The Sedona Conference Journal

Volume 25 2024

Evaluating the FTC's Authority to Enforce the GLBA's Provisions Regarding the Security and Privacy of Consumer Financial Information: Lessons from Recent Case Law

Douglas H. Meal & Sharilyn N. Clark

Recommended Citation:

Douglas H. Meal & Sharilyn N. Clark, *Evaluating the FTC's Authority to Enforce the GLBA's Provisions Regarding the Security and Privacy on Consumer Financial Information: Lessons from Recent Case Law*, 25 SEDONA CONF. J. 343 (2024).

EVALUATING THE FTC'S AUTHORITY TO ENFORCE THE GLBA'S PROVISIONS REGARDING THE SECURITY AND PRIVACY OF CONSUMER FINANCIAL INFORMATION: LESSONS FROM RECENT CASE LAW

Douglas H. Meal and Sharilyn N. Clark[1]

I. INTRODUCTION

The Graham-Leach-Bliley Act ("GLBA") has two particular provisions that govern the conduct, in the privacy and cybersecurity context, of "financial institutions" that are subject to the GLBA. Many will be familiar with Section 501(b) of the GLBA[2] ("the GLBA Security Requirement"), which directs various agencies identified in the GLBA to establish "appropriate standards" for the financial institutions subject to their jurisdiction relating to "safeguards" (1) to insure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer. Less well known is Section 521(a) of the GLBA[3] ("the GLBA Pretexting Prohibition"), which protects the privacy of "customer

1. Mr. Meal is an Adjunct Professor at Cleveland State University College of Law and teaches a course there in Cybersecurity Litigation. Ms. Clark is a 2024 graduate of Cleveland State University College of Law and focused her studies there on privacy and cybersecurity law. The views expressed herein are those of the authors only and are not attributable to the law school with which they are affiliated.

2. 15 U.S.C. § 6801(b).

3. 15 U.S.C. § 6821(a).

information of a financial institution" by prohibiting any person from employing a variety of fraudulent practices for the purpose of pretextually obtaining or causing the disclosure of such information.

The GLBA gives the Federal Trade Commission (FTC) certain enforcement authority with regard to both the GLBA Security Requirement (and any rule promulgated by the FTC thereunder) and the GLBA Pretexting Prohibition. As discussed in Part II below, the statutory language that the GLBA uses in conferring that enforcement authority on the FTC is not entirely clear on its face as to the boundaries of and limitations of that authority. Moreover, that statutory language is markedly different as between the GLBA Security Requirement on the one hand and the GLBA Pretexting Prohibition on the other hand. Further, even though GLBA was enacted in 1999, FTC efforts to enforce the GLBA Security Requirement and the GLBA Pretexting Prohibition rarely are litigated, so judicial decisions interpreting the FTC's enforcement authority under those statutes are nearly nonexistent.

Part III below discusses two such judicial decisions, both of which were recently rendered in a case pending before the U.S. District Court for the Southern District of New York. As discussed in Part III.A below, those decisions open the door to a very broad reading of the substantive scope of the GLBA Pretexting Prohibition and the remedies available to the FTC for a violation of that prohibition. We believe that reading is either clearly erroneous or at a minimum highly questionable in a number of respects, as we discuss in Part III.B below. Moreover, as discussed in Part III.C below, the reasoning of those rulings casts doubt on whether the FTC currently has *any* viable remedy available to it—even the ability to obtain a mere cease-and-desist order—for a violation of the GLBA Security Requirement or the so-called "Safeguards Rule" promulgated by the FTC thereunder.

II. THE STATUTORY BASIS FOR FTC ENFORCEMENT OF THE GLBA SECURITY REQUIREMENT AND THE GLBA PRETEXTING PROHIBITION.

A. FTC Enforcement of the GLBA Security Requirement

Section 501(a) of the GLBA declares that it is "the policy of the Congress" that "financial institutions" (as defined in the GLBA) have the obligation to "protect the security and confidentiality" of their customers' nonpublic personal information.[4] In furtherance of that policy, the GLBA Security Requirement calls for the various agencies and authorities that have regulatory jurisdiction over financial institutions to establish "appropriate standards" pertaining to administrative, technical, and physical safeguards "(1) to insure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer."[5] GLBA Sections 504(a) and 505(a) in turn grant the FTC, among other agencies, rulemaking and enforcement authority, respectively, to carry out the directive of the GLBA Security Rule with respect to those financial institutions that are subject to the FTC's regulatory authority.[6] Specifically, Section 504(a) grants the FTC

4. 15 U.S.C. § 6801(a).

5. 15 U.S.C. § 6801(b).

6. Per GLBA Section 505(a)(7), the FTC's regulatory authority extends to any financial institution "that is not subject to the jurisdiction of any [other] agency or authority" listed in Section 505(a)(1)-(6). 15 U.S.C. § 6805(a)(7). According to the FTC, those financial institutions "include, but are not limited to, mortgage lenders, 'pay day' lenders, finance companies, mortgage brokers, account servicers, check cashers, wire transferors, travel agencies operated in connection with financial services, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally

authority to create "regulations as may be necessary" to carry out that directive, and Section 505(a)(7) of the GLBA provides that the GLBA Security Requirement and the rules enacted by the FTC thereunder may be enforced against those financial institutions by the FTC "[u]nder the Federal Trade Commission Act" ("FTC Act").[7]

The FTC complied with the rulemaking authority granted to it in the GLBA by creating what has come to be called the "Safeguards Rule."[8] The Safeguards Rule requires those institutions within the FTC's jurisdiction to "develop, implement, and maintain a [written] comprehensive information security program" that is "reasonably designed" to meet the three objectives specified in the GLBA Security Requirement and that, in addition, includes certain elements specified in Section 314.4 of the Safeguards Rule.[9]

Importantly, as will be discussed in Part III.C below, the Safeguards Rule was not enacted by the FTC pursuant to its rulemaking authority under Section 18 of the FTC Act, which allows the FTC to enact so-called "trade regulation rules"[10], i.e., "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or

---

insured credit unions, investment advisors that are not required to register with the Securities and Exchange Commission, and entities acting as finders." 16 C.F.R. § 314.1(b).

7. 15 U.S.C. § 6804(a) & 6805(a)(7).

8. The Safeguards Rule is codified at 16 CFR Part 314.

9. 16 C.F.R § 314.3.

