# 13-3100

& 13-3272 (XAP)

IN THE UNITED STATES COURT OF APPEALS

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### PRELIMINARY STATEMENT

The Federal Trade Commission ("FTC" or "Commission") is investigating Western Union to determine whether the company has failed to protect consumers from sending money transfers induced by

investigation. After the Commission denied an administrative petition to quash the CID and Western Union still refused to comply, the Commission instituted the present enforcement proceeding.

As the Commission showed in its opening brief, the district court erroneously declined to enforce the CID with respect to complaints involving transactions outside the United States. The court improperly determined that the FTC could not compel production of the documents because it has no jurisdiction over foreign transactions. As the Commission showed, the district court erred when it framed the issue as whether the FTC has authority over "wholly foreign" transactions and thus failed to consider the relevance of foreign complaints to the purpose of the investigation. Western Union's arguments obfuscate the simple fact that its handling of foreign complaints reflects on the overall quality of its anti-fraud program everywhere, including the United States. Because for eign complaints are a legitimate subject for Commission inquiry, the district court's contrary ruling should be reversed.

potential violations of the Federal Trade Commission Act and therefore must be produced to the FTC.

2. Whether the district court properly determined that the FTC resolution authorizing the investigation of Western Union provided the company with sufficient notice of the purpose of the investigation.

#### STATEMENT OF THE CASE

The FTC relies primarily on the Statement of the Case in its opening brief, FTC Br. 4-14, but provides additional facts relevant to Western Union's cross-appeal.

As part of its investigation, the FTC issued a CID requiring

Western Union to produce two groups of documents. Specification 1 of
the CID seeks documents relating to complaints made by consumers
anywhere in the world regarding

Specification 2 of the CID seeks documents relating to the work of a monitor who is evaluating, making recommendations, and reporting on Western Union's AML program. Dkt. 1 at 8, 34-35 [JA-18, JA-44 to-45]; see alsoDkt. 1-1 at 45-63 [JA-91 to -109]. Western Union agreed to appointment of the monitor to settle allegations by the State of Arizona that the company had failed to respond to suspicious transactions involving its money transfer network and thus was complicit in criminal money laundering in the Southwest Border Area. Dkt. 1-2 at 1-24 [JA-110 to -133]. The monitor's reports, related documents, and communications with Western Union are "relevant to assessing Western Union's anti-fraud program and efforts to reduce fraud-based

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monitor were not relevant to the investigation. Western Union also alleged that the Commission's resolution authorizing the investigation and the issuance of the CID was not sufficiently specific to have provided Western Union with notice. Id. The Commission unanimously denied the petition to quash in a detailed, 23-page ruling. Dkt. 1-3 at 2-24 [JA-165 to -187].

The Commission first ruled that the resolution adequately notified Western Union of the purpose of the inquiry. Id. at 7-8 [JA-170 to -171]. The resolution authorized investigation of fraudulent telemarketers "or others assisting them," such as companies like Western Union that provide the means to obtain the fraud-induced funds. Id. at 7 [JA-170]. The Commission had relied on the same resolution to investigate MoneyGram, Western Union's primary competitor. Id. at 7-8 [JA-170 to -171]; seenote 2, supra.

The Commission then determined that documents relating to the monitor's review of Western Union's AML program were relevant to the investigation. Relevance is "defined broadly," the Commission explained, Dkt. 1-3 at 9 [JA-172], and the AML documents were relevant for three reasons. First, regulatory provisions that require

Western Union to guard against money laundering also require it to report "any type of suspicious transaction, including consumer fraud."

Thus, the Commission explained, "from a regulatory perspective, there is substantial overlap betwee0g0g69ML programga programgto

#### C. District Court Enforcement Proceedings

Despite the Commission's order, Western Union refused to comply with the CID. Dkt. 1-3 at 28 [JA-191]. On April 15, 2013, the Commission filed an enforcement proceeding in the United States District Court for the Southern Dist rict of New York. After argument, the district court (Hon. Alvin K. He llerstein) entered an order requiring compliance with the CID in full, except as to the Commission's request for foreign complaints.

The court rejected Western Union's objections to producing documents relating to the monitor. The court acknowledged that "[a]n investigation is a very broad set of activities on the part of an administrative agency to ascertain if a law has been violated or not."

