefore kept off the public record) pursuant to a provision in the Settlement Agreement allowing – but not requiring – either Western Union or the Arizona Attorney General to request that the reports be filed under seal.<sup>5</sup>

The state court denied the Arizona Attorney General’s request, without prejudice, on September 25, 2012. The ruling was premised on the court’s view that “for the Court to order disclosure to [the FTC and Department of Homeland Security] pursuant to the agreement, I would want them in the courtroom to know what the scope of the agreement is, that it is going to be a two-way street. It would benefit the monitor in doing the monitor’s job.”<sup>6</sup> The court made clear that it was making no comment on “the extent that the FTC or Homeland Security has a right to secure information that the monitor has or the Attorney General’s Office has.”<sup>7</sup>

The Commission then issued CIDs to obtain the reports and related materials, first to the Monitor and then to Western Union directly. Specifically, on November 5, 2012,

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<sup>3</sup> Western Union did provide other information about its antifraud program and contributed complaints from U.S.-based consumers to the Commission’s online complaints database. Starting in August 2012, FTC staff also requested foreign complaints, but Western Union declined based on privacy concerns.

<sup>4</sup> Pet. Ex. E. The Arizona Attorney General pointed out that such a release is consistent with the Monitor Engagement Letter (“MEL”) (*see* Pet. Ex. E, at 5-6; *see also* Pet. Ex. B ¶ 9) and is specifically authorized by Paragraph 17.1.4 of the Settlement Agreement (providing that the state has leave to disclose any materials or information provided by Western Union where such disclosure “is required by law, otherwise authorized by this Agreement, or is in the proper discharge of or otherwise furthers the State’s official duties or responsibilities.”).

<sup>5</sup> Pet. Ex. D, at 4.

<sup>6</sup> Pet. Ex. F, at 21-22.

<sup>7</sup> Pet. Ex. F, at 21.

the Commission issued a CID to the Monitor, seeking

All documents referring or relating to the Periodic Reviews of the Monitor appointed by the court in *State of Arizona ex rel. Horne v. Western Union Financial Services, Inc.*, No. CV 2010-005807, including, but not limited to, all drafts of any reports, reviews, or correspondence with Western Union.

The Commission directed a separate CID to Western Union on December 12, 2012. In addition to the Monitor's reports, the CID requires Western Union to produce (1) internal documents that refer or relate to communications with the Monitor *B i.e.*, documents showing Western Union's internal reaction to the findings and recommendations in the Monitor's reports; and (2) complaints from consumers worldwide referring or relating to fraud-induced transactions. As defined, such complaints include complaints made by foreign consumers about transactions that were picked up either in the U.S. or in a foreign jurisdiction.

After receiving the CID, the Monitor sought to confirm his authority to provide the requested materials to the FTC by filing a motion in the settled Arizona action. On January 28, 2013, the state court denied that request "in the absence of a formal enforcement action order issued by the appropriate federal jurisdiction."<sup>8</sup> The court reasoned that Western Union had an expectation of confidentiality when it "voluntarily gave the Monitor access to its otherwise private practices and proprietary data." Accordingly, the court concluded, it was reasonable "that Western Union did not expect that [its] proprietary information and practices would be otherwise provided to a third party who has no enforceable limitation on its use or disclosure."<sup>9</sup> The state court specifically noted that (1) "it has no jurisdiction, and makes no attempt to determine the enforceability of the FTC's CID," and (2) it was "in no way address[ing] the issue of whether the FTC has authority to take" the Monitor's reports and what the FTC "may do with them."<sup>10</sup>

On January 31, 2013, Western Union filed the instant petition to quash.<sup>11</sup>

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<sup>8</sup> Pet. Ex. G, at 4.

<sup>9</sup> Pet. Ex. G, at 2-3.

<sup>10</sup> Pet. Ex. G, at 3-4.

