

An Explanation of the Provisions of the US SAFE WEB Act

This document summarizes and explains the provisions of the proposed US SAFE WEB Act of 2005: Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers across Borders Act.¹ The box below shows where each particular provision of the Act is discussed.

The US SAFE WEB Act would greatly aid the Federal Trade Commission (the “Commission” or “FTC”) in its efforts to protect U.S. consumers from global fraud by (1)

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cases, this will not happen – sometimes because the CID recipient is itself involved in the scam and sometimes because the CID recipient has liability or customer relations concerns about providing consent.

In other cases, more complete information sharing could help avoid duplication of efforts and may speed up investigations. It could also increase the quantity and quality of evidence in _____ er case

US SAFE WEB Act § 4(b) (adding FTC Act § 6(j)): Allows the FTC to conduct investigations and discovery to help foreign law enforcers in appropriate cases. **Similar to** longstanding SEC, CFTC, and federal banking agency authority. **Needed to** allow the FTC to obtain information for foreign agencies' actions to halt fraud, deception, spam, spyware, and other consumer protection law violations targeting U.S. consumers. Also **needed** to help the FTC to obtain, in return, foreign investigative assistance in FTC cases.

1. Conducting Investigations Using Civil Investigative Demands

Under current law, the FTC is not authorized to use its main investigatory tool, the CID, on behalf of its foreign counterparts to obtain information for use in their investigations.⁹ This is true even when the foreign law enforcement agency is investigating conduct that harms U.S. consumers.¹⁰ The US SAFE WEB Act contains a provision that would allow the FTC to issue CIDs to assist its foreign counterparts. The US SAFE WEB Act provision is modeled on existing statutes granting the SEC, CFTC, and federal banking agencies authority to conduct investigations on request from foreign counterpart agencies.¹¹

In many instances, providing investigative assistance to foreign counterparts would benefit U.S. consumers. For example, suppose a Canadian agency is investigating a Canadian telemarketer selling bogus lottery tickets to elderly U.S. consumers. The Canadian agency might ask the FTC to issue CIDs to obtain information from a U.S.-based payment processor. Such information would assist the Canadian agency in its investigation, which would in turn benefit U.S. consumers at little cost to the FTC. However, without the US SAFE WEB Act, if the FTC were not itself investigating the Canadian company, it would not have the authority to issue the CIDs.

The Commission's current lack of authority to use CIDs on behalf of foreign enforcement agencies is troubling because assisting a foreign agency's in-progress investigation will, in some cases, protect U.S. consumers more quickly, more effectively, and at far less cost than the FTC's undertaking its own action. The US SAFE WEB Act provision on investigative assistance would give the FTC the discretion whether (and to what extent) to provide assistance, and would require the FTC to consider certain criteria, including the public interest of the United States and the availability of reciprocal assistance, before agreeing to help foreign authorities.

2. Conducting Investigations Pursuant to 28 U.S.C. § 1782

The US SAFE WEB Act would also give the FTC the ability to use an existing federal statute – 28 U.S.C. § 1782 – to gather evidence for a foreign law enforcement agency in certain categories of cases. As with the provision allowing the FTC to use a CID on behalf of foreign law enforcers, this provision would allow the FTC to provide assistance in foreign actions benefitting U.S. consumers.

Under Section 1782, a district court may order, pursuant to a letter rogatory or on application of any interested party, that a person within the district give his testimony or statement or produce a document or thing for use in a foreign or international proceeding.¹² To execute a Section 1782 request, a district court may appoint a person in the U.S. to obtain the requested evidence. The Department of Justice (“DOJ”) routinely uses this provision in executing letters rogatory and requests under criminal mutual legal assistance treaties, with Assistant U.S. Attorneys filing an action to provide assistance to the foreign interested party.¹³ Courts can also appoint private attorneys to seek assistance under this provision.¹⁴ Section 1782 is frequently used when foreign proceedings are already in progress, and the foreign litigant needs to obtain evidence from the U.S. expeditiously.

Section 1782 would enable the FTC to assist a foreign agency, permitting the FTC to go directly into court to take testimony or seek the production of documents or things, rather than employing an investigatory tool like a CID. The FTC’s ability to use this procedure would advance the twin aims of Section 1782 – providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to U.S. litigants.¹⁵

The following scenario illustrates the benefit of this procedure. Assume, for example, that the Danish consumer protection agency has launched legal proceedings against a Danish business that is harming U.S. and Danish consumers by selling phony domain names over the Internet. During the trial, the Danish agency learns that a former employee of the Danish business who has critical information about the scheme lives in the United States. The Danish agency needs to obtain testimony from the former employee quickly. It asks the FTC for help. With the authority to use Section 1782, the FTC could file an action in the federal district court of the jurisdiction where the former employee is located, and obtain the employee’s testimony for use in the Danish trial.

