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IN THE UNITED STATES

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Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers
beyond Borders Act of 2006 (“U.S. SAFE WEB Act”),
Pub. L. No. 109-455, 120 Stat. 3372 6, 20

Pub. L. No. 112-203,

FTC’s “jurisdiction”¹ over “wholly foreign” transactions, but such concerns about the FTC’s statutory authority are properly addressed only if and when the Commission files or issues a complaint. They are not a legitimate basis for constraining the scope of an otherwise reasonable FTC document request at the investigatory stage.

In any event, even if the issue were properly presented here, the FTC has clear statutory authority to examine these “wholly foreign” transactions. In the SAFE WEB Act of 2006, Congress confirmed the FTC’s authority over unfair or deceptive acts or practices in foreign commerce *either* when those acts involve “material conduct occurring within the United States,” *or* when they “cause or are likely to cause reasonably foreseeable injury within the United States.” Here, the subjects of the FTC’s investigation satisfy not only one but both of these bases. First, Western Union develops and implements its worldwide antifraud policies in the United States. Those U.S.-based activities more than satisfy the “material conduct” prong of the SAFE WEB Act. Second, if Western Union faces complaints from foreign consumers because it has failed to take reasonable steps to administer its system to prevent fraud, those same shortcomings “are likely to

¹ Although the district court used the term “jurisdiction” to describe the controversy, the issue is more appropriately classified as a question relating to the agency’s statutory authority or regulatory coverage. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-69 (2013).

cause reasonably foreseeable injury” to U.S. consumers as well as foreign ones. Finally, even if there were doubt on these points, it should be resolved by deferring to the FTC’s reasonable construction of its own organic statute.

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION²**

The FTC initiated a proceeding against Western Union in the United States District Court for the Southern District of New York, seeking enforcement of a CID issued by the Commission under Section 20 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 57b-1 [SA-27 to -34]. The district court had jurisdiction pursuant to 15 U.S.C. § 57b-1(e) and (h) [SA-33 to -34] and 28 U.S.C. §§ 1331, 1337(a), and 1345.

The district court (per Hon. Alvin K. Hellerstein) granted the Commission’s enforcement petition in part and denied it in part on June 7, 2013, and denied Western Union’s motion for reconsideration on June 21. On August 14, 2013, the FTC filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291 and 15 U.S.C. § 57b-1(h) [SA-34].

² Citations to docket entries are in the form “Dkt. ___” and refer to PACER ECF heading page numbers where available. Citations to the Special Appendix and Joint Appendix are “SA-___” and “JA-___.”

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in refusing to enforce a CID seeking documents that are located in the United States, involve Western Union's conduct in the United States, and are reasonably likely to relate to injury to consumers in the United States.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

This appeal arises from an FTC CID issued to Western Union.³ Western Union did not comply with the CID, but instead filed an administrative petition to quash it. The Commission denied Western Union's petition entirely, but extended the time for Western Union to comply to March 18, 2013. On April 15, 2013, after Western Union had still failed to provide the requested documents, the FTC instituted a CID enforcement proceeding in the Southern District of New York under 15 U.S.C. § 57b-1(e) [SA-33].⁴

³ The FTC also issued a CID to a monitor who had been appointed by a state court to settle allegations by the State of Arizona that Western Union was not policing its money transfer network for money laundering related to human and drug trafficking. *See State of Arizona v. Western Union Fin. Servs., Inc.*, No. CV-2010-005807 (Ariz. Super. Ct. Maricopa Cnty. Feb 24, 2010).

⁴ The Commission's petition also named the Monitor because he had withheld his reports and related materials. The Monitor complied with the CID after the district court granted the Commission's petition as to those materials.

The district court heard argument on May 28, 2013. Dkt. 41 [JA-828 to -858]. In a written order dated June 7, 2013, the court enforced the CID in most respects, but it declined to enforce the CID’s request for consumer complaints and related materials about what the court called “wholly foreign” money transfers – *i.e.*, transfers conducted over Western Union’s international network in which the sender and the immediate recipient are both outside the United States. Dkt. 47 ¶ 5 [SA-11 to -12] [JA-869 to -870].⁵ The court found that “the record does not support the FTC getting these documents under the U.S. SAFE WEB Act. 15 U.S.C. § 45(a)(4).” Dkt. 47 ¶ 5 [SA-11 to -12] [JA-869 to -870].