10. *See* The Federal Trade Commission, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, Part III (revised May 2021), *available at* https://www.ftc.gov/about-ftc/mission/enforcement-authority (defining "trade regulation rules" as being "'rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce'' within the meaning of Section 5(a)(1) of the [FTC] Act" (quoting FTC Act Section 5(a)(1))).

affecting commerce (within the meaning of [FTC Act Section 5(a)]."[11] Instead, the FTC relied solely on its rulemaking authority under the GLBA in enacting the Safeguards Rule.[12] Additionally, nothing in the Safeguards Rule purports to provide that a violation of the Safeguards Rule constitutes a violation of Section 5(a) of the FTC Act or purports to require the elements of a Section 5(a) violation to be established to prove a violation of the Safeguards Rule.

B. FTC Enforcement of the GLBA Pretexting Prohibition

The GLBA Pretexting Prohibition prohibits any person from attempting to obtain or obtaining, or causing or attempting to cause to be disclosed to any person, "customer information of a financial institution" relating to another person by (1) making a "false, fictitious, or fraudulent statement or representation" to an employee of a financial institution, (2) making such a statement or representation to a customer of a financial institution, or (3) providing any document to any employee of a financial institution, knowing the document was forged, counterfeit, lost, or stolen, was fraudulently obtained, or contains a false statement.[13] Section 522(a) of the GLBA gives the FTC jurisdiction to enforce the GLBA Pretexting Prohibition against pretty much the same group of "financial institutions" over which the FTC has enforcement authority with respect to the GLBA Security Requirement.[14] But instead of granting the FTC authority to

11. 15 U.S.C. § 57(a)(1)(B).

12. *See* "Authority," 26 C.F.R. Part 314 (only specifying GLBA Sections 501(b) and 505(b)(2) as the authority for the Safeguards Rule's enactment).

13. 15 U.S.C. § 6822(a).

14. *Compare* 15 U.S.C § 6822(b) (identifying which financial institutions are carved out from the FTC's GLBA Pretexting Prohibition enforcement jurisdiction) *with* 15 U.S.C. § 6805(a)(1)-(6) (identifying which financial

enforce the GLBA Pretexting Prohibition against those financial institutions "under the [FTC] Act" (as the GLBA had done with respect to the GLBA Security Requirement), GLBA Section 522(a) grants the FTC power to enforce the GLBA Pretexting Prohibition "with the same power and authority as the Commission has under the Fair Debt Collection Practices Act" ("FDCPA").[15] The difference in language is significant, as the FTC has broad enforcement authority under the FDCPA. Specifically, Section 814(a) of the FDCPA provides that, for purposes of the FTC's authority to enforce compliance with the FDCPA, a violation of the FDCPA shall be deemed "an unfair or deceptive act or practice" in violation of Section 5(a) of the FTC Act; "[a]ll of the functions and powers" of the FTC are available to enforce such compliance; and the FTC is entitled to treat any FDCPA violation "in the same manner as if the violation had been a violation of a [FTC] trade regulation rule."[16]

III. THE RECENT RULINGS IN *FTC V. RCG ADVANCES*

A. *The District Court's Interpretation and Application of the GLBA Pretexting Prohibition in RCG Advances*

In the first 20 years following the GLBA's enactment in 1999, the FTC rarely exercised its enforcement power with respect to the GLBA Pretexting Prohibition.[17] Indeed, we have found no case prior to 2020 in which the FTC's enforcement authority

institutions are carved out from the FTC's GLBA Security Requirement enforcement jurisdiction).

15. 15 U.S.C. § 6822(a).

16. 15 U.S.C. § 1692*l*(a).

17. The most recent FTC settlement that we found where a claim was made under the GLBA Pretexting Prohibition was the Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief in *FTC v. Sun Spectrum Communications Organization, Inc.*, No. 03-81105-CIV-COHN/SNOW (S.D. Fla. filed Oct. 3, 2005).

under the GLBA Pretexting Prohibition was actually litigated. Things changed in 2021, however, when the FTC filed an amended complaint in *FTC v. RCG Advances* ("*RCG Advances*") in which the FTC asserted that the defendants had violated not only Section 5(a) of the FTC Act (as had been alleged in the FTC's original 2020 complaint), but also the GLBA Pretexting Prohibition.[18] The FTC's GLBA Pretexting Prohibition claim in *RCG Advances* has been addressed at length in two rulings recently rendered by the district court: first, in a September 2023 ruling on the FTC's summary judgment motion;[19] and second in a post-trial ruling rendered in February 2024.[20] As discussed below, by means of those two rulings the district court addressed numerous questions of first impression regarding the FTC's GLBA Pretexting Prohibition enforcement authority.

RCG Advances, LLC ("RCG") was in the business of entering into "merchant cash advance agreements" ("MCA Agreements") with merchants pursuant to which RCG loaned a lump sum of cash to a customer; in exchange, the customer assigned its future receivables to RCG until RCG collected an agreed-upon amount.[21] Specifically, the MCA Agreements contemplated that RCG would make an initial deposit of the loan amount directly into its customers' bank accounts and thereafter make daily debits of a specified amount directly from its customers' bank accounts until RCG recouped the entire amount that it was owed.[22] In order to accomplish this, the MCA

18. *See* Amended Complaint, FTC v. RCG Advances, LLC, No. 20-cv-4432 (JSR), Count Five (S.D.N.Y., filed June 10, 2021).

19. FTC v. RCG Advances, LLC (*SJ Ruling*), No. 20-cv-4432 (JSR), 2023 WL 6281138 (S.D.N.Y., Sept. 27, 2023).

20. FTC v. Braun (*PT Ruling*), No. 20-cv-4432 (JSR), 2024 WL 449288 (S.D.N.Y., Feb. 6, 2024).

21. *SJ Ruling* at *1.

22. *Id*.

Agreements provided that customers would agree to permit direct debits from and credits to their bank accounts and give RCG information about their bank accounts necessary to implement such debits and credits.[23]

In *RCG Advances*, the FTC alleged that RCG and the other defendants (including an RCG "owner, officer, and manager" named Jonathan Braun) had defrauded RCG's customers by lying about terms of the advances, including the amount of money they would be loaned, the amount to be collected, and other material terms.[24] The FTC further alleged that the defendants intimidated the business owners by making violent threats when it was time to collect on the payments.[25] The FTC's amended complaint made five claims against the defendants. In Counts One through Four, the FTC claimed that the defendants had violated Section 5(a) of the FTC Act by (1) making false and misleading statements that qualify as deceptive acts or practices; (2) misusing Confessions of Judgment; (3) threatening customers to induce them to make payments; and (4) making unauthorized withdrawals from customers' bank accounts.[26] In Count Five, the FTC claimed that the defendants had violated the GLBA Pretexting Prohibition by making false statements to obtain customers' bank account information and then using that information to overdebit and undercredit funds from those customers' accounts.[27] The relief sought by the FTC under the GLBA Pretexting Prohibition claim included a permanent injunction, civil penalties, and monetary redress for RCG's

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*. at *2.