3. International Agreements

In some cases, foreign law requires that the FTC enter into a formal international agreement to effect reciprocal investigative and evidentiary cooperation. For example, Part III of Canada’s Competition Act requires a formal international agreement as a prerequisite for certain types of cooperation by the FTC’s counterpart agency, Competition Bureau Canada.¹⁶ In

US SAFE WEB Act § 7: Safeguards FTC investigations in a defined range of cases by (1)

decides not to issue the CID because it would tip off the target to the investigation.³⁰

In addition, the FTC itself is required to notify investigative targets when it serves CIDs seeking certain information from certain f

Second, when neither the RFPA nor the ECPA notice provisions apply, the US SAFE WEB Act would authorize the Commission to seek a court order, in strictly limited circumstances and for a strictly limited period of time, to delay notice by the recipient of a CID to the investigative target. The circumstances under which courts could order delay of notice are modeled on a provision of the Securities Exchange Act.³⁸

Finally, the US SAFE WEB Act would tailor the mechanism available for the FTC to seek court-ordered delay of notice to targets by the FTC under RFPA and ECPA. There are two main reasons for this proposed provision. First, the circumstances under which delayed notice is permitted under RFPA and ECPA are not specifically tailored to address situations the FTC routinely faces, such as where notice is likely to cause investigative targets to conceal or send offshore assets obtained through fraud. The US SAFE WEB Act would authorize court orders for the agency to postpone providing notice in the same circumstances described above, modeled on existing Securities Exchange Act language.³⁹ Second, it is not clear that the authority of FTC attorneys to directly litigate enforcement actions, set forth in Section 16 of the FTC Act, includes seeking court orders for delay under RFPA and ECPA. The US SAFE WEB Act would ensure that the FTC could seek such orders directly.

In proposing these changes, the FTC recognizes that there is a balance to be struck between the government's need for information and privacy interests. The FTC believes that the US SAFE WEB Act is consistent with that balance. In every instance in which the FTC seeks to compel confidentiality, it would be required to seek a court order and provide specific justification for that order. And even if the court issues such an order, it only applies for a limited period of time.

B. Protecting Certain Entities Reporting Suspected Violations of Law

US SAFE WEB Act § 8: Protects a limited category of appropriate entities from liability for voluntary disclosures to the FTC about suspected fraud or deception, or about recovery of assets for consumer redress. **Similar to** longstanding protections for financial institutions making disclosures of suspected wrongdoing to federal agencies. **Needed because** liability concerns discourage third-party businesses from alerting the FTC to suspected law violations or recoverable assets.

The US SAFE WEB Act exempts certain specified entities from liability for voluntarily sharing information with the FTC. The US SAFE WEB Act provision in this area is modeled generally upon 31 U.S.C. § 5318(g), a “safe harbor” provision for financial institutions that report possible illegal activities

C. Allowing Information Sharing with Federal Financial and Market Regulators

US SAFE WEB Act § 10: Adds the FTC to RFPAs list of financial and market regulators allowed to readily share appropriate information. The list already includes the SEC and the CFTC. **Needed to** help the FTC track proceeds of fraud, deception, or other illegal practices sent through U.S. banks to foreign jurisdictions, so they can be recovered and returned to consumer victims.

The FTC has not been included in an exemption provided in RFPAs that allows federal financial and market regulators to share financial records, examination reports, or appropriate supervisory or other information.⁴⁶ Such interagency information sharing with the FTC currently only extends to certain FTC antitrust functions, through specific authorization in federal financial services statutes.⁴⁷

In the cross-border context, interagency information sharing with financial regulators would be particularly helpful in tracking assets for consumer redress. In particular, such

US SAFE WEB Act § 5: Permits the FTC to cooperate with DOJ in using additional staff and financial resources for foreign litigation of FTC matters. **Needed because,**

recover money on behalf of fraud victims.

In addition to authorizing this use of appropriated funds, the US SAFE WEB Act would provide for the FTC to be more directly involved in cases filed in foreign courts, leveraging the expertise of its staff litigators. FTC attorneys are intimately familiar with the facts of FTC cases and the manner in which fraudsters use the border to shield themselves from law enforcement. With DOJ guidance, FTC attorneys could supplement the existing limited staff resources that DOJ has to supervise foreign counsel in such cases. Indeed, there is precedent for such a mechanism: Congress has enacted legislation explicitly permitting DOJ to receive details of personnel and funds from other federal agencies.⁴⁹

B. Confirming the FTC's Remedial Authority in Cross-Border Cases

US SAFE WEB Act § 3: Expressly confirms: 1) the FTC's authority to redress harm in the United States caused by foreign wrongdoers and harm abroad caused by U.S. wrongdoers; and 2) the availability in cross-border cases of all remedies available to the FTC, including restitution. **Needed to** avoid spurious challenges to jurisdiction in FTC cases and to encourage the full range of remedies for U.S. consumer victims in foreign courts.

