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LATHAM & WATKINS^{LLP}

June 3, 2022

FOIA CONFIDENTIAL TREATMENT REQUESTED
5 U.S.C. § 552
16 C.F.R. § 4.9 AND 4.10

Via email

FOIA Office Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
FOIA@ftc.gov

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Re: Freedom of Information Act Request Regarding BCP Matter Involving Walmart

To Whom It May Concern:

This is a request under the Freedom of Information Act for information related to the Federal Trade Commission's ("FTC" or "Agency") long-running matter involving Walmart and money transfers.

On June 1, 2022, the FTC voted 3-2 in favor of filing a complaint in federal court against my client, Walmart Inc. ("Walmart"). The FTC appears poised to pursue a novel and untested legal theory against Walmart that would represent an unprecedented expansion of the Agency's power—and will do so based on significant factual errors and to address a significant amount of reported fraud that the Agency already publicly attributed to other actors, not Walmart. Additionally, the investigation and vote to proceed with a complaint against Walmart have been riddled with a lack of transparency and a host of procedural irregularities. The FTC's behavior has raised serious questions about the Agency's motivations in pursuing Walmart for the misconduct of third-party fraudsters. In light of the questions raised by the Commission's approach to this case, we request a copy of all documents and communications described below.

Origin and Basis for FTC's Investigation of Walmart

FTC Staff informed Walmart that it initiated its investigation because of a rise in reported fraud with respect to MoneyGram money transfers (Walmart is an agent of MoneyGram, as well as other money transfer principals). It is startling that the FTC would initiate an investigation of Walmart for a rise in reported fraud that the FTC publicly claimed in 2018 was due to failures by MoneyGram—not Walmart—to prevent "millions of dollars in fraud-induced money transfers." Additionally, the FTC publicly attributed the rise in reported fraud—which occurred while MoneyGram was subject to an FTC Consent Order—to, among other failures, an 18-month period when MoneyGram's anti-fraud interdiction system for blocking fraudsters had failed. The

MoneyGram interdiction system failure occurred when MoneyGram was under federal government oversight, including an FTC Consent Decree and a compliance monitor. Yet the FTC never informed Walmart of the MoneyGram interdiction system failure.

Now, the Agency appears poised to attempt to shift blame to Walmart for the conduct of third-party fraudsters engaged in money transfers, including fraudsters that used MoneyGram during a compliance outage that took place while MoneyGram was subject to federal government supervision through a monitor. Accordingly, Walmart seeks the following categories of information related to the FTC's knowledge about the MoneyGram interdiction system failure:

1. All documents and communications¹ related to MoneyGram's interdiction system failure, as described in the 2018 MoneyGram settlement;²
2. All documents and communications regarding when any person at the FTC first learned of MoneyGram's interdiction system failure;
3. All documents and communications regarding when the federal government's compliance monitor at MoneyGram learned about the interdiction system failure;
4. All documents and communications regarding any decision not to tell Walmart about MoneyGram's interdiction system failure;
5. All documents and communications regarding how MoneyGram's interdiction system failure could affect the FTC's reputation given that MoneyGram was under an FTC consent order at the time;
6. All documents and communications relating to the federal government's compliance monitor's supervision of MoneyGram, including but not limited to all monitor reports;
7. All documents and communications relating to any attempt to quantify money transfer fraud during the time MoneyGram's interdiction system was down (while MoneyGram was under government supervision);

¹ The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Federal Rule of Civil Procedure 34(a)(1)(A), which includes any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, whether electronically stored or not. A draft or non-identical copy is a separate document within the meaning of this term. The term "communication" is defined to mean the transmission, sending and/or receipt of information of any kind by and/or through any means including but not limited to speech, writings, computer electronics of any kind, photographs, sound, radio and/or video signal, telephone, telecommunication, photographic film of any type and/or other media of any kind. This term encompasses any statements or messages made or exchanged on social media platforms, including Facebook, Instagram, Reddit or Twitter.

² See FTC's Unopposed Mot. for Entry of Stip. Order for Comp. Relief & Mod. Order for Per. Inj. at 3-4, *FTC v. MoneyGram Int'l, Inc.*, No. 09-cv-6576 (N.D. Ill. Nov. 8, 2018) (ECF No. 14).