On June 17, 2013, Western Union filed a Motion for Clarification and/or Reconsideration, which the district court denied on June 21, 2013. Dkts. 44-46, 50 [SA-17 to -18] [JA-875 to -954, -966 to -967]. The FTC filed this appeal, and Western Union filed a cross-appeal addressing the portions of the CID that the district court enforced. Dkts. 52, 54 [JA-968 to -975].

B. Facts and Proceedings Below

1. Cross-Border Fraud and the U.S. SAFE WEB Act

U.S. consumers are increasingly the targets of cross-border fraud.⁶ In 1995,

fewer than 1% of complaints received by the FTC had a foreign connection. By 2001, that figure had jumped to 13%, and, by 2004, a full 16% of complaints in the FTC's Consumer Sentinel database concerned foreign businesses or foreign consumers.⁷

Congress responded with the "Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act of 2006" ("the SAFE WEB Act"). Pub. L. No. 109-455, 120 Stat. 3372 [SA-43 to -55]. The SAFE WEB Act amends Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a) [SA-20 to -21]; *see also* 15 U.S.C. § 44 (defining "commerce"). The new legislation enhanced the FTC's ability to respond to cross-border fraud, chiefly by augmenting the Commission's ability to (1) cooperate with its foreign counterparts; (2) gather information about

<http://www.ftc.gov/sentinel/reports/annual-crossborder-reports/crossborder-cy2004.pdf>.

⁷ Fed. Trade Comm'n, *The US SAFE WEB Act – Protecting Consumers from Spam, Spyware, and Fraud: A Legislative Recommendation to Congress* 1-2 (2005), available at <http://www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf> [hereinafter SAFE WEB Recommendation]. Indeed, "[c]ross-border complaints have accounted for more than 10% of all *Consumer Sentinel* fraud complaints every year since 2000, with a high of 22% in 2006 and 13% for each of the last three years." *Reauthorizing the U.S. SAFE WEB Act of 2006, Hearing Before the Subcomm. on Commerce, Manufacturing & Trade of the H. Comm. on Energy & Commerce*, 112th Cong. 3-4 & nn. 7-9 (2012) (statement of Hugh Stevenson, Deputy Director for International Consumer Protection, Federal Trade Commission) [hereinafter Stevenson Test.], available at www.ftc.gov/os/testimony/120712safeweb.pdf.

schemes harming U.S. consumers; (3) obtain consumer redress in cross-border cases and seek restitution even on behalf of foreign consumers;⁸ and (4) participate in international enforcement projects and networks.

Of particular relevance here, the SAFE WEB Act also authorizes the Commission to police “unfair or deceptive acts or practices” involving foreign commerce that *either* (1) “cause or are likely to cause reasonably foreseeable injury within the United States” *or* (2) “involve material conduct occurring within the United States.” 15 U.S.C. § 45(a)(4)(A)(i)-(ii) [SA-20 to -21]. That statutory amendment confirmed the international scope of (among other things) Section 5’s prohibition on “unfair” practices, defined as any practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed

3. The Civil Investigative Demand

On December 12, 2012, the Commission issued a CID to obtain information

consumer complaints about “wholly foreign” money transfers or the Monitor’s

Western Union had also asserted, without elaboration, that foreign data-privacy laws precluded it from producing personal information in the complaints. The Commission rejected that assertion on the grounds that Western Union had not identified any such laws and that, in any event, foreign law could not trump the needs of this federally authorized investigation. *Id.* at 22 [JA-185]. The Commission similarly rejected Western Union's vague assertion that producing the foreign complaints was somehow inconsistent with the U.S. and European Union Safe Harbor, a framework established for allowing transfer of personal information from the European Union to the United States. *Id.* at 23-24 [JA-186 to -187]. (The district court did not reach either of these issues.)

5. The FTC's Enforcement Proceeding

During a show-cause hearing on May 28, 2013, the district court ordered Western Union to produce all documents required by the CID, with one exception: the "wholly foreign" complaints.

On the issue of consumer complaints required by Specification 1 of the CID, the court ordered Western Union to produce all complaints except those from foreign consumers relating to money transfers between Western Union outlets located outside of the United States. Without elaboration, the court stated:

[A]t this point [the FTC] can't get the foreign complaints. They're outside [the FTC's] jurisdiction. And I'm not saying that there may not be another opportunity for you after you inspect what is given to you domestically, but at this point I deny that aspect of the request.

Dkt. 41 at 20 [JA-848].