The proposed US SAFE WEB Act contains a provision confirming the Commission's ability to take action in cross-border cases, including the authority to provide restitution to U.S. and foreign consumers injured by spam, spyware, telemarketing fraud, and other law violations. Specifically, the legislation provides that the Commission may challenge unlawful and deceptive practices that cause or are likely to cause reasonably foreseeable injury within the United States, or that involve material conduct occurring within the United States. It further confirms the Commission's ability to obtain remedies, including restitution, for domestic and foreign consumers injured by such practices. These criteria are similar to those developed by federal bili

US SAFE WEB Act § 4(b) (adding FTC Act § 6(k)): Expressly authorizes the FTC to make criminal referrals for prosecution when violations of FTC law also violate U.S. criminal laws.

“prosecutors, investigators with criminal law enforcement jurisdiction, and agencies or entities with specific statutory or regulatory authority to refer matters for criminal prosecution”(emphasis added).⁶¹ Other MLATs contain similar language.⁶²

The FTC’s role in developing cases that ultimately become criminal matters, particularly those involving fraudulent or deceptive conduct, already is substantial. Indeed, FTC investigations and judicial proceedings frequently result in subsequent criminal prosecutions.⁶³ And in 2003, the FTC established a Criminal Liaison Unit to build on its successful cooperation with criminal law enforcement agencies.⁶⁴ Thus, a Congressional grant of explicit authority to make criminal referrals in appropriate cases involving unfair or deceptive practices under Section 5 of the FTC Act would not change materially the actual scope of the Commission’s legal powers. It would, however, send a clear signal to foreign criminal law enforcement agencies about the appropriateness of sharing information with the FTC.

IV. Strengthening the FTC’s Cooperation and Relationship with Foreign Authorities

A. Providing for Foreign Staff Exchange Programs

US SAFE WEB Act § 9: Provides for foreign staff exchange arrangements between the FTC and foreign government authorities, and permits the FTC to accept reimbursement for its costs in these arrangements. **Needed to** improve international law enforcement cooperation in cross-border matters.

The proposed US SAFE WEB Act authorizes the FTC to conduct staff exchange programs, under which employees of foreign government agencies could be detailed to work at the FTC on specific cases and investigations, and FTC employees could be detailed to work for foreign agencies. The US SAFE WEB Act provision is analogous to other Congressional authorizations facilitating staff exchanges.⁶⁵

Staff exchanges would help the FTC, and in turn, U.S. consumers, by improving the skills of FTC employees and foreign law enforcers in combating fraud and deception and improving international law enforcement networks.⁶⁶ To have a fully successful staff exchange program,

foreign government officials detailed to the FTC should be able to work on appropriate cases and investigations, and in such matters to have access to non-public case files.⁶⁷ Allowing foreign employees to work on FTC cases and investigations and have access to confidential material would help those employees learn about FTC investigative techniques and later adopt those techniques in their agency investigations. They could also provide significant help investigating joint cases involving evidence or witnesses located in their country. For example, a foreign employee from a Canadian agency could provide significant help in an FTC investigation into telemarketing fraud originating in Canada.

The US SAFE WEB Act's provision on staff exchanges is necessary to provide consent pursuant to the Emoluments Clause of the Constitution, which prohibits, without the consent of Congress, (1) foreign government officials from being put in a position of "trust" by the United States, or (2) those holding a position of "profit" or "trust" in the United States from being employed by a foreign government.⁶⁸ Providing a foreign government employee who is detailed to the FTC to assist with an investigation with access to confidential FTC information arguably puts that person in a position of "trust" under the Emoluments Clause. Similarly, the Emoluments Clause would preclude an FTC employee from being employed by a foreign government. An explicit Congressional authorization of staff exchanges between the FTC and foreign government agencies would obviate any concerns that such exchanges may violate the Emoluments Clause and provide additional resources to the FTC in cross-border spam, spyware, and telemarketing fraud cases.