Dkt. 41 at 14 [JA-842]. Thus, the court explained, documents created about one issue may nonetheless be relevant to others. Because "a money transfer can be an object or subject of laundering and it can be an aspect of fraud," the court concluded that the FTC had "prima facie" demonstrated the documents' relevance. It thus ordered Western Union to produce them. Id. at 11-12 [JA-839 to -840].

The court denied the FTC's request for an order requiring Western Union to produce for eign complaints. The court stated, "They're outside [the FTC's] jurisdiction. \* \* \* The fraud is outside the United States." Id. at 20-21 [JA-848 to -849]. The court also rejected Western Union's further assertion that the FTC's investigatory resolution was vague, finding it "no more general or more specific than the usual general resolution that you find with all administrative agencies." Id. at 27 [JA-855].

#### STANDARD OF REVIEW

The FTC relies on its statement of the applicable Standard of Review in its opening brief. FTC Br. 14.

#### **SUMMARY OF ARGUMENT**

The FTC Act grants the FTC broad authority to investigate whether Western Union has engaged in "unfair or deceptive acts or practices." The Act further entitles the Commission to compel the production of evidence that is "relevant" to an authorized investigation. The documents at issue here sa5.7(n fvsfythat )98(a)8.2(t-5.7(a)ndard)

about foreign fraud-induced money transfers over Western Union's network.

The FTC is investigating whether Western Union has implemented adequate policies and procedures for policing fraud involving its global network and responding to consumer complaints of fraud-induced money transfers.

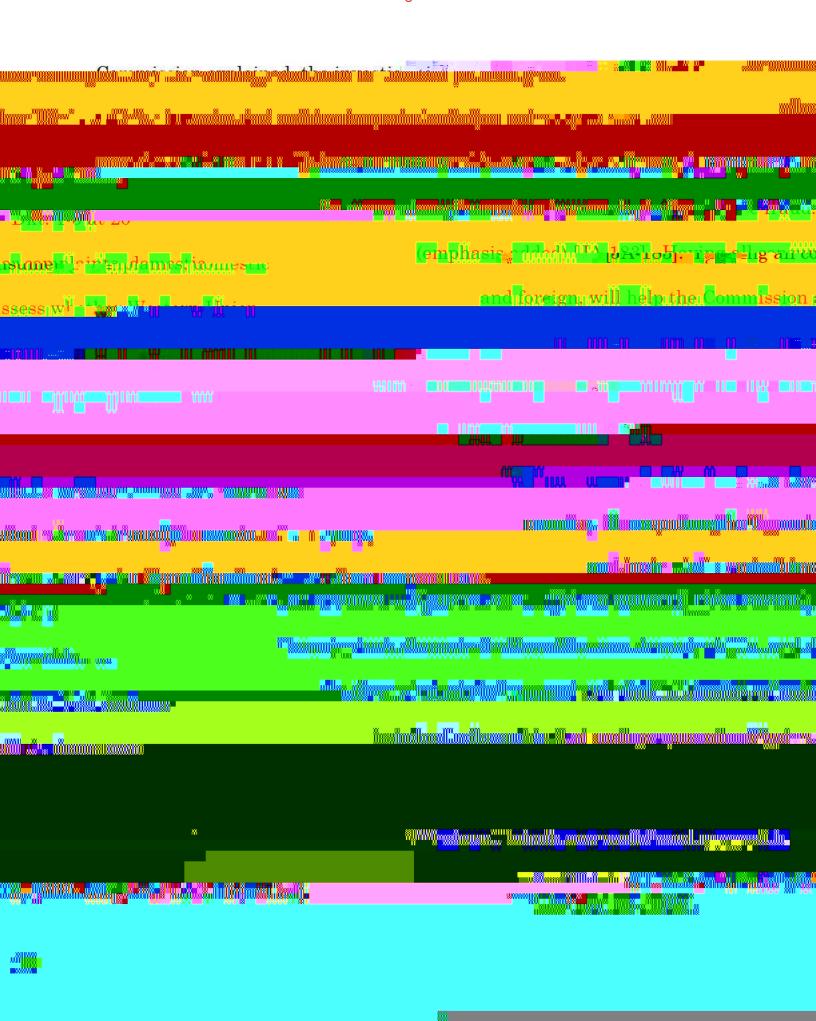
lawfully address fraudulent cond

foreign law. The conflict Western Union asserts with European privacy law is illusory and unsupportable. Nor has Western Union demonstrated that compliance with the CID will result in sanctions abroad.