8. All documents and communications related to any enforcement actions the FTC considered or took against any fraudster, money mule, or telemarketer that the FTC contends Walmart should have stopped;
9. All documents and communications related to, and all documents supporting all facts and contentions set forth in papers related to the FTC 2018 MoneyGram settlement³, including all documents and evidence related to and supporting the following FTC statements:
 - a. “[MoneyGram] failed to properly train its agents.”;
 - b. “Significantly, moreover, although MoneyGram implemented a new interdiction system in April 2015 that was supposed to enhance its ability to automatically hold and prevent the payout of money transfers that likely were fraud-induced, this interdiction system failed to function properly from approximately April 2015 through October 2016, thereby failing to prevent millions of dollars in fraud-induced money transfers.”;
 - c. “Despite the Order’s requirements, MoneyGram failed to adequately monitor and prevent the money transfer activity of recipients of fraud-induced money transfers, including recipients who had been the subject of one or more consumer fraud complaints, or who otherwise had engaged in suspicious activity or activity linked to fraud-induced money transfers.”;
10. All documents and communications related to any efforts that the FTC took to protect consumers upon discovering MoneyGram’s interdiction system failure;
11. All documents and communications related to MoneyGram’s 2012 Deferred Prosecution Agreement with DOJ, Deferred Prosecution Agreement, *United States v. MoneyGram Int’l, Inc.*, No. 12-cr-00291 (M.D. Pa. Nov. 9, 2012) (ECF No. 3), including, but not limited to all documents and communications with or relating to the corporate compliance monitor;
12. All documents and communications related to monetary amounts paid by MoneyGram and Western Union to the federal government in settlements in *FTC v. MoneyGram Int’l, Inc.*, No. 09-cv-6576 (N.D. Ill.) and *FTC v. The Western Union Company*, No. 1:17-cv-00110 (M.D. Pa.), including the apparent delay from 2018–2022 in paying settlement funds to MoneyGram customers; and
13. All documents that the FTC contends provided guidance to Walmart relating to prevention of telemarketing-related money transfers, including but not limited to any draft guidance; answers to questions received from money transfer providers; draft or model verbiage for telemarketing signage; draft or model guidance regarding, referencing, or related to fraud rates; and/or draft or model guidance related to “red flags” associated with telemarketing.

³ FTC’s Unopposed Mot. for Entry of Stip. Order for Comp. Relief & Mod. Order for Per. Inj. at 3-4, *FTC v. MoneyGram Int’l, Inc.*, No. 09-cv-6576 (N.D. Ill. Nov. 8, 2018) (ECF No. 14).

Bureau of Economics' Analysis & Walmart's Pro-Competition and Pro-Consumer Benefits

Walmart met with the Bureau of Consumer Protection and the Bureau of Economics in fall 2020 to present econometric analysis that undercut the notion that Walmart caused money transfer fraud. The analysis was presented by former FTC Bureau of Economics Director Dr. Michael Baye. Walmart demonstrated to the Bureau of Consumer Protection and the Bureau of Economics that Walmart has saved money transfer customers—including the unbanked and underbanked, who lack access to traditional financial services—over \$6 billion over the last eight years through reduced fees due to Walmart's introduction in 2014 of a white label money transfer product, with more than \$2 billion in estimated savings directly to Walmart customers and over \$4 billion in savings for non-Walmart customers through pro-competitive effects from Walmart's disruption of the industry.

Walmart also demonstrated through econometric analysis that a rise in reported fraud connected to MoneyGram money transfers could not reasonably be attributable to Walmart, and that, moreover, reported fraud rates for Walmart services are significantly lower than for other MoneyGram agents.

Because Chair Khan and Commissioner Slaughter refused to meet directly with Walmart to discuss this matter, it is unclear whether they took into consideration the billions of dollars in pro-competitive and pro-consumer impacts of Walmart's money transfer services. Additionally, the Federal Trade Commission vote comes at a time when the FTC does not even have a Director of the Bureau of Economics—the most recent Director resigned in February of this year, after less than a year on the job. It is fair to ask if the Bureau of Economics was even consulted by those who voted to approve a complaint against Walmart.

Accordingly, Walmart seeks the following categories of documents and communications:

14. All documents and communications related to competition within the money transfer industry, including all documents related to pro-competitive effects caused by Walmart's entry into a market previously dominated by MoneyGram and Western Union;
15. All documents and communications related to consumer and competitive benefits stemming from Walmart's presence in the money transfer market as an agent and the harm to consumers and competition that may result from the FTC's pursuit of an enforcement action against Walmart;
16. All documents and communications related to the Bureau of Economics' consideration and evaluation of Walmart's significant consumer savings and pro-competitive impact, including:
 - a. All documents and communications related to the Bureau of Economics' view as to whether to pursue a case against Walmart related to its money transfer services; and