B. Authorizing Expenditure of Funds on Joint Projects

US SAFE WEB Act § 4(b) (adding FTC Act § 6(l), 4(c)): Authorizes the FTC to expend appropriated funds, not to exceed \$100,000 annually, toward operating expenses and other costs of cooperative cross-border law enforcement projects and bilateral and multilateral meetings. **Similar to** SEC authority. **Needed to** allow the FTC to help support valuable international cooperative organizations and projects such as the website or consumer education programs of the International Consumer Protection and Enforcement Network (ICPEN) that foster the FTC's mission.

The US SAFE WEB Act would allow the Commission to expend a limited amount of funds for operating expenses and other costs of bilateral and multilateral cooperative law enforcement organizations, including ICPEN, the International Competition Network, Mexico-

in the Securities Exchange Act, the Commodity Exchange Act, and other statutes.⁷¹

The authority to accept reimbursement for providing investigative and case assistance will promote the efficient use of FTC resources, allowing the FTC to provide the assistance to generate goodwill and reciprocity without expending its own funds. For example, if an Asian consumer protection authority is investigating a weight-loss scam, in which a deceptive advertiser targeted primarily Asian consumers, and learns that the target has fled to the United States, it may ask the FTC to hire a private investigator and to work with him or her to locate the target. The Asian authority may need such assistance because of time differences and language problems. The FTC's provision of this assistance at no cost to it could lead to reciprocal help from Asian authorities.

The ability to seek reimbursement would also benefit joint projects. For example, the FTC wants to modify the *econsumer.gov* website to accept a broader range of languages and provide a broader range of features. Other authorities have expressed an interest in contributing financially toward improvements to the site, but the FTC currently cannot accept such payment.

Currently, the FTC cannot receive reimbursements under the Miscellaneous Receipts Act, which requires all funds received by the U.S. government to be deposited into the U.S. Treasury, "except as provided by another law."⁷²

Endnotes

1. This legislation is largely identical to S. 1234, 108th Cong., 2d Sess. (2004), and to H.R. 3143, 108th Cong., 2d Sess. (2004), *available, in a report of the Committee on the Judiciary, at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr635p2&dbname=cp108&>. See also S. Rep. No. 127, 108th Cong., 1st Sess. (2003), 2003 WL 22022750 (Leg.Hist.), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr127&dbname=cp108&>; H.R. Rep. No. 635(I), 108th Cong., 2^d Sess.(2004), 2004 WL 1835122 (Leg.Hist.), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr635p1&dbname=cp108&>; H.R. Rep. No. 635(II), 108th Cong., 2^d Sess.(2004), 2004 WL 2623198 (Leg.Hist.), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr635p2&dbname=cp108&>.*
2. Such information may only be shared with foreign law enforcement with the consent of the submitter. *See* 15 U.S.C. § 57b-2(b)(3)(c); 16 C.F.R. § 4.10(d); *see also* 15 U.S.C. §§ 46(f), 57b-2(b)(6); 16 C.F.R. § 4.11(c).
3. The proposed US SAFE WEB Act would allow the FTC to share information with a foreign agency that is investigating violations of foreign laws prohibiting fraudulent or deceptive practices or other practices substantially similar to practices prohibited by consumer protection laws administered by the FTC or, with the approval of the Attorney General, other foreign criminal laws that are encompassed in an applicable MLAT. It would also allow the FTC to share information in order to gain assistance in its own matters from a foreign law enforcement agency.
4. 15 U.S.C. § 78x(c).
5. 7 U.S.C. § 12(e).
6. 12 U.S.C. § 3109.
7. This document discusses scenarios setting forth examples of the types of problems the Commission faces in its cases and investigations. These scenarios are based on real cases and investigations. In some instances, we have combined facts from more than one case or investigation and/or changed country names to preserve the confidentiality of investigative information.
8. The proposed US SAFE WEB Act would allow the FTC to provide investigative assistance when a foreign agency is investigating violations of laws prohibiting fraudulent or deceptive practices or other practices substantially similar to practices prohibited by consumer protection laws administered by the FTC.
9. 15 U.S.C. § 57b-1.
10. This obstacle to investigative cooperation is separate from the obstacles to information sharing discussed above. Not only does the Commission need the authority to share with foreign law enforcers information obtained in its own investigations regardless of whether the submitter of information consents to the sharing, it also needs the authority to issue CIDs to gather information in cases it is not otherwise investigating. In certain cases, even if U.S. consumers are involved, as in this example, there may be no independent reason for opening an FTC investigation because there may be no effective relief to pursue through an FTC action given the circumstances of a particular case. However, through the strengthened investigative cooperation recommended here, the Commission could play a role in addressing the harmful practices at issue.
11. 15 U.S.C. § 78u(a)(2); 7 U.S.C. § 16(f); 12 U.S.C. § 1818(v)(2).
12. 28 U.S.C. § 1782.