<sup>11</sup> It is by no means certain that Western Union has standing to seek to quash the CID issued to the Monitor. Generally, the target of a government investigation lacks standing to dispute the validity of administrative subpoenas directed to a third party. *See, e.g., Greene v. Phila. Hous. Auth.*, 789 F. Supp. 2d 582, 586 (E.D. Pa. 2011); *see also*

## II. ANALYSIS

### A. The Applicable Legal Standards.

Compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the inquiry, as defined by the Commission's investigatory resolution.<sup>12</sup> Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have "a justifiable belief that wrongdoing has actually occurred."<sup>13</sup>

Western Union argues that the CIDs should be quashed because they do not satisfy these standards. First, Western Union claims that the CIDs were not issued pursuant to a valid resolution. Second, Western Union claims that the requested materials are not relevant to the purpose of the investigation. Third, it claims that the FTC lacks authority to compel the production of materials prepared pursuant to, or as a consequence of, a state court settlement. Fourth, Western Union contends that the Commission exceeded its authority in seeking complaints and information related to money transfers between foreign countries. As explained below, we are not persuaded that these contentions have merit.

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**B. The CIDs Are Supported by a Specific and Valid Resolution.**

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supported multiple other investigations, including CIDs issued to Western Union's competitor, MoneyGram, in 2007 and 2008.

Western Union's reliance on the decision of the D.C. Circuit in *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980), is misplaced. Although *Carter* held that a bare reference to Section 5 of the FTC Act, without more, "would not serve very specific notice of purpose," the Court approved the resolution at issue, noting that it also referred to specific statutory provisions of the Cigarette Labeling and Advertising Act, and further related it to the subject matter of the investigation.<sup>16</sup> With this additional information, the Court felt "comfortably apprised of the purposes of the investigation and the subpoenas issued in its pursuit."<sup>17</sup> Similarly, the resolution here provides substantially more information than the bare text of Section 5, and thus adequately notifies Western Union of the nature and scope of the investigation.

Western Union's argument also fails in light of the history of communications between the company and the FTC. The purpose of an authorizing resolution is to notify a CID recipient of the nature and scope of the investigation.<sup>18</sup> Given the lengthy dialogue between staff and Western Union, there is no doubt that the company is aware of the nature of staff's investigation. The Commission has previously found that such interactions may be considered along with the resolution in evaluating the notice provided to Petitioners: "[T]he notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioner more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation."<sup>19</sup>

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repeatedly rejected similar arguments about such omnibus resolutions. *See, e.g., LabMD, Inc.*, No. 123099, at 9 (Apr. 20, 2012); *Firefighters Charitable Found.*, No. 102-3023, at 4 (Sept. 23, 2010); *D.R. Horton, Inc.*, Nos. 102-3050, 102-3051, at 4 (July 12, 2010); *CVS Caremark Corp.*, No. 072-3119, at 4 (Dec. 3, 2008).

<sup>16</sup> *Carter*, 636 F.2d at 788.

<sup>17</sup> *Id.* Western Union also contends that the resolution fails to conform to the FTC's Operating Manual. Pet. 9. But for the reasons stated above, the resolution at issue is sufficiently specific to comply with the Operating Manual. FTC Operating Manual, Ch. 3.3.6.7.4.1. In any event, the manual itself confers no rights on Western Union. *Id.*, Ch. 1.1.1; *see also FTC v. Nat'l Bus. Consultants, Inc.*, 1990 U.S. Dist. LEXIS 3105, 1990-1 Trade Cas. (CCH) & 68,984, at \*29 (E.D. La. Mar. 19, 1990).

<sup>18</sup> *O'Connell Assocs., Inc.*, 828 F. Supp. at 170-71.

<sup>19</sup> *Assoc. First Capital Corp.*, 127 F.T.C. 910, 915 (1999).





money services business (“MSB”) authorities do not segregate AML and antifraud

responding parties to complete the consumer fraud complaint form and return it to the consumer protection division.

The consumer protection division will investigate the complaint and attempt to resolve the dispute. If the complaint is not resolved, the division will refer the complaint to the appropriate state or federal agency for further action.