II. Contrary to Western Union's daims in its cross-appeal, the district court properly held that the FTC may obtain documents related

# ARGUMENT FEDERAL TRADE COMMISSION'S REPLY BRIEF

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policies and practices, established and directed from its corporate headquarters in Colorado.

Even if the Commission's authority with respect to foreign transactions were at issue, however, the district court departed from longstanding instructions about the limited role of district courts in agency process enforcement.<sup>4</sup> SeeFTC Br. 16-19. As this Court has declared, "it is for the agency rather than the district courts to determine in the first instance the question of coverage in the course of the preliminary investigation into possible violations." SEC v. Brigadoon Scotch Distrib. Co. , 480 F.2d 1047, 1053 (2d Cir. 1973). Western Union contends that these limitations do not apply here,

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<sup>&</sup>lt;sup>4</sup> Western Union is wrong in asserting that the FTC has waived the argument that the district court improperly considered the agency's jurisdiction. SeeWU Br. 19-21. In fact, the Commission raised the limited nature of district court review prominently in its initial enforcement petition and in its opening brief. See, e.g, Dkt. 2 at 11 [JA-232]; FTC Br. 17. Western Union now invokes an exception to the limited nature of district court review, and the Commission is entitled to respond to that argument.

pointing to some inapposite cases in which plenary review was allowed.<sup>5</sup>
SeeWU Br. 23-24 & n.2. While some courts have denied process
enforcement based on limits to the agency's authority, they have done

deceptive acts or practices" extends to "unfair or deceptive acts or

nations and actors," not that they were identical.<sup>7</sup> Nothing in the statutory language enacted by Congress supports Western Union's argument that the Commission must show "substantial effects" in the United States to prevail.

Therefore, Western Union's reliance on pre-2010 and pre-SAFE WEB case law is misplaced. Under current law, courts may no longer look to "conduct" or "effects" to determine whether a statute applies extraterritorially. Morrison v. Nat'l Austl. Bank Ltd ., 561 U.S. 247, 130 S. Ct. 2869 (2010). Rather, statutes have extraterritorial effect only upon "the affirmative intention of the Congress clearly expressed." Id. at 2877 (internal quotation marks omitted). The SAFE WEB Act amendments "affirmatively" demonstrate a "clearly expressed" intent. See 15 U.S.C. § 45(a)(4) [SA-20 to -21].8 The amendments are properly construed according to their own "plain and unambiguous" terms, not

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<sup>&</sup>lt;sup>7</sup> FTC, An Explanation of the Provisions of the US SAFE WEB Act 14 (2006), available at http://www.ftc.gov/sites/default/files/documents/reports/us-safe-web-act-protecting-consumers-spam-spyware-and-fraud-legislative-recommendation-congress/explanation-provisions-us-safe-web-act.pdf (emphasis added).

<sup>&</sup>lt;sup>8</sup> Congress reauthorized the SAFE WEB Act in 2012, after the Supreme Court's decision in Morrison, without making any substantive changes. See Pub. L. No. 112-203, 126 Stat. 1484 (Dec. 4, 2012) [SA-57].

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by reference to judge-made law regarding the extraterritorial reach of other statutes. See, e.g., Hardt v. Reliance Stan dard Life Ins. Co., 560 U.S. 242, 251 (2010).

1. The Foreign Complaints "Involve" Western Union's Domestic "Material Conduct" of Administering and Policing Its Network

The Commission showed that the "material conduct" at issue here is Western Union's establishment and application in the United States of anti-fraud policies that apply across its global network. FTC Br. 22-23. Western Union is wrong in suggesting that its foreign complaints do not involve material conduct within the United States for the simple reason that the company focuses on the wrong conduct. SeeWU Br. 29-33. The Commission has made clear repeatedly (e.g., Dkt. 1-3 at 20 [JA-183]; FTC Br. 22) that the focus of the investigation and the "material conduct" at issue is Western Union's administration of its worldwide network, how Western Union responds to complaints about fraudinduced money transfers, and whether Western Union has taken adequate steps to detect and prevent such transfers.