27. *Id*.

customers in the amounts by which they were overdebited or undercredited.[28]

In ruling on the FTC's motion for summary judgment on its GLBA Pretexting Prohibition claim, the district court agreed that RCG had violated the GLBA Pretexting Prohibition. As noted above, the GLBA Pretexting Prohibition prohibits persons from obtaining or attempting to obtain or cause to be disclosed to any person, "customer information of a financial institution" relating to another person by making a "false, fictitious, or fraudulent statement or representation" to a customer of a financial institution.[29] The FTC alleged that by making false representations about the MCA Agreements to obtain customers' bank account information, the defendants violated the GLBA Pretexting Prohibition.[30] The district court found that RCG had a "practice" of breaching the MCA Agreements' covenants regarding the debiting and crediting of its customers' accounts.[31] Given this practice, the district court found that RCG had indeed made false representations about the MCA Agreements by inaccurately specifying (1) the amount of funding that would be provided and (2) the repayment amount that would be collected from its customers.[32] The district court further found that those misrepresentations were enough to induce customers into signing the MCA Agreements and granting RCG access to their bank account information.[33] Based on these findings, the district court ruled that RCG had made "false, fictitious, or fraudulent"

28. *Id*.

29. 15 U.S.C. § 6821(a)(2).

30. *SJ Ruling*, 2023 WL 6281138 (S.D.N.Y., Sept. 27, 2023), at *9.

31. *Id.* at *5; see also *id.* at *2 (defendants "regularly failed to adhere to the contractual terms of the MCA Agreements").

32. *Id.* at *9–10.

33. *Id*. at *10.

representations to its customers for purposes of obtaining "customer information of a financial institution" relating to those customers, in violation of the GLBA Pretexting Prohibition.[34]

The district court's summary judgment ruling further found that Braun was individually liable for RCG's violation of the GLBA Pretexting Prohibition. The district court first ruled that the standard for assessing individual liability under the GLBA, at least in the context of a GLBA claim brought by the FTC, was the same standard that applies to assessing individual liability under the FTC Act.[35] The district court next held that, under the FTC Act standard for assessing individual liability, Braun was individually liable for RCG's GLBA Pretexting Prohibition violation.[36]

The district court then turned to the remedies sought by the FTC by reason of Braun's GLBA Pretexting Prohibition violation. Regarding the FTC's requests for compensatory damages and civil penalties, the FTC argued, and the district court agreed, that by virtue of GLBA Section 522(b)'s grant of enforcement authority under the GLBA Pretexting Prohibition analogous and equivalent to the FTC's enforcement authority in the FDCPA, the FTC had the authority to enforce against Braun's GLBA Pretexting Prohibition violation in the same manner as if the violation has been a violation of an FTC trade regulation rule.[37] The district court further held that, because the language of the GLBA allows the FTC such enforcement authority, the FTC had the right to seek both consumer redress under Section 19(a)(1) of the FTC Act and civil penalties under Section 5(m)(1)(A) of the FTC Act as remedies for Braun's GLBA

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*. at *11.

Pretexting Prohibition violation, because both those provisions make relief available where there has been a violation of one of the FTC's trade regulation rules.[38] However, the district court declined to award summary judgment in the FTC's favor as to either of these requested remedies, finding that material issues of fact existed as to the amount of consumer redress that should be awarded under FTC Act Section 19(a)(1) and as to whether Braun acted knowingly, as required for a penalty to be imposable under FTC Act Section 5(m)(1)(A).[39]

The district court did, however, award summary judgment in the FTC's favor on its request for entry of a permanent injunction against Braun as a remedy for his GLBA Pretexting Prohibition violation. The district court ruled that Section 13(b) of the FTC Act authorizes a permanent injunction as a remedy for a violation "of any provision of law enforced by the [FTC],"[40] when "there exists some cognizable danger of recurrent violation"[41] "or some reasonable likelihood of future violations."[42] Applying that standard to Braun, the district court "ha[d] no trouble finding a permanent injunction prohibiting Mr. Braun from making merchant cash advances or participating in debt collection activities (as defined the FTC's proposed order) to be appropriate."[43] The district court also found appropriate a permanent injunction requiring Braun to refrain from illegal

38. *Id*. at *11, 13.

39. *Id*. at *11–13.

40. *See* 15 U.S.C. § 53(b).

41. *SJ Ruling*, 2023 WL 6281138 (S.D.N.Y., Sept. 27, 2023), at *14 (quoting United States v. W.T. Grant Co., 345 U.S. 62 9, 633 (1953)).

42. *SJ Ruling*, 2023 WL 6281138 at *14 (quoting FTC v. Minuteman Press, 53 F. Supp. 2d 248, 260 (E.D.N.Y. 1998)).

43. *SJ Ruling*, 2023 WL 6281138 at *14.

conduct and to request removal of negative credit reports issued against customers.[44]

In February 2024, subsequent to the district court's summary judgment ruling, the case went to trial. Following the trial, the district court issued the post-trial ruling, which addressed the three issues that the summary judgment ruling had left open regarding the relief to be awarded for Braun's violation of the GLBA Pretexting Prohibition: (1) what amount of money should be awarded under Section 19(a)(1) of the FTC Act for consumer redress, (2) whether Braun acted "knowingly" when violating GLBA Section 521(a), as required for a civil penalty to be imposable by reason of that violation under FTC Act Section 5(m)(1)(A), and (3) if Braun did act knowingly, what amount of civil penalties should be imposed under Section 5(m)(1)(A).[45] As to the first question, the district court concluded that the FTC's trial evidence "reasonably approximated the defendants' unjust gains" and accordingly held that Braun was liable for $3,421,067 under Section 19(a)(1) of the FTC Act to redress the harm to individual consumers caused by the amounts the defendants' "over-collected or underfunded" pursuant to the MCA Agreements.[46] As to the second question, the jury in the trial had concluded that Braun acted "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" when violating the GLBA Pretexting Prohibition, and the district court concluded it was bound by that conclusion.[47] As to the third question, the district court held that (a) because Braun exercised "considerable control and authority" over RCG, gained "substantial money" from his work, and showed "utter disregard

44. *Id*.

45. *PT Ruling*, 2024 WL 449288 (S.D.N.Y., Feb. 6, 2024) at *1.

46. *Id*. at *8–10.

