13-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION, Petitioner-Appellant,

v.

THE WESTERN UNION COMPANY, Respondent-Appellee, and

LONNIE KEENE, KEENE CONSULTING ARIZONA LLC, Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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INTRODUCTION

The FTC is investigating whether The Western Union Company uses effective procedures to stop consumers from being deceived into sending funds to perpetrators of fraud, here and abroad, using the company's money transfer network. Because money transfers are like sending cash – they cannot be reversed and are difficult to trace – they have become the preferred form of payment for dishonest telemarketers and other perpetrators of fraud.

In 2012, the FTC issued a Civil Investigative Demand ("CID") to Western Union seeking documents, including worldwide consumer complaints relating to fraud-induced money transfers. The Commission needs these documents as part of an investigation to determine whether Western Union has violated the FTC Act by taking inadequate measures to police its money transfer network and prevent it from being used to perpetrate consumer fraud. The district court enforced the CID in most respects but denied it as to one key set of documents. Specifically, the court declined to order Western Union to produce what the court called "wholly foreign" complaints relating to money transfers between Western Union agents located outside the United States, even though Western Union maintains these complaints at its Colorado headquarters.

The district court's refusal to enforce that aspect of the CID was erroneous for two basic reasons. To begin with, the court based its denial on its view of the

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

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[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 JURISDICTION[2]

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].

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[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]

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[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,

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[5] Although the district court used the term "wholly foreign," many of these transfers may affect consumers in the United States. Nevertheless, this brief has adopted that locution for convenience.

[6] Fed. Trade Comm'n, *Cross-Border Fraud Trends* 5 (2005), *available at*

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

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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 by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) [SA-25].

2. The Western Union Investigation

The Commission opened an investigation of Western Union in 2012, after having previously settled charges that MoneyGram, Western Union's primary competitor for money transfer services, violated the FTC Act by failing to have

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[8] SAFE WEB Recommendation, at ii-iv, 13-17; *see also* 15 U.S.C. § 45(a)(4)(B) [SA-21].

effective antifraud policies and procedures.[9] That investigation, coupled with an increasing number of complaints about fraud-induced money transfers, raised concerns about the adequacy of Western Union's program to detect and prevent fraud-induced money transfers in its worldwide network of over 500,000 money transfer agents.

This investigation principally addresses whether Western Union, by failing to police its money transfer network, and to prevent it from being used for fraud, has itself been violating Section 5 by facilitating the fraudulent and deceptive practices of dishonest telemarketers and other third parties. Third parties who use Western Union's services as part of a fraudulent scheme are difficult to trace and identify because, in many cases, money transfer agents allow the third parties to pick up consumers' payments without verifying their identity. Money transfer companies can ameliorate those risks by establishing adequate controls – for example, by taking steps to identify complicit agents. But a money transfer company that lacks adequate policies and procedures for policing its systems exposes consumers to an unreasonable risk of fraud.

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[9] The MoneyGram investigation resulted in a settlement of allegations by the FTC that MoneyGram had engaged in "unfair practices" and had provided substantial assistance to telemarketing frauds using its money transfer system. A stipulated permanent injunction requires the company, *inter alia*, to establish, implement, and maintain a comprehensive antifraud program. *FTC v. MoneyGram Int'l, Inc.*, No. 09-cv-6576 (N.D. Ill. Oct. 19, 2009).

3. The Civil Investigative Demand

On December 12, 2012, the Commission issued a CID to obtain information on these issues. The CID asked for two discrete categories of documents. The first, Specification 1, included all documents "referring or relating to complaints made to Western Union by consumers anywhere in the world, referring or relating to fraud-induced money transfers." Dkt. 1 at 34 [JA-44]. The Commission requested these complaints to obtain a complete picture of how Western Union administers its money transfer network around the globe. Dkt. 1-3 at 20-21 [JA-183 to -184]. For example, the quantity and pattern of consumer complaints are relevant to the question whether Western Union is diligent in policing its own agents – a key step in preventing fraud-induced money transfers that could harm consumers anywhere in the world, including in the United States. Dkt. 1 at 9-10 [JA-19 to -20]; Dkt. 1-3 at 19-21 [JA-182 to -184].

The second, Specification 2, requires Western Union to produce all documents referring or relating to communications with the Monitor. Specification 2 is the subject of Western Union's cross-appeal and thus receives only abbreviated treatment in this brief.

4. Western Union's Petition to Quash

Western Union filed an administrative petition to quash the CID, arguing, among other things, that the Commission lacked authority to obtain either

consumer complaints about "wholly foreign" money transfers or the Monitor's reports. Dkt. 1-1 at 1-18 [JA-47 to -64]. The Commission, in a 23-page ruling, considered and rejected each of these contentions. *See* Dkt. 1-3 at 1-24 [JA-164 to -187].