Those acts "involve material conduct occurring within the United States" under the SAFE WEB Act. 15 U.S.C. § 45(a)(4)(A)(ii) [SA-20 to -

21]. "Material" means "significant; essential." Black's Law Dictionary 1066 (9th ed. 2009). FTC case law establishes that "material" means "important." SeeLetter from the Fed. Trade Comm'n to Hon. John Dingell ("Deception Statement"), appended to In re Cliffdale Assocs., 103 F.T.C. 110, 174, 182 & n.45 (1984). Western Union's oversight of its global money transfer system, which is directed from its U.S. headquarters, fits comfortably within those definitions. If the company's oversight is deficient — a determination which can become more apparent after examining a full set of domestic and foreign complaints — it exposes consumers in the United States, as well as those abroad, to a risk of unreasonable harm. Such conduct is "material."9

Western Union's "aiding and abetting" argument is likewise premised on the misunderstanding that the FTC's investigation is directed at operators of foreign frauds. SeeWU Br. 32-33. As explained above, the FTC's investigation focuses primarily on Western Union's

<sup>&</sup>lt;sup>9</sup> Even if the pre-Morrison "material conduct" cases have some continuing vitality after Morrison, the Commission satisfies those standards as well. North-South Finance Corp. v. Al-Turki , 100 F.3d 1046, 1052-53 (2d Cir. 1996), involved "preparatory" or "post-sale" conduct; by contrast, Western Union's practices may substantially assist the fraud. IIT v. Vencap, Ltd.

including those in the United States.<sup>11</sup> See, e.g., FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010) (finding liability for "unfair practices" where website, despite consumer complaints and knowledge that

brief, where it acknowledges that "given the ease with which [the money transfer] system allows money to be transferred, it also attracts fraudsters, who seek to abuse Western Union's services to victimize the unwary through common fraud schemes." WU Br. 4-5.

Western Union is therefore wrong when it contends that "there is no logical connection between a complaint from a consumer in Poland regarding a foreign agent in France and domestic U.S. injury." WU Br. 34. That claim fails for two reasons. First, Western Union's failure to address such a complaint may well subject consumers in the United States to fraud-induced money transfers received by the same French agent. Second, such a failure to take responsive action with respect to that agent may be evidence of a systemic failure by Western Union to take adequate steps with respect to agents worldwide, including those in the United States. Thus, the complaints are directly relevant to an evaluation of conduct by Western Union that may put American consumers at risk.

Union has not cited a single case "brought by EU privacy authorities against U.S. companies for producing data to a U.S. enforcement authority in the context of a specific investigation." Dkt. 28-7 ¶ 6.15 [JA-783]. There is no apparent basis for Western Union's claim.

Even if Western Union could cite such a case, however, foreign laws "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 [foreign law]." Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court , 482 U.S. 522, 544 n.29 (1987) (citing Société International Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-06 (1958)). 12 Even in

n.28.13

Western Union overlooks entirely Aérospatiale, the Restatement, and the numerous cases in which courts have enforced administrative subpoenas or required production even in the face of conflicting foreign law. 15 Western Union cites a general EU data protection directive, but it has not identified any particular European nation's data protection law that would sanction the company for complying with the CID. 16 Nor does Western Union address the status of privacy law in countries in Asia, Africa, and the Americas that either have no privacy laws or expressly authorize the kind of disclosures requested here. 17

cuments/EDPS/PressNews/Press/2011/EDPS-2011-03\_EU\_PNR\_EN.pdf ("[P]assengers' personal data could certainly be necessary for law enforcement purposes in targeted cases, when there is a serious threat supported by concrete indicators.").

See, e.g, Linde v. Arab Bank, PLC , 706 F.3d 92, 109-15 (2d Cir. 2013); First Am. Corp. v. Price Waterhouse LLP , 154 F.3d 16, 22-23 (2d Cir. 1998); CAB v. Deutsche Lufthansa Aktiengesellschaft , 591 F.2d 951, 952-53 (D.C. Cir. 1979); SEC v. Minas de Artemisa, S.A., 150 F.2d 215, 218-19 (9th Cir. 1945); NML Capital, Ltd. v. Republic of Argentina , No. 03 Civ. 8845(TPG), 2013 WL 491522, at \*9-\*11 (S.D.N.Y. Feb. 8, 2013); Vanguard Int'l Mfg., Inc. v. United States , 588 F. Supp. 1229, 1232-34 (S.D.N.Y. 1984); SEC v. Banca Della Svizzera Italiana , 92 F.R.D. 111, 114-19 (S.D.N.Y. 1981).

Although the EU has a general data protection directive, the scope of the directive depends on how the directive is implemented locally in each EU country. See Dkt. 28-7 ¶ 4.4 [JA-776].