As to Specification 2, however, the c

Western Union need not produce any documents arising from or relating to wholly foreign transactions – *i.e.*, wire transfers transmitted by senders in foreign countries to recipients in foreign countries – because the record does not support the FTC getting these documents under the U.S. SAFE WEB Act. 15 U.S.C. § 45(a)(4).

Dkt. 47 ¶ 5 [SA-11 to -12] [JA-869 to -870]. The court thus denied the Commission’s petition for enforcement of Specification 1 “to the extent [it] seeks any documents relating to transactions that were neither sent from nor received in the United States.” Dkt. 47 ¶ 8 [SA-13] [JA-871]. As to Specification 2, the court held that the Monitor’s reports and other documents were “reasonably relevant to the FTC’s investigation and do not impose undue burden on Western Union,” and ordered Western Union to produce them.¹²

including the court's ruling on the foreign complaints (paragraph 5), the court's adoption of the FTC's proposal for a process to identify and produce documents

against practices to which the documents at issue may be highly relevant. That Act extends the Commission's Section 5 authority to foreign commerce when the activities in question either (1) "involve material conduct occurring within the United States" or (2) "cause or are likely to cause reasonably foreseeable injury within the United States." Each of those conditions is met here. First, it is undisputed that the "material conduct" at issue – Western Union's administration of its money transfer system, including its fraud-prevention regime – is located in the United States. Second, any foreign complaints that Western Union receives may well illuminate shortcomings in that fraud-prevention regime, and those shortcomings could easily "cause reasonably foreseeable injury within the United States" as well as abroad.

Instead, court review of administrative compulsory process is “strictly limited.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (citing *Endicott Johnson*, 317 U.S. at 509). The only issues for a district court to consider are whether “the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also Constr. Prods.*, 73 F.3d at 471; *Brigadoon*, 480 F.2d at 1053.

The reason for this “strictly limited” review is “obvious”: it serves to promote agency effectiveness and expedition in conducting investigations. *Texaco*, 555 F.2d at 872-73, 879. Agencies such as the FTC “must be free without undue

Indeed, allowing such premature objections “would stop much if not all of investigation in the public interest at the threshold of inquiry.” *Id.* (quoting *Okla. Press*, 327 U.S. at 213).

For this reason, courts “have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (citing *Constr. Prods.*, 73 F.3d at 468-73). In giving agencies like the FTC the statutory authority to conduct investigations, “Congress has authorized [the agency], rather than the district courts in the first instance, to determine the question of coverage.” *Okla. Press*, 327 U.S. at 213-14. These determinations are subject to plenary review only when the agency commences a law enforcement action (assuming that it does so). *Texaco*, 555 F.2d at 874, 879.

The ruling below ignores these principles. In its bench rulings, the district court went straight to the issue of the Commission’s regulatory authority:

[A]t this point you can’t get the foreign complaints. *They’re outside your jurisdiction.* And I’m not saying that there may not be another opportunity for you after you inspect what is given to you domestically, but at this point I deny that aspect of the request.

Dkt. 41 at 20 (emphasis added) [JA-848]. This ruling suggests that, in the court’s view, either (1) the Commission lacks statutory authority to obtain the complaints or (2) the Commission *might* have such authority, but has not demonstrated the

need for the documents to date.¹⁴ Either way, the court improperly foreclosed or delayed a key aspect of this investigation on the basis of concerns about the FTC's authority that will not become ripe unless and until Western Union faces an actual complaint. *Constr. Prods.*, 73 F.3d at 470-71.

Finally, although the district court intimated that the Commission might be able to establish its authority with a more fully developed record, that suggestion does not make the ruling any less erroneous. If the court meant to signal that it intends to maintain some level of ongoing supervision, that role would contradict the settled rule that court review of process enforcement proceedings is "strictly limited" so that agencies like the FTC may conduct their investigations without "undue interference or delay." *Texaco*, 555 F.2d at 871-72; *Brigadoon*, 480 F.2d at 1053.

II. THE FTC HAS STATUTORY AUTHORITY TO INVESTIGATE THE MATTERS AT ISSUE.

The district court's "jurisdictional" concerns were not only unripe, but also untenable on the merits, because the Commission's broad enforcement authority plainly reaches conduct to which the documents in question may be highly relevant. Even prior to being amended by the SAFE WEB Act, Section 5 of the

¹⁴ Similarly, the written order states only that "the record does not support the FTC getting these documents under the U.S. SAFE WEB Act." Dkt. 47 ¶ 5 [SA-11 to -12] [JA-869 to -870].