- b. All documents and communications related to whether the Bureau of Economics was notified about the Walmart investigation or opined in any way on the Walmart investigation during the tenure of the former Bureau of Economics director;
17. All documents and communications related to the role of the Bureau of Economics and/or economics generally in the evaluation of whether to bring a claim under the Telemarketing Sales Rule or Section 5 of the FTC Act, including:
- a. All documents and communications regarding economic considerations about pro-competitive and pro-consumer benefits to unbanked and underbanked consumers;
 - b. All documents and communications related to frustrations by Bureau of Economics staff regarding the failure or refusal of Chair Khan to consider their opinions and analysis;
 - c. All documents and communications related to the effect of Chair Khan on the morale of Bureau of Economics staff, including all documents, feedback, and analysis related to the Office of Personnel Management's 2021 Federal Employee Viewpoint Survey, including the findings that: (1) only 53% of FTC employees strongly agree or agree that senior leaders maintain high standards of honesty and integrity (down from 87% in 2020), (2) only 42% of FTC employees strongly agree or agree that there is a high level of respect for the FTC's senior leaders (down from 83% in 2020), and (3) only 49% of FTC employees strongly agree or agree that senior leaders generate high levels of motivation and commitment in the workforce (down from 80% in 2020); and
 - d. All documents and communications related to the abrupt departure of former Bureau of Economics Director Marta Wosinska in February 2022 after serving in the role for less than a year.

Legal Authority & AMG

On April 22, 2021, the Supreme Court ruled in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) that the FTC does not have the authority to obtain monetary relief under Section 13(b) of the FTC Act. Although the FTC has lobbied Congress to amend the FTC Act to give the FTC authority to obtain monetary remedies under Section 13(b), Congress has declined to do so thus far. Accordingly, Walmart seeks the following categories of information:

18. All documents and communications regarding the Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), including any discussion of how the decision impacted a potential case against Walmart. This includes but is not limited to:
- a. All FTC documents or policies related to the FTC's ability or attempts to continue to obtain monetary relief for alleged violations of Section 5 following *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); and

- b. Any communications, including involving or among the Midwest Regional Office or any of its attorneys, Samuel Levine or his staff, or Chair Khan or her staff, directing or authorizing Staff to demand monetary relief for alleged violations of Section 13(b) following the Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021);
19. All documents and communications related to the FTC's authority to pursue any claim for injunctive relief against Walmart in the absence of any alleged ongoing misconduct;
20. All documents and communications related to the FTC's strategy to persuade Congress to amend the FTC Act after *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021);
21. All documents and communications related to how and whether the FTC could use the Telemarketing Sales Rule to circumvent the Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), including:
 - a. All documents and communications about the Telemarketing Sales Rule's applicability where there is no evidence that fraud is connected to telemarketing; and
 - b. All documents and communications about the FTC's discussions whether the Telemarketing Sales Rule can be expanded to target companies that are not accused of engaging in fraudulent telemarketing; and
22. All documents and communications related to the FTC's April 27, 2022 Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking related to the Telemarketing Sales Rule.
23. All documents and communications related to any FTC rulemakings that relate to or discuss the Walmart investigation, money transfers, or Walmart in general.
24. All documents and communications related to *Axon Enterprise, Inc. v. Federal Trade Commission*, 986 F.3d 1173 (9th Cir. 2021), *cert. granted*, 142 S.Ct. 895 (U.S. Jan. 24, 2022) (No. 21-86) by or in the custody of Chair Khan or Commissioner Slaughter.

Transparency, Fairness, and Due Process

The FTC's investigation of Walmart has been marred by a lack of transparency and riddled by a series of troubling procedural irregularities. For example, despite repeated requests, Chair Khan and Commissioner Slaughter refused to meet with Walmart for Walmart to present legal and factual arguments regarding the merits of the FTC's proposed lawsuit before they voted on pursuing this unprecedented case. To their credit, Commissioners Wilson and Phillips agreed to meet with Walmart. Then, after Commissioner Bedoya was confirmed, FTC Staff informed Walmart that the Bureau of Consumer Protection was recommending that Commissioner Bedoya also refuse to discuss the matter with Walmart. Commissioner Bedoya nonetheless met with Walmart.

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Walmart seeks the following categories of information related to the transparency issues and procedural irregularities arising during the Commission's investigation and authorization of a complaint against Walmart:

25. All documents and communications related to the refusal of Chair Khan and Commissioner Slaughter to meet with Walmart prior to voting on filing an action against the Company in federal court;
26. All documents and communications regarding the Bureau of Consumer Protection's recommendation that Commissioner Bedoya refuse to meet with Walmart;
27. All documents and communications regarding the FTC's rules to vote to authorize complaints; and
28. All documents and communications related to any external communications between Chair Khan and third parties outside the FTC—including government officials at other agencies—regarding the Walmart matter.

I am willing to pay fees to expedite these requests, if necessary, but please inform me before fees exceed \$2,000 to seek my approval of additional fees.

Please promptly acknowledge receipt of this notice and confirm that you will comply with this request. You can contact me at sean.berkowitz@latham.com or (312) 777-7016 if you have any questions.

Sincerely,



Sean Berkowitz
of LATHAM & WATKINS LLP

cc: Johanna Spellman, Latham & Watkins LLP
Drew Wisniewski, Latham & Watkins LLP