47. *Id*. at *1 & *10.

and contempt" for consumers, the civil penalty amount should be calculated at $18,000 per violation, against a maximum per-violation penalty of either $50,120 or $51,744[48]; (b) Braun had violated the GLBA Pretexting Prohibition 942 times, because RCG overcollected on 396 and underfunded on 546 of the MCA Agreements; and (c) the FTC was therefore entitled to a total civil penalty award of $16,956,000 ($18,000 multiplied by 942).[49]

B. *Analysis of the District Court's Interpretation and Application of the GLBA Pretexting Prohibition in RCG Advances*

RCG Advances appears to be the first litigated case brought by the FTC to enforce the GLBA Pretexting Prohibition. For this reason alone, the district court's rulings in *RCG Advances* are groundbreaking and warrant significant attention. Moreover, those rulings address numerous questions of first impression as to the interpretation and application of the GLBA Pretexting Prohibition. For example, *RCG Advances* addresses not just the showing the FTC must make to establish a *corporate* violation of the GLBA Pretexting Prohibition, but also what showing is required to hold a person *individually* liable for such a corporate violation. Further, *RCG Advances* addresses what showing must be made to entitle the FTC to remedy either a corporate or an individual violation of the GLBA Pretexting Prohibition by an award of (1) compensatory damages to any consumers injured by the violation; (2) civil monetary penalties; and/or (3) a permanent injunction.

RCG Advances therefore stands to become a veritable road map for both the FTC and any future defendant in any future FTC enforcement action under the GLBA Pretexting

48. The parties disputed the applicable maximum amount, and the district court found it unnecessary to resolve that dispute. *Id*. at *11 n.9.

49. *Id*. at *10–11.

Prohibition. In an effort to assist future litigants and courts in following (or not) the GLBA Pretexting Prohibition roadmap created by *RCG Advances*, we set forth below our analysis of each component of the district court's rulings with respect to the theories of corporate liability, individual liability, and relief advanced by the FTC under the GLBA Pretexting Prohibition.[50]

Corporate Liability. As noted in Part III.A *supra*, in *RCG Advances* the district court found a violation of the GLBA Pretexting Prohibition based on RCG's contractual promise to its customers that it "would collect a specified amount from customers and customers would receive a specified lumpsum amount upfront," a promise that RCG had a "practice" of breaching. In reaching this conclusion, the district court reasoned as follows:

1. RCG made the promise in question in order to obtain from RCG's customers their bank account information so as to enable RCG to make deposits into and withdrawals from those customers' bank accounts, information that constituted "customer information of a financial institution" within the meaning of the GLBA Pretexting Prohibition.
2. RCG had no intention of performing that promise at the time it was made, making the promise not merely a contractual obligation to a customer of a financial institution,

50. As will be seen, we take issue with a number of aspects of the district court's rulings in *RCG Advances*. In so doing, we intend no disrespect whatsoever for the district court. In nearly every aspect of our disagreement with the district court's rulings, the district court was either (1) led into error by the FTC's erroneous assertions as to the scope of its enforcement authority or (2) never faced with an objection by the defendant as to the FTC's erroneously asserted position or (3) both. We therefore offer our conclusions regarding the district court's rulings in *RCG Advances* not as a criticism of the district court but rather to assist future litigants on both sides of the "v." in preventing future courts from committing similar errors.

but a "false, fictitious, or fraudulent statement or representation to a customer of a financial institution" within the meaning of the GLBA Pretexting Prohibition.

3. The RCG promise therefore violated the GLBA Pretexting Prohibition, (a) first because the statute by its express terms extends to *any* "false, fictitious, or fraudulent statement or representation" that (as was the case here) otherwise satisfies the language of GLBA Section 521(a), and (b) second because the statute at a bare minimum extends to a statement or representation that (as was the case here) independently constitutes a "deceptive" act or practice prohibited by FTC Act Section 5(a) and otherwise satisfies the language of GLBA Section 521(a).[51]

The district court's reasoning in points 1 and 3(a) above was sound given the language of the GLBA Pretexting Prohibition itself. Moreover, its reasoning in point 2 above likewise appears to have been sound given the defendant's apparent concession that RCG had no intention of performing the promise at the time it was made.[52] But the district court's reasoning in point 3(b)

51. *See SJ Ruling*, 2023 WL 6281138 (S.D.N.Y., Sept. 27, 2023), at *9–10.

52. *See id*. at *9 (noting defendant's argument that "never having the intent to perform contractual obligations is different in kind from the false statements the GLB Act was intended to reach"). At least in some jurisdictions, a promise to perform a contractual obligation may be fraudulent if "the promisor had no intention to perform at the time the promise was made." *See, e.g.*, Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000). Holdings of this sort support the district court's apparent theory that proof of an intent not to perform a contractual promise can make the promise a "false, fictitious, or fraudulent statement or representation" within the meaning of the GLBA Pretexting Prohibition. The actual evidence that the district court presented as to RCG's alleged intent not to perform was not particularly compelling, however, as that evidence indicated that as to most customers RCG actually *did not* follow its alleged "practice" of breaching the promise in question and, instead, fully complied with that promise. *See SJ Ruling*, 2023 WL 6281138 at *11 (noting that the FTC had presented evidence that

above, whereby the district court offered an alternative, fallback ground for its finding of a violation of the GLBA Pretexting Prohibition, does not withstand scrutiny. Statements do not need to be "false, fictitious, or fraudulent" to violate Section 5(a)'s prohibition on deceptive acts and practices; rather, they need only be materially misleading. Thus, statements that are literally true can violate Section 5(a)'s deception prong where they are misleading by implication or omission, but such statements could never be "false, fictitious, or fraudulent" within the meaning of the GLBA Pretexting Prohibition. Also, to prevail on a claim under Section 5(a)'s deception prong the FTC need not prove that the defendant's materially misleading statements were made with an intent to defraud or deceive or were made in bad faith,[53] but such proof might well be required to establish a "false, fictitious, or fraudulent" statement or representation within the meaning of the GLBA Pretexting Prohibition. The district court therefore erred in defending its finding of GLBA Pretexting Prohibition liability on the fallback theory that the GLBA Pretexting Prohibition's requirement of a "false, fictitious, or fraudulent" statement or representation "certainly reaches statements that would be independently violative of Section 5 of the FTCA."[54]

---

only 26.4% of RCG's customers were overcharged at least once, and only 36.4% had fees "over-deducted" (and thus had their accounts undercredited) at least once, over a five-year period). But in opposing summary judgment, the defendant did not contest RCG's alleged intent not to perform, so the district court seems to have taken that particular point as having been conceded.