Regarding the complaints and related materials from foreign consumers, the Commission concluded that its request fell well within its authority to investigate cross-border fraud under the SAFE WEB Act.[10] Dkt. 1-3 at 19-21 (citing 15 U.S.C. § 45(a)(4)) [JA-182 to -184]. It explained that "Western Union's actions in developing and administering its antifraud program" indisputably occurred in the United States, and therefore, for purposes of the SAFE WEB Act, the complaints reflected "material conduct occurring within the United States." *Id.* at 20 [JA-183]. The Commission further concluded that the records at issue also meet the SAFE WEB Act's "reasonably foreseeable injury" test. As it explained, incidents of wire transfer fraud affecting foreign victims may reflect inadequate measures by Western Union to police its network, and any systemic shortcomings could harm consumers anywhere in the world, including the United States. *Id.* at 20-21 [JA-183 to -184].

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[10] The Commission separately rejected Western Union's contentions that the requested Monitor's reports and related documents were irrelevant to the adequacy of the company's antifraud efforts (Dkt. 1-3 at 9-18 [JA-172 to -181]) and protected from disclosure by the terms of a state court settlement (*id.* at 14-18 [JA-177 to -181]).

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 court rejected Western Union's various objections to production of the Monitor's reports and related documents. As the court explained, "relevance is a wide boundary," and the FTC had made a "prima facie" showing that the Monitor's documents were relevant because a money transfer could be misused for either fraud or money laundering: "They both have to do with money transferred from one place to another place [through] the agency of a company like Western Union." Dkt. 41 at 11-12, 16 [JA-839 to -840, -844].

6. The June 7 Order

On June 7, 2013, the court issued a written order formalizing its oral rulings.[11] Dkt. 47 [SA-9 to -16] [JA-867 to -874]. As to Specification 1, the court confirmed that the FTC could obtain all of the consumer complaints, *except* for those arising from foreign transactions. The order provided:

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[11] At the May 28 hearing, the court had directed the parties to submit a proposed order. Dkt. 41 at 28-29 [JA-856 to -857]. The court instructed the parties to include alternative paragraphs if there were aspects about which they were unable to reach agreement. The joint order submitted by the parties contained several alternative paragraphs. *See* Dkt. 43 [SA-1 to -8] [JA-859 to -866]. On June 6, 2013, the court issued an order with hand-written edits accepting all of the FTC's proposed alternative paragraphs. *Id.* The June 7 order did not change the court's June 6 ruling, but included additional hand-written edits to make the court's acceptance of the FTC's proposals clearer. *See, e.g.*, Dkt. 47 ¶¶ 5, 13-16 [SA-11 to -15] [JA-869 to -873].

> 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]

7. Post-Order Proceedings

Western Union filed a Motion for Clarification and/or Reconsideration on June 17, 2013. Dkts. 44-46 [JA-875 to -954]. In the motion, Western Union challenged the court's selection of several paragraphs proposed by the FTC,

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[12] Dkt. 47 ¶¶ 6, 12-15 [SA-12 to -15] [JA-870 to -873]. In response to Western Union's claim that production of documents "referring or relating to communications with the Monitor" would be unduly burdensome, the order established an iterative procedure for the FTC and Western Union to exchange keyword search terms and other steps (which the order called a "protocol") to be used in identifying and producing these documents. *Id.* ¶¶ 13-14 [SA-13 to -15] [JA-871 to -873]. Though the FTC provided Western Union with the final search protocol on August 8, 2013, Western Union did not even start to comply until after the FTC instituted contempt proceedings with respect to that aspect of the district court's order.

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 "referring or relating to communications with the Monitor" (paragraphs 13 and 14), and the requirements relating to Western Union's certification as to the completion of its production (paragraph 16). Dkt. 45 [JA-879 to -948]. The district court denied Western Union's motion on June 21, 2013, finding that the motion "attempt[ed] to relitigate issues discussed at the May 28, 2013, hearing." Dkt. 50 [SA-18] [JA-967].

STANDARD OF REVIEW

In a compulsory process enforcement case, this Court reviews the district court's factual findings for clear error and its interpretation of the agency's investigatory authority de novo. *See Mollison v. United States*, 481 F.3d 119, 122 (2d Cir. 2007). As discussed below, a district court should not second-guess an agency's determination about the scope of its own authority during the investigatory phase of a process-enforcement proceeding. In any event, to the extent that the scope of the FTC's authority is currently at issue, the FTC's considered views on that issue are entitled to substantial judicial deference. *See Arlington*, 133 S. Ct. at 1868, 1871; *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

SUMMARY OF ARGUMENT

The district court acknowledged that courts should defer to investigatory agencies in proceedings to enforce administrative compulsory process, but it erred in two critical respects when denying enforcement of the document requests at issue here.