FTC Act authorized the Commission to investigate and to enforce the prohibition against “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45 [SA-20]. In turn, Section 20 authorized the FTC to issue a CID “[w]henver the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 57b-1(c)(1) [SA-29]. Under these provisions, the FTC has long pursued investigations and enforcement actions that involve unfair or deceptive acts or practices in foreign commerce. *See, e.g., Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944).

If there were any doubt about the international reach of the FTC’s authority, Congress resolved it when it passed the SAFE WEB Act in 2006. Pub. L. No. 109-455, 120 Stat. 3372 [SA-42 to -55]. At the FTC’s behest, Congress enacted that law for the express purpose of clarifying and strengthening the FTC’s authority over conduct affecting consumers across international borders.¹⁵ The FTC sought this legislation to confirm that the Commission’s authority extends to acts or practices involving foreign commerce, as Section 4 provides, 15 U.S.C. § 44, and to enhance the tools by which the Commission could protect consumers, both domestic and foreign, from cross-border fraud. As the FTC explained to Congress,

¹⁵ *See* Stevenson Test. at 1, 4 & nn. 11-14; SAFE WEB Recommendation.

the Act's enhanced authority was critical to the agency's ability to deal with the challenges posed by a globalized economy, where fraud can easily originate from "Gary, Indiana, or Gurgaon, India." SAFE WEB Recommendation at i. As part of this enhanced authority, the Commission also recommended that Congress clarify the agency's authority to obtain consumer redress for both domestic and foreign consumers in order to deprive wrongdoers of their ill-gotten gains, regardless of their location. *Id.* at 15.

As enacted, the SAFE WEB Act affirms that the FTC's authority over

involved a private securities law action about the sale of securities outside the United States, the Supreme Court clarified that statutes are not presumed to have extraterritorial effect absent an expression of affirmative intent from Congress. Here, Congress *has* expressed the requisite “affirmative intent,” both when it passed the SAFE WEB Act in 2006, and again when it reauthorized the legislation in 2012, two years after *Morrison*. Pub. L. No. 112-203, 126 Stat. 1484 [SA-56 to -57].

In short, there is no doubt that Congress intended to confirm the FTC’s authority to reach “foreign commerce” when *either* of two criteria is met. Here, the foreign matters at issue fall within the FTC’s authority under *both* of those criteria.

First, the subject of the FTC’s investigation, and the “material conduct” at issue, is Western Union’s administration of its global money transfer network and, specifically, its policies and procedures for responding to fraud-induced money transfers. 15 U.S.C. § 45(a)(4)(A)(ii); Dkt. 1-4 at 4 [JA-216]; Dkt. 1 at 5-10 [JA-15 to -20]; Dkt. 41 at 6-8 [JA-834 to -836]. It is undisputed that Western Union manages and administers its global money transfer network from its headquarters in Englewood, Colorado. Dkt. 1 ¶ 3 [JA-14]; Dkt. 20 ¶ 4 [JA-333]; Dkt. 21-1 at 2-3 [JA-374 to -375]. Indeed, the company maintains the consumer complaints at issue in this appeal at its U.S. address. Dkt. 22-8 at 3 [JA-495]. Thus, as the

Commission ruled in denying Western Union’s petition to quash, the disputed complaints and related materials plainly reflect “material conduct occurring within the United States” for purposes of the SAFE WEB Act. Dkt. 1-3 at 19-20 [JA-182 to -183].

Second, the FTC was entitled to the “wholly foreign” complaints for the independent reason that they relate to acts or practices that, as provided in the SAFE WEB Act, “cause or are likely to cause reasonably foreseeable injury within the United States.” *See* 15 U.S.C. § 45(a)(4)(A)(i) [SA-20 to -21]. As the

reasonably foreseeable injury within the

CONCLUSION

For the reasons stated above, this Court should reverse the district court to the extent that it denied the Commission's request for "wholly foreign" complaints and direct the district court to enter its own order requiring Western Union to comply with Specification 1 of the CID in full.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the Principal Brief for Appellant Federal Trade Commission complies with the type-volume limitation set forth in Fed. R. App. 32(a)(7)(B) because it contains 5,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Microsoft Word word processing program used to prepare the brief.

I further certify that the Principal Brief for Appellant Federal Trade Commission complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

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