53. *See* FTC v. Moses, 913 F.3d 297, 306 (2d Cir. 2019); FTC v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d Cir. 2016) ("[I]t is enough that the representations or practices were likely to mislead consumers acting reasonably.") (internal quotation and citation omitted); FTC v. Five-Star Auto Club, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000) ("It is not necessary to prove Defendants' misrepresentations were made with an intent to defraud or deceive, or were made in bad faith to establish a Section 5 violation.").

54. *See SJ Ruling*, 2023 WL 6281138 at *10.

Individual Liability. As discussed in Part III.A above, the district court's ruling in *RCG Advances* that Braun was individually liable for RCG's violation of the GLBA Pretexting Prohibition rested on the district court's conclusion that the standard for assessing individual liability under the GLBA, at least in the context of a GLBA claim brought by the FTC, is the same standard that applies to assessing individual liability under the FTC Act.[55] The district court arrived at this conclusion based on *FTC v. Moses*,[56] which held that the standard for assessing individual liability under the FDCPA, at least in the context of a FDCPA claim brought by the FTC, is the same standard that applies to assessing individual liability under the FTC Act.[57] In so holding, the Second Circuit reasoned that because FDCPA violations are statutorily deemed to be violations of Section 5(a) of the FTC Act and to be subject to enforcement in the same manner as if they had been violations of an FTC trade regulation rule, "it follows, we conclude, that the FTCA individual liability standard applies" to claims of individual FDCPA liability asserted by the FTC.[58] In *RCG Advances*, the district court concluded that the "logic [of *Moses*] demands that the same result obtain here" and accordingly carried that "logic" over to the GLBA Pretexting Prohibition by applying the FTC Act's individual liability standard to the FTC's claim that Braun was individually liable for RCG's violation of GLBA Section 521(a).[59] We agree that if *Moses* were logical, its logic would apply equally in the context of an FTC claim under the GLBA Pretexting Prohibition, but we

55. *Id*. at *10.

56. 913 F.3d 297 (2d Cir. 2019).

57. *Id*. at 307.

58. *Id*.

59. *SJ Ruling*, 2023 WL 6281138 at *10. The district court's ruling on this point was recently followed in *FTC v. Celsius Network Inc.*, 2023 WL 8603064, *5 (S.D.N.Y. Dec. 12, 2023).

disagree with the supposed "logic" of *Moses*. Just because a violation of the FDCPA or the GLBA Pretexting Prohibition can be *enforced against* by the FTC as if it were a violation of Section 5(a) of the FTC Act and/or an FTC trade regulation rule does not mean, logically or otherwise, that the FTC Act must be used to determine whether a violation of the FDCPA or the GLBA Pretexting Prohibition *can be found in the first place*. Indeed, to us *Moses* illogically turns the statutory language on its head, by deeming individual conduct to violate the FDCPA where it would have violated the FTC Act, rather than (as the statute commands) deeming individual conduct to violate the FTC Act only if it violated the FDCPA. In our view then, in *RCG Advances* Braun's individual liability for RCG's violation of GLBA Section 521(a) should have been assessed under the GLBA's standard for individual liability, which may well differ substantially from the FTC Act's standard for individual liability.[60]

Relief. As discussed in Part III.A *supra*, in *RCG Advances* the relief awarded by the district court as a remedy for the violation it found of the GLBA Pretexting Prohibition included (1) consumer redress under Section 19 of the FTC Act; (2) civil monetary penalties under Section 5(m)(1)(A) of the FTC Act; and (3) a permanent injunction under Section 13(b) of the FTC Act. We set forth below our analysis of the district court's three remedy rulings.

1. **Consumer Redress**

Under Section 19(a) of the FTC Act, an award of consumer redress is permissible only where the defendant

60. We unfortunately have found no case purporting to set forth the standard for individual liability under either GLBA Section 521(a) or the GLBA generally. We do note, however, that other statutes have stricter standards for individual liability than the standard applied under the FTC Act. *See* FTC v. Ross, 743 F.3d 886, 892 (4th Cir. 2014) (contrasting standard for individual securities fraud liability with the FTC Act individual liability standard).

either (1) violates a "trade regulation rule" (i.e., a rule enacted under FTC Act Section 18(a)(1)(B) that defines with specificity acts or practices that are unfair or deceptive within the meaning of FTC Act Section 5(a)),[61] or (2) has been found in a final FTC cease-and-desist order entered pursuant to FTC Act Section 5(b) to have committed an unfair or deceptive trade practice in violation of FTC Act Section 5(a).[62] As discussed in Part III.A *supra*, the district court found that the FTC was entitled to recover consumer redress by reason of the defendant's violation of the GLBA Pretexting Prohibition[63] and further found that the amount of recoverable consumer redress was $3,421,067.[64] Both findings were correct, in our judgment. The district court based the first finding on its conclusion that GLBA authorizes the FTC to enforce the GLBA Pretexting Prohibition by treating violations of the GLBA Pretexting Prohibition as violations of a trade regulation rule,[65] and indeed that is the only reasonable reading of the relevant statutory language.[66] The

61. *See* 15 U.S.C. § 57b(a)(1).

62. *See* 15 U.S.C. § 57b(a)(2).

63. *See SJ Ruling*, 2023 WL 6281138 at *11.

64. *See PT Ruling*, 2024 WL 449288 (S.D.N.Y., Feb. 6, 2024) at *8–10.

65. *See SJ Ruling*, 2023 WL 6281138 at *11.

66. As the district court pointed out (*see SJ Ruling* at *11), GLBA Section 522(a) allows the FTC to enforce the GLBA Pretexting Prohibition "in the same manner and with the same power and authority" that the FTC has under the FDCPA, see 15 U.S.C. § 6822(a), and the FDCPA in turn allows the FTC to use "all of its functions and powers" under the FTC Act to enforce compliance with the FDCPA and, in so doing, to treat an FDCPA violation "in the same manner as if it had been a violation of a [FTC] trade regulation rule." 15 U.S.C. § 1692l(a). Given this statutory language, the conclusion is inescapable that, for purposes of the FTC's enforcement of the GLBA Pretexting Prohibition, violations of the GLBA Pretexting Prohibition may be treated as violations of a trade regulation rule.

district court thus correctly concluded that, under FTC Act Section 19(a)(1), the defendant's violation of the GLBA Pretexting Prohibition in and of itself was sufficient to entitle the FTC to recover consumer redress for the injury consumers suffered by reason of that violation. The district court based the second finding on a statistical study done by the FTC that estimated the aggregate amount by which RCG either overdebited or underfunded its customers.[67] Given that the defendant made no effort to challenge the reasonableness of the FTC's statistical methodology and presented no calculation of his own of the aggregate amount of the overdebiting and underfunding that occurred,[68] the district court was well within its discretion to accept the essentially uncontradicted evidence the FTC offered on this point.