First, contrary to the court's assumption, the Commission need not establish its substantive enforcement authority over the matters it is investigating in order to justify a request for judicial enforcement of compulsory process. Instead, when it receives such a request, a district court should defer to the Commission's own assessment of the kinds of information that are relevant or necessary to complete its investigation. Here, the court should have enforced the CID in full without second-guessing the FTC's determination that it needed foreign complaints as part of its assessment of Western Union's antifraud program. Any questions about the FTC's enforcement authority are unripe unless and until the FTC files or issues a complaint. Furthermore, although the district court intimated that it might reconsider its ruling if the Commission's request were supported by a greater showing of need, such ongoing judicial supervision of an administrative investigation is itself plainly improper.

In any event, even if the scope of the FTC's authority were properly at issue, the SAFE WEB Act plainly authorizes the Commission to take enforcement action

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.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THE SCOPE OF THE FTC'S AUTHORITY IN A PROCEEDING TO ENFORCE COMPULSORY PROCESS.

As this Court has held, "at the subpoena enforcement stage, *courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers*; rather, the coverage determination should wait until an enforcement action is brought against the subpoenaed party."[13]

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[13] *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 470-71 (2d Cir. 1996) (emphasis added) (citing, *inter alia*, *Endicott Johnson Corp. v. Perkins*, 317

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 interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the [agency's] regulatory authority." *Brigadoon*, 480 F.2d at 1053; *see also Constr. Prods.*, 73 F.3d at 470. If parties could challenge an agency's authority to conduct an investigation before the facts can be developed, then agency investigations would be "foreclosed or at least substantially delayed." *Texaco*, 555 F.2d at 879.

U.S. 501, 509 (1943)); *accord Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 213-14 (1946); *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1317 (D.C. Cir. 2011); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir. 1996); *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991); *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052-53 (2d Cir. 1973).

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

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[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]henever 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,

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[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 "unfair or deceptive acts or practices" extends to "acts or practices involving foreign commerce that—(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. § 45(a)(4)(A) [SA-20 to -21]. The Act also confirms the availability of monetary restitution to both domestic and foreign victims of fraud, meaning that Congress has granted the FTC the authority to obtain monetary remedies even for victims outside of the United States. *Id.* § 45(a)(4)(B) [SA-21].

The district court ignored these statutory provisions altogether when it refused to allow the FTC to obtain Western Union's complaints. The court invoked *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010), as an apparent basis for its ruling, but failed to recognize that the SAFE WEB Act satisfies the *Morrison* standard. *See* Dkt. 41 at 18 [JA-846]. In that case, which

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 Commission explained in denying Western Union's administrative petition to quash, "a problem agent in a foreign jurisdiction that is receiving fraud-induced transactions from foreign victims may also likely be receiving fraud-induced transactions from U.S. victims." Dkt. 1-3 at 21 [JA-184].

For example, a problem agent in the U.K. who remains on the job despite many complaints from Canadian consumers is probably also receiving suspicious transactions coming from other countries besides Canada, including the United States. Similarly, a corrupt agent in Jamaica who is complicit with fraudulent telemarketers and is the subject of complaints from French consumers is also likely to facilitate fraudulent money transfers from the United States. In such a case, Western Union's failure to respond to such complaints and to suspend or terminate its compromised agent would be conduct that "cause[s] or [is] likely to cause

reasonably foreseeable injury within the United States." 15 U.S.C. § 45(a)(4)(A)(i) [SA-20 to -21]. Any complaints received from foreign consumers would be evidence of that conduct and is therefore a proper object of the Commission's CID authority.

In fact, foreign complaints could become central to the Commission's assessment of Western Union's fraud-prevention practices. For example, if a small number of U.S. consumers have complained about transfers to the same agent in the U.K., that alone may not demonstrate that Western Union should have investigated that agent. But if the same agent is also the subject of complaints from consumers in other countries, then the U.S. and foreign complaints *collectively* may show that Western Union was on notice of a problem that it should have investigated and corrected.[16]

Finally, if there were any doubt about the scope of the FTC's authority over foreign matters in any respect, the FTC's considered views on that issue, as expressed in its opinion denying the petition to quash, would be entitled to substantial judicial deference. In particular, when a court reviews an agency's construction of a statute it administers, the court must determine "whether

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[16] Through its ruling, the district court also prevented the FTC from identifying foreign victims of fraud-induced "wholly foreign" transfers and obtaining restitution on their behalf – a task that Congress specifically authorized the FTC to perform. *See* 15 U.S.C. § 45(a)(4)(B) [SA-21].

Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. As the Supreme Court recently confirmed, that principle of deference extends to an agency's determination of the scope of its own statutory authority. *Arlington*, 133 S. Ct. at 1868, 1871; *see also Mathirampuzha v. Potter*, 548 F.3d 70, 82 (2d Cir. 2008).

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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Dated: November 27, 2013

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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