See Dkt. 28-6 [JA-771]; Privacy Comm'r of Can. v. SWIFT ¶ 48 (Apr. 2, 2007), http://www.priv.gc.ca/cf-dc/2007/swift\_rep\_070402\_e.asp; NML

obtains users' consent has no bearing on this appeal. The Safe Harbor Framework does not apply to Western Union, which is not a participant. See Dkt. 1-3 at 24 n.76 [JA-187]. Even if Western Union were in the Safe Harbor, 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."

legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." NLRB ex rel. Int'l Union of Elec., Radio & Mach. Workers v. Consol. Vacuum Corp. , 395 F.2d 416, 419-20 (2d Cir. 1968); EEOC v. KarenKim, Inc., 698 F.3d 92, 99-100 (2d Cir. 2012) (internal quotation marks omitted). If the district court finds that the information sought by the agency is irrelevant, this Court will affirm unless that determination is "clearly erroneous." See RNR Enters., Inc. v. SEC, 122 F.3d 93, 97 (2d Cir. 1997).

## A. Documents Pertaining to the Work of the Monitor Are Relevant to the FTC's Investigation of Western Union's Anti-Fraud Practices

The district court correctly deferred to the Commission's determination that documents pertaining to the monitor's evaluation of Western Union's AML program are relevant to the Commission's investigation. The Commission had determined that its inquiry into

Western Union asks the Court to second-guess both the Commission and the court below. It points largely to supposed substantive differences between money laundering and fraud. WU Br. 45-46.

As the district court acknowledged, "a money transfer can be an object or subject of laundering and it can be an aspect of fraud. It can do both, and [the FTC is] interested in the fraud." Dkt. 41 at 11-12 [JA-839 to -840]. The court correctly required Western Union to comply with Specification 1 of the CID in its entirety.

B. The Commission's Investigatory Resolution Provided Sufficient Notice of the Nature and Scope of the Investigation

Western Union claims that the investigatory resolution under which the CID was issued was not sufficient to provide notice of the purpose of the investigation or to allow the court to assess the relevance of the requested documents. The FTC Act requires a CID to "state the

unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the [FTC Act]; and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to

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Contrary to Western Union's contention (WU Br. 52-56), the notice requirement in the 1980 FTC Improvements Act was not intended to force the Commission, in advance of an investigation, to delineate the exact parameters of its inquiry. Courts have approved resolutions comparable to the one at issue here without articulating any concern about their ability to assess the relevance of the requested documents, both before and after the FTC Improvements Act. In FTC v. Carter, for example, the district court rejected a challenge to a resolution that, citing Section 5 of the FTC Act and Section 8(b) of the Cigarette Labeling and Advertising Act, stated that the investigation concerned "the advertising, promotion, offering for sale, sale, or distribution of cigarettes." 636 F.2d 781, 788 (D.C. Cir. 1980). This resolution left the court "comfortably apprised of the purposes of the investigation and subpoenas issued in its pursuit." Id.; see also Nat'l Claims Serv., Inc., 1999 U.S. Dist. LEXIS 3312 at \*4 ("unnamed business opportunity firms" who sell "business opportunities \* \* \* to consumers [and] have been or are engaged in unfair or deceptive acts or practices"); FTC v. O'Connell Assocs., Inc., 828 F. Supp. 165, 167 n.1 (E.D.N.Y. 1993) ("[t]o determine whether unnamed consumer reporting

agencies or others are or may be engaged in acts or practices in violation of Section 5 [of the FTC Act] and of the [Fair Credit Reporting

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## CONCLUSION

The district court's order should be affirmed in part and reversed in part and the matter remanded with instructions to enter an order directing Western Union to comply with the CID in its entirety.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(a), I certify that the Response and Reply Brief for Appellant/Cross-Appellee Federal Trade

Commission complies with the type-volume limitation set forth in Fed.

R. App. P. 28.1(e)(2)(A)(i) and contains 7,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Microsoft Word 2010 word processing program used to prepare this brief.

I further certify that the Response and Reply Brief for Appellant Federal Trade Commission complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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## CERTIFICATE OF SERVICE OF BRIEF FILED UNDER SEAL

I hereby certify that on April 28, 2014, I served a courtesy copy of the Response and Reply Brief for Appellant Federal Trade Commission filed under seal this day upon counsel for respondents The Western Union Company and Lonnie Keene, Keene Consulting Arizona, LLC, through FedEx overnight delivery service and by e-mail to the addresses below:

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