2. Civil Monetary Penalties

Under Section 5(m)(1)(A) of the FTC Act, an award of a civil monetary penalty is permissible only where the defendant (1) violates a trade regulation rule (2) "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" that the violative act or practice is unfair or deceptive and is prohibited by the rule.[69] As discussed in Part III.A *supra*, in *RCG Advances* the district court's summary judgment ruling found that the defendant had violated a trade regulation rule,[70] and the district court's post-trial decision found that the defendant "knowingly"

67. *See PT Ruling*, 2024 WL 449288 at *9.

68. *See id*. at *10.

69. 15 U.S.C. § 45(m)(1)(A).

70. *See SJ Ruling*, 2023 WL 6281138 at *13.

committed that violation[71] and should be assessed a Section 5(m)(1)(A) penalty in the amount of $16,965,000.[72]

The district court's finding of a violation of a trade regulation rule seems to us to be correct. The district court based that finding on its conclusion that the GLBA authorizes the FTC to enforce the GLBA Pretexting Prohibition by treating violations of the GLBA Pretexting Prohibition as violations of a trade regulation rule.[73] That conclusion was in our view correct, for the reasons discussed above in relation to the district court's ruling on consumer redress.

The district court's finding of a "knowing" violation of Section 521(a) on the defendant's part seems highly questionable to us. The district court based that finding on the jury's supposedly "binding" trial finding that the defendant "knowingly violated the GLB Act."[74] But the jury's finding is only binding on the district court to the extent the district court properly instructed the jury regarding the law on a "knowing" violation of the GLBA Pretexting Prohibition (which we believe it did not do[75]) and to the extent the jury

---

71. *See PT Ruling*, 2024 WL 449288 at *10.

72. *See id*. at *10–11.

73. See *SJ Ruling*, 2023 WL 6281138 at *13.

74. *See PT Ruling*, 2024 WL 449288 at *1 & *10.

75. The district court instructed the jury that in order to find a "knowing" violation of GLBA Section 521(a) the jury needed to find that the defendant had actual knowledge that RCG made material misrepresentations to its customers and that the defendant "knew or should have known that [the misrepresentations] were violating the GLB Act," meaning that he had "actual knowledge that [RCG] was violating the GLB Act or that a reasonable person under the circumstances would have known that there was a federal law prohibiting deceptive practices in making agreements like" RCG's agreements with its customers. *See* The Court's Instructions to the Jury, Instruction No. 10, FTC v. RCG Advances, LLC, No. 1:20-cv-04432 (S.D.N.Y, filed Jan. 10, 2024). As the district court's summary judgment ruling pointed out (*see SJ*

was presented with evidence from which a reasonable fact-finder could find that the defendant committed a "knowing" violation of the GLBA Pretexting Prohibition (which

---

Ruling, 2023 WL 6281138 at *13), there is case law supporting the district court's use of a "should have known" standard for determining whether, per Section 5(m)(1)(A), the defendant had "knowledge fairly implied on the basis of objective circumstances that [his conduct in violation of GLBA Section 521(a) was] prohibited by" GLBA Section 521(a), although that statutory language certainly could be read to require something more than that the defendant "should have known" he was violating the statute in question. However, even assuming that part of the Court's instruction was correct, we believe the district court was on shaky ground in describing the "should have known" standard as being whether a "reasonable man" would have known that the conduct in question violated the GLBA Pretexting Prohibition. We believe a more reasonable "should have known" standard would be the standard used for determining individual liability under the FTC Act, under which an individual "should have known" that the company's conduct violated the FTC Act only where the individual "was recklessly indifferent to its [violative nature], or had an awareness of a high probability of [its being violative] and intentionally avoided learning of the truth." FTC v. Moses, 913 F.3d 297, 307. Moreover, the district court in our view was also on shaky ground in characterizing the GLBA Pretexting Prohibition as a "federal law prohibiting deceptive practices in making agreements like" the MCA Agreements. That language sounds like a description of FTC Act Section 5(a)'s deception prong, rather than a description of the GLBA Pretexting Prohibition. The GLBA Pretexting Prohibition would be more accurately characterized as a "federal law prohibiting false, fictitious, or fraudulent statements in order to obtain customer information of a financial institution." Given the substantial differences between the two statutes, having actual knowledge or reason to know of Section 5(a)'s deception prong, or that one's conduct was violating that prong, would certainly not equate to having actual knowledge or reason to know of the GLBA Pretexting Prohibition or that one's conduct was violating *that* requirement. Yet that is what the district court's jury instruction mistakenly suggests. And the district court's mistake was material, because the defendant's mere knowledge or reason to know that RCG was violating a "federal law prohibiting deceptive practices" (*i.e.*, FTC Act Section 5(a)) would not be knowledge sufficient to justify a Section 5(m)(1)(A) penalty.

seems highly questionable to us, from what we can tell from the district court's summary judgment and post-trial rulings[76]).

---

76. The district court's post-trial ruling does not set forth what evidence the jury was presented in regard to the defendant's alleged "knowing" violation of the GLBA Pretexting Prohibition, so we cannot be sure on this point. At summary judgment, however, the only evidence the FTC offered on the "knowing" violation point was two documents showing that the defendant was aware of the existence of *the GLBA in general*. *See SJ Ruling*, 2023 WL 6281138 at *13. The district court ruled that this evidence was insufficient to conclusively establish a "knowing" violation of Section 521(a) on the defendant's part, but it then went on to find this evidence sufficient to enable a reasonable factfinder to find such a violation at trial. *Id*. We respectfully disagree with the district court on the latter point. Evidence that the defendant knew of the existence of *the GLBA in general* does not raise an inference that he knew of the existence of *the GLBA Pretexting Prohibition in particular*, much less an inference that he knew RCG was violating the GLBA Pretexting Prohibition by its misrepresentations to its customers. Nor does such evidence suggest anything about what a reasonable person would know regarding the GLBA or the GLBA Pretexting Prohibition or what conduct violates the GLBA Pretexting Prohibition. After all, the GLBA Pretexting Prohibition is just one subsection of a massive statute that contains seven separate Titles, 20 separate Subtitles, 141 separate sections, and certainly more than 1000 (we haven't counted) other subsections. Moreover, FTC enforcement of the GLBA Pretexting Prohibition was virtually unheard of prior to *RCG Advances*, as prior to the Supreme Court's decision in AMG Capital Management, LLC. v. FTC, 593 U.S. 67 (2021), the FTC could have used Section 5(a)'s deception prong to challenge, and FTC Act Section 13(b) to seek consumer redress for, any conduct that might have violated the GLBA Pretexting Prohibition. As a result, as the district court pointed out, no litigated decisions existed as to the scope of the GLBA Pretexting Prohibition prior to its rulings in *RCG Advances*. *See SJ Ruling*, 2023 WL 6281138 at *9. Indeed, many privacy and cybersecurity lawyers (including the senior author of this Article) had never had any occasion even to encounter the GLBA Pretexting Prohibition prior to *RCG Advances*. And the FTC's original complaint in *RCG Advances* did not even allege a violation of the GLBA Pretexting Prohibition, suggesting that *even the FTC* did not have reason to know that the facts it was alleging amounted to a violation of the GLBA Pretexting Prohibition. With all that being the case, a