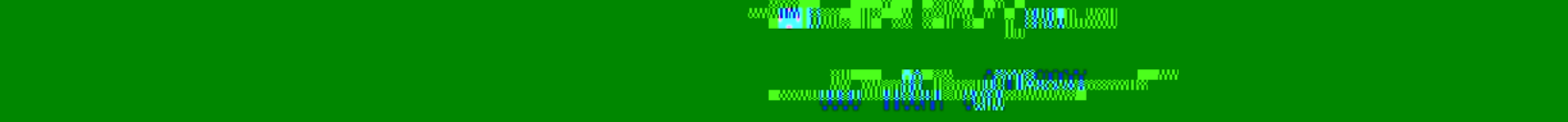
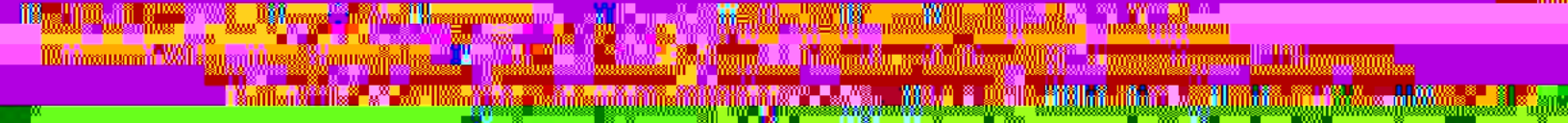
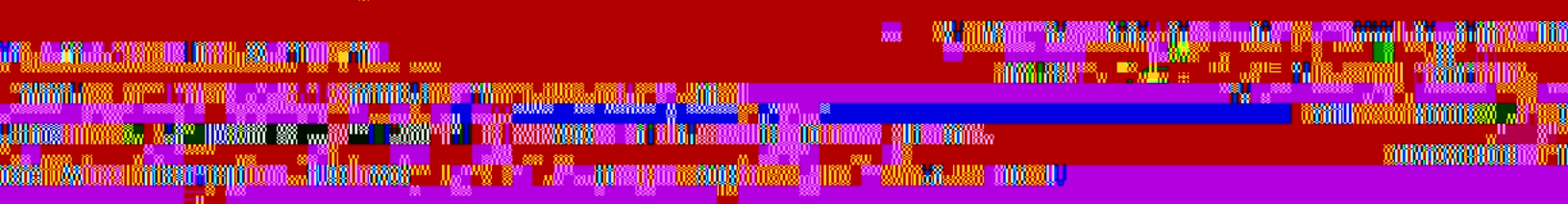
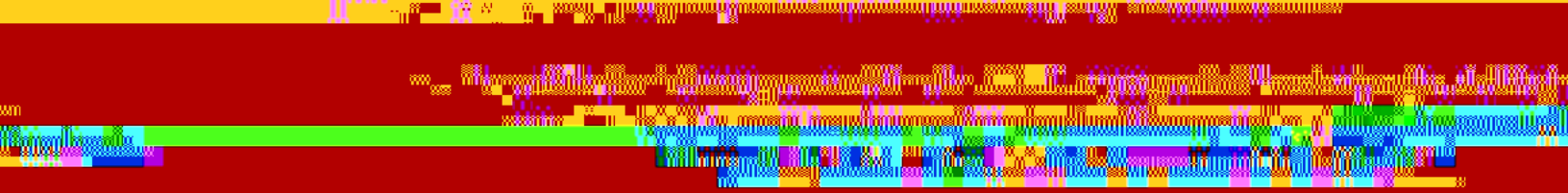
The consumer protection division will also provide information and advice to consumers on how to avoid consumer fraud. This information is available on the division's website and through consumer education programs.

Consumers should be aware of common consumer fraud schemes, such as pyramid schemes, multi-level marketing, and investment fraud. Consumers should also be aware of the signs of consumer fraud, such as high-pressure sales tactics and promises of large returns.

Consumers should take steps to protect themselves from consumer fraud, such as researching companies and products, reading reviews, and being cautious of offers that seem too good to be true.

Consumers should also report any suspected consumer fraud to the consumer protection division. This information is important for the division to identify and prevent consumer fraud.