13. *See, e.g., In re Commissioner's Subpoenas*, 325 F.3d 1287 (11th Cir. 2003); *In re Letter of Request from the Crown Prosecution Serv. of the United Kingdom*, 870 F.2d 686

26. *See* 15 U.S.C. §§ 57b-2(b), 57b-2(f). Since, as a practical matter, the Commission cannot enforce compulsory process against a foreign entity, the complete protection from disclosure contained in 15 U.S.C. § 57b-2(f) likewise does not apply.

27. *See supra* note 20.

28. The exemption from disclosure described in the previous paragraph would apply to complaints collected by foreign government agencies and private sector entities and shared with the FTC subject to a request for confidential treatment. The exemption described in this paragraph would apply to consumer complaints submitted directly by consumers to a joint database that the FTC sponsors with foreign consumer protection agencies.

29. *See* Transcript of FTC February 2003 public workshop on Public/Private Partnerships to Combat Cross-Border Fraud [hereinafter “Cross-Border Fraud Tr.”], Flynn (FTC) (Feb. 19) at 128-29 and Wenger (FTC) (Feb. 20) at 89-90, available at <http://www.ftc.gov/bcp/workshops/crossborder/index.html>.

30. *See id.*, Flynn (FTC) (Feb. 19) at 128-29 and Wenger (FTC) (Feb. 20) at 89-90.

31. 12 U.S.C. § 3405.

32. 18 U.S.C. § 2703(b). This provision covers situations in which the FTC seeks to obtain information from electronic communications services about “the contents of an electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days” or, generally, from a provider of remote computing services about the contents of an electronic communication held or maintained on behalf of a subscriber or customer or for the purpose of providing storage or computer processing services to subscribers or customers.

33. 12 U.S.C. § 3409; 18 U.S.C. § 2705.

34. This provision would not apply when the notice or delayed notice provisions of RFPA and ECPA are triggered.

35. As with the first provision, this provision would not apply when the notice or delayed notice provisions of RFPA and ECPA are triggered.

36. Cross-Border Fraud Tr., *supra* note 29, Schultz (Feb. 19) at 137.

37. This section provides that “[a]ny financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.” 31 U.S.C. § 5318(g)(3)(A).

38. 15 U.S.C. § 78u(h).

39. *Id.*

40. The exemption from liability under 31 U.S.C. § 5318(g) is broad. It “applies whether the financial institution makes a required or volunteered report . . .; whether the report is made to federal, state, or local authorities . . .;0.00 0.00 rgBT72.0000 1

51. 15 U.S.C. § 45(a)(1).

52. 15 U.S.C. § 44.

53. The seminal case, decided in 1944, is *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944). There, the Commission enjoined a U.S. citizen from making false and misleading representations about his correspondence school to consumers in Latin America. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the injunction, holding that “[i]t is true that much of the objectionable activity occurred in Latin America; however, it was conceived, initiated, concocted, and launched on its way in the United States. That the persons deceived were all in Latin America is of no consequence.” *Id.* at 34-35.

54. See, e.g., *FTC v. Cleverlink Trading Ltd., et al.*, Case No. 05 C 2889 (N.D. Ill., filed May 16, 2005), available at <http://www.ftc.gov/opa/2005/05/housewives.htm>; *FTC and The People of the State of California v. Opt-In Global Inc., d/b/a Vision Media Ltd.*, C 05 1502 SC (N.D. Cal., filed Apr. 5, 2005), available at <http://www.ftc.gov/opa/2005/04/optin.htm>; *FTC v. 9125-8954 Quebec Inc., a corporation d/b/a Global Mgmt. Solutions, et al.*, Civil Action No. CV-005-0265 (W.D. Wash., filed Feb. 15, 2005), available at <http://www.ftc.gov/opa/2005/03/a>

56. This rationale has been expressed by the federal courts in the securities law context. *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir.1975) (permitting suits involving material conduct occurring in the United States on the theory that Congress did not want “to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.”).

57. *See, e.g., E.E.O.C.v. Arabian Am. Oil Co.*, 499 U.S. 244, 264 (1991); *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999).

58. For example, in the FTC’s

67. The FTC has engaged in limited staff exchange programs under which it has hosted visitors for a few weeks at a time, set up meetings for the visitors, and worked with the visitors on non-case related joint projects. These exchanges, particularly with visitors from the Australian Competition and Consumer Commission, Danish Consumer Ombudsman's Office, Spanish Data Protection Authority, and Japan Fair Trade Commission have improved our communication and information exchanges with these agencies. However, these visits could have been even more productive if the visitors were permitted to assist FTC staff on particular cases.

68. U.S. Const. art.