> Finally, we believe the district court's finding as to the amount of the Section 5(m)(1)(A) fine was clearly incorrect. The district court based that finding on its conclusion that the defendant had committed 942 violations of the GLBA Pretexting Prohibition during the five-year limitations period, consisting of the estimated 546 RCG customers who were overdebited, and the estimated 396 RCG customers who were underfunded, during that five-year period under the 1,499 MCA Agreements that RCG then had in place with its customers.[77] Evidently, the district court assumed that the defendant had violated the GLBA Pretexting Prohibition only if, and only when, RCG overdebited or underfunded a customer pursuant to one of the MCA Agreements.[78] This assumption seems to us to have been clearly erroneous.[79] By

---

person's mere knowledge of the existence of GLBA in general would not, in our view, give anyone reason to know of the requirements of and the sort of conduct that violates the GLBA Pretexting Prohibition. Thus, assuming that at trial the jury was presented with the same "evidence" of the defendant's "knowing" violation of the GLBA Pretexting Prohibition that the FTC had relied on at summary judgment, and was presented with no other evidence that went to the issue (we are not aware of any), we believe the district court should have directed a verdict in the defendant's favor on this point on the ground that no reasonable jury could find a knowing GLBA Pretexting Prohibition violation based on that evidence.

77. *See PT Ruling*, 2024 WL 449288 at *10–11.

78. The FTC appears to have made this very same assumption, as its summary judgment motion calculated the proposed Section 5(m)(1)(A) penalty based on its expert's estimate of the number of customers who were overdebited or underfunded during the five-year limitations period. *See* FTC's Memorandum in Support of Its Motion for Summary Judgment Against Defendant Jonathan Braun, FTC v. RCG Advances, LLC, No. 1:20-cv-04432, at 35-36 (S.D.N.Y, filed Apr. 8, 2022).

79. Even if this assumption had been correct, it seems to us the penalty amount was miscalculated, because under this assumption the number of GLBA Pretexting Prohibition violations should have been calculated not based on the *number of customers* who suffered overdebiting or underfunding

its own express terms, the GLBA Pretexting Prohibition is violated when "customer information of a financial institution" *is obtained* by a third party by means of a false, fictitious, or fraudulent statement or representation—not when such information, having been so obtained, is thereafter misused by the third party to the detriment of the customer in question. In *RCG Advances*, then, the number of GLBA Pretexting Prohibition violations should have been calculated based on the number of MCA Agreements that, during the five-year limitations period, RCG *entered into* and by which it thereby unlawfully obtained the customer's bank account information.[80] It should have been irrelevant to the calculation of the number of violations whether or how often the customer's bank account information was thereafter misused to the detriment of the customer.

3. Permanent Injunction

Under Section 13(b) of the FTC Act, entry of a permanent injunction against conduct violative of "any provision of law enforced by the [FTC]" is permissible in certain circumstances.[81] As discussed in Part III.A *supra*, in *RCG Advances* the district court's summary judgment ruling applied the *W.T. Grant* standard and found that the FTC was entitled to a Section 13(b) permanent injunction against the defendant,

---

the five-year limitations period, but the *number of times* overdebiting or underfunding occurred during that period. In other words, under this assumption there should have been two violations—not one violation—if a customer was overdebited twice during the limitations period.

80. The district court's rulings in *RCG Advances* do not say how many of the 1,499 MCA Agreements that RCG had in place during the five-year limitations period were entered into during that period, so we are not able to say whether the district court's finding of 942 GLBA Pretexting Prohibition violations over- or undercalculated the actual number of GLBA Pretexting Prohibition violations that occurred.

81. *See* 15 U.S.C. § 53(b).

on the ground that "there exists some cognizable danger of recurrent violation" by the defendant of the GLBA Pretexting Prohibition and FTC Act Section 5(a).[82] Even assuming the district court correctly applied the *W.T. Grant* standard, we believe the district court's entry of a Section 13(b) permanent injunction was erroneous, as it failed to take account of certain of the other statutory predicates to the entry of such an injunction and the FTC's failure to establish those other predicates in *RCG Advances*.

First, by its express terms FTC Act Section 13(b)(1) permits the FTC to commence a civil action "to enjoin" a particular act or practice only where the FTC "has reason to believe" that the defendant "is violating, or is about to violate, any provision of law enforced by the [FTC]."[83] In *RCG Advances*, neither the FTC's original complaint nor the amended complaint it filed approximately a year later made any allegation to the effect that the defendants were violating or were about to violate either the GLBA Pretexting Prohibition or FTC Act Section 5(a). Moreover, at summary judgment the FTC advanced no argument and proffered no evidence that the defendant was violating or was about to violate either of those statutes, and the district court certainly made no finding to this effect.[84] Absent any such allegation, argument, evidence, or finding, no authority existed for the Section 13(b) injunction the district court entered in *RCG Advances*.[85]

---

82. *See SJ Ruling*, 2023 WL 6281138 (S.D.N.Y., Sept. 27, 2023), at *14 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

83. 15 U.S.C. § 53(b)(1).

84. *See SJ Ruling*, 2023 WL 6281138 at *14.

85. *See* FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 161 (3d Cir. 2019) (to state a claim for a permanent injunction under Section 13(b) of the FTC Act,

Second, by its express terms Section 13(b)(2) permits the FTC to commence a civil action "to enjoin" a particular act or practice only where the FTC "has reason to believe" that "the enjoining thereof *pending the issuance of a complaint by the Commission* and *until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become fina*l, would be *in the interest of the public*."[86] In *RCG Advances*, neither the FTC's original complaint nor the amended complaint it filed approximately a year later made any allegation to the effect that it "would be in the interest of the public" to enter injunctive relief "pending the issuance," and during the pendency, of an FTC administrative complaint. Nor did the FTC make any argument or offer any evidence to this effect at summary judgment, and the district court certainly made no such finding in granting the permanent injunction requested by the FTC. Indeed, satisfying Section 13(b)(2) would have been impossible in *RCG Advances*, as the FTC never filed an administrative complaint under FTC Act Section 5(b) with respect to the acts and practices that its complaint alleged violated the GLBA Pretexting Prohibition and FTC Act Section 5(a). Nor did it ever seek interim injunctive relief of ***any*** sort, much less of the sort described in Section 13(b)(2), namely an injunction pending the issuance and during the pendency of an FTC administrative complaint.[87] Absent any such allegation, argument, evidence, or finding,

"the FTC must plead that [the defendant] 'is' violating or 'is about to' violate [a] law" enforced by the FTC).