Non-communicable diseases are also part of Western



[REDACTED]

We conclude, therefore, that the steps Western Union must take to eliminate various forms of any suspected illegal transactions from its system

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communications with the Monitor.”<sup>42</sup> The CID thus encompasses Western Union’s internal communications and reactions to the findings and recommendations of the Monitor, which are relevant to determining the strength of the company’s culture of compliance and whether there is a widespread commitment to eliminating illegal transactions from Western Union’s system. These documents, which have not been shared with the Monitor or with the Arizona Attorney General, are not covered by any confidentiality provisions in the settlement documents and thus must be produced in response to the CID directed at Western Union.

In short, the Monitor’s reports and related materials are relevant to assessing Western Union’s commitment to eliminating illegal transactions from its system, and thus are “reasonably relevant” to the purposes of the Commission’s investigation. Western Union has not satisfied its burden to demonstrate that the information requested by the CID is “plainly irrelevant” or “obviously wrong.”<sup>43</sup>

underlying information may be shared in certain circumstances — including with investigative agencies or in furtherance of the Attorney General’s duties.<sup>46</sup>

Second, Western Union errs in contending that CIDs represent an improper attempt to circumvent an order of a state court. The September 2012 ruling dealt solely with the Arizona Attorney General’s request to share copies of the reports that had been provided to him.<sup>47</sup> Similarly, the January 2013 order dealt solely with the request made by the Monitor, pursuant to the CID addressed to the Monitor, to disclose copies of the reports in the Monitor’s custody.<sup>48</sup> Neither the ruling nor the order purports to address the copies of the Monitor’s reports that reside in Western Union’s own files, or the other materials sought in Specification 2 of the CID addressed to Western Union – which includes materials besides the Monitor’s reports, such as “information Western Union provided to the Monitor” and Western Union’s internal reactions to the Monitor’s reports.<sup>49</sup> The state court’s ruling and order, by their own terms, are simply inapplicable to the documents that Western Union seeks to shield from disclosure.

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Third, the Arizona state court did not purport to prohibit the Commission from using its process to obtain the reports or related information either from the Monitor or the State of Arizona. On the contrary, on both occasions the court specifically noted that it was not addressing the scope of the Commission's process authority. When ruling on the Arizona Attorney General's request, the state court explained that it was "mak[ing] no comment" on "the extent that the FTC or Homeland Security has a right to secure information that the monitor has or the Attorney General's Office has."<sup>50</sup> Similarly, when ruling on the Monitor's request, the state court recognized that "it has no jurisdiction, and makes no attempt to determine the enforceability of the FTC's CID," and therefore specifically declined to address "whether the FTC has authority to take" the reports and what the Commission "may do with them" thereafter.<sup>51</sup>

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The same considerations apply when a state court purports to restrict the Commission's ability to use its investigative process. "To . . . federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2.'"<sup>54</sup>

Fifth, the fact that the requested documents were generated as a result of Western Union's settlement with the Arizona Attorney General does not change the analysis. Documents created pursuant to settlement or in reliance on confidentiality protections are not automatically shielded from all disclosure. For example, even in the context of purely private rights, the Third Circuit has recognized that parties' reliance on a confidentiality order is only one of several factors that must be considered when nonparties seek access to confidential settlement materials.<sup>55</sup> The threshold to forestall disclosure of documents submitted to facilitate settlement is even higher when a case involves – as it does here – "a government agency and an alleged series of deceptive trade practices culminating (it is said) in widespread consumer losses," because "[t]hese are patently matters of significant public concern."<sup>56</sup>

Moreover, Western Union's cited cases – *United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998), and *McCoo v. Denny's Inc.*, 2000 WL 156824 (D. Kan. Feb. 11, 2000) – do not support the proposition that the Commission may not use process to obtain documents that would not exist but for the Arizona settlement agreement. Notably, the persons seeking disclosure in *Bleznak* and *McCoo* were seeking evidence to use in vindicating their purely private rights. By contrast, the Commission is an agency of the





law, this specification must be enforced if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the purpose of the inquiry, as set forth in the Commission's investigatory resolution.

Western Union does not claim that the specification is too indefinite or not reasonably relevant. It contends, however, that the Commission has exceeded its authority in requesting information about transactions that occurred outside the U.S. and further, that the request cannot be reconciled with foreign data privacy laws. We are not persuaded by either of these claims.

The FTC is authorized to obtain through compulsory process Western Union's worldwide complaints about fraud-induced money transfers. In 2006, Congress passed the U.S. SAFE WEB Act, which enhanced the FTC's ability to protect U.S. consumers from perpetrators of fraud operating abroad and to prevent the U.S. from becoming a haven for fraudulent activity targeting foreign victims by amending Section 5's core provisions to confirm the agency's cross-border jurisdictional authority. The SAFE WEB amendments provide that the term "unfair or deceptive acts or practices" in Section 5(a) of the FTC Act "includes such acts or practices involving foreign commerce" that either: "(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States." 15 U.S.C. '



such complaints.<sup>65</sup>

For similar reasons, any failure by Western Union to take effective remedial action against a problematic foreign agent would necessarily cause or be likely to cause

Western Union's references to the need to promote international comity and avoid conflicts among data protection laws do not provide any basis for quashing the CID. Western Union has not cited any actual foreign data protection law, or described how such law would preclude Western Union from providing the FTC with any worldwide complaints.

Furthermore, Western Union's reliance on *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987), is misplaced. First, *Aerospatiale* involved private interests, not a federal agency's use of compulsory process in a law enforcement investigation. Second, contrary to Western Union's assertion, nothing in *Aerospatiale* stands for the proposition that discovery rules "ought never to be construed to violate the law of nations if any other possible construction remains . . ." <sup>67</sup> Instead, the Supreme Court concluded that the litigants were not required to use the procedures of the Hague Convention to obtain documents maintained outside the United States -- even from foreign corporations. <sup>68</sup> Indeed, federal courts analyzing the *Aerospatiale* decision have often applied the factors described there to order compliance with U.S. discovery requests even in the face of a foreign blocking or other statute. <sup>69</sup>

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the harm and the proper amount of restitution.

<sup>67</sup> Pet. 12-13 (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987)). The text quoted by Western Union actually appears in a much older case, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), and was intended to promote international comity as was the Court's decision in *Aerospatiale*. But the *Aerospatiale* Court also explicitly recognized the interests of the United States as an important factor in developing a comity analysis, following the *Charming Betsy* canon, that balances respect for other countries' judicial sovereignty against U.S. discovery requirements.

<sup>68</sup> 482 U.S. at 538-43. The Court explained that foreign blocking statutes

do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts.

*Id.* at 544 n. 29 (citations omitted, citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206 (1958)).

<sup>69</sup> See, e.g., *Devon Robotics v. Deviedma*, No. 09-cv-3522, 2010 U.S. Dist. LEXIS

Finally, Western Union fails to cogently explain how the CID undermines the FTC's role in enforcing the U.S.-EU Safe Harbor Framework.<sup>70</sup> Generally, t

conflict between U.S. law and the law of another jurisdiction, U.S. companies must still follow U.S. law. The Safe Harbor Framework itself provides that “where U.S. law imposes a conflicting obligation, U.S. organizations whether in the safe harbor or not must comply with the law.”<sup>76</sup>

#### **IV. CONCLUSION**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Western Union to Quash Civil Investigative Demands be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** all responses to the specifications in the Civil Investigative Demand to Western Union must now be produced on or before March 18, 2013.

By the Commission, Commissioner Leibowitz not participating.

Richard C. Donohue  
Acting Secretary

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Safe Harbor Privacy Principles (July 21, 2000)), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0520:en:NOT>.

<sup>76</sup> See Export.gov, Damages for Breaches of Privacy, Legal Authorizations and Mergers and Takeovers in U.S. Law, at § B, [http://export.gov/safeharbor/eu/eg\\_main\\_018482.asp](http://export.gov/safeharbor/eu/eg_main_018482.asp) (last updated Jan. 30, 2009). We note that Western Union is not presently among the organizations that have certified their compliance with the Safe Harbor privacy requirements. See <http://safeharbor.export.gov/list.aspx> (last visited March 4, 2013).