86. 15 U.S.C. § 53(b)(2) (emphasis added).

87. The FTC's failure to seek interim injunctive relief in *RCG Advances* strongly suggests that *RCG Advances was not* a case where, as required by Section 13(b)(1), the FTC had reason to believe the defendants "[were] violating, or [were] about to violate, any provision of law enforced by the [FTC]."

no authority existed for the Section 13(b) permanent injunction the district court entered in *RCG Advances*.[88]

Third, as the Supreme Court noted in *AMG Capital Management, LLC v. FTC*, the "appearance of the words ''permanent injunction'' (as a proviso [following after Section 13(b)'s authorization of interlocutory injunctive relief]) suggests that those words are directly related to a previously issued preliminary injunction."[89] While this statement by the Supreme Court was dictum, and while several courts have subsequently refused to follow that dictum[90], we

88. It might be argued that our first and second points of disagreement with the district court's Section 13(b) ruling are invalid because the FTC need only satisfy Sections 13(b)(1) and 13(b)(2) where it is seeking interim—rather than permanent—injunctive relief under Section 13(b). *See, e.g.*, FTC v. American Future Systems, Inc., No. 20-CV-2266, 2021 WL 3185777 at *1, n.1 (PartA) (E.D. Pa. July 26, 2021) (holding that the FTC can seek a Section 13(b) permanent injunction without ever filing (or intending to file) an administrative complaint). Such an argument would however run afoul of the plain language of Section 13(b) itself, which requires the Section 13(b)(1) and 13(b)(2) predicates to be met in any action "to enjoin"—not to "preliminarily" or "temporarily" or "interlocutorily" enjoin—an act or practice thereunder. That argument would also run afoul of the overall structure of Section 13(b), which sets the Section 13(b)(1) and 13(b)(2) predicates off from the rest of Section 13(b) in a fashion that can only be read as intending that Section 13(b)'s remaining language, including its permanent injunction proviso, is *all* subject to satisfaction of the Section 13(b)(1) and 13(b)(2) predicates.

89. 593 U.S. 67, 76 (2021).

90. *See, e.g.*, FTC v. Am. Future Sys., Inc., No. 20-CV-2266, 2021 WL 3185777, at *1 (E.D. Pa. July 26, 2021) ("Neither *AMG Capital* nor any other case in this Circuit or others requires FTC to seek or obtain a temporary restraining order or preliminary injunction before pursuing permanent injunctive relief under Section 13(b)."); FTC v. Elec. Payment Sols. of Am. Inc., No. 17-CV-2535, 2021 WL 3661138, at *16 (D. Ariz. Aug. 11, 2021) ("the provision of §13(b) authorizing the FTC to seek a permanent injunction operate[s] separately from the provision authorizing the FTC to seek a preliminary injunction while pursuing administrative proceedings"); FTC v. Neora LLC, 552 F.

believe that the structure of Section 13(b)'s statutory language inescapably conditions the availability of a Section 13(b) permanent injunction on the FTC's having sought and obtained interlocutory injunctive relief with respect to whatever act or practice the FTC is seeking to permanently enjoin. After all, given that as discussed above Section 13(b)(2) expressly conditions *any* action "to enjoin" an act or practice under Section 13(b) on the FTC's having reason to believe that interim injunctive relief with respect to such act or practice is in the interest of the public, how is it plausible that Congress did not also intend to condition any such action on the FTC's actually *acting* on that required belief by seeking and obtaining the interim injunctive relief it believes to be in the public interest? If our (and apparently the Supreme Court's) reading of that statutory language is correct, then the district court's entry of a Section 13(b) permanent injunction in *RCG Advances* was erroneous, as the FTC never sought, much less obtained, a Section 13(b) interlocutory injunction in that case.

Fourth, by its express terms Section 13(b)'s permanent injunction proviso says that the FTC may seek a permanent

---

Supp. 3d 628, 635-36 (N.D. Tex. 2021)(rejecting the argument that, under Section 13(b), "permanent injunctions are wholly unavailable absent a prior administrative proceeding or previously issued preliminary injunction or temporary restraining order," reasoning that this argument was "inconsistent" with Section 13(b)'s "legislative history and relevant precedent"). But each of these three courts reached its conclusion based on a still-binding pre-*AMG* Court of Appeals precedent that the court believed to preclude it from following the Supreme Court's *AMG* dictum on this point. Also, while in FTC v. Hoyal & Assocs., Inc., 859 F. App'x 117, 120 (9th Cir. 2021), the Ninth Circuit issued a "non-precedential" opinion reaffirming its pre-*AMG* holdings regarding the availability of a Section 13(b) permanent injunction ("We have long held that the FTC can obtain injunctive relief without initiating administrative proceedings."), it did so without considering the *AMG* dictum that calls the continuing validity of those holdings into question.

injunction thereunder only "in proper cases" and that the court may issue such an injunction only "after proper proof."[91] In *RCG Advances* the district court gave no consideration as to whether the action was a "proper case" for the FTC to seek a Section 13(b) permanent injunction, and it may well be that neither party raised the issue to the district court. As discussed below, we believe *RCG Advances* was not a "proper case" for the FTC to seek a Section 13(b) permanent injunction and that the district court accordingly erred in entering such an injunction in that case.

The sparse case law under Section 13(b)'s permanent injunction proviso offers little guidance as to what constitutes a "proper case" for a Section 13(b) permanent injunction.[92] Neither does Section 13(b)'s legislative history or the plain meaning of the word "proper" provide any useful interpretive guidance.[93] For its part, the FTC initially advanced but later withdrew an interpretation of a "proper case" as being a "clear case" of a violation of the statute in question.[94] Today, however, the FTC evidently advocates for a "proper case" as being one where the violation either is ongoing or

91. 15 U.S.C. § 53(b).

92. *See* Howard Beales III & Timothy J. Muris, S*triking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L. J. 1, 31 (2013) (concluding that "the case law does not answer the question what is a 'proper case'" under Section 13(b)). Our review of the post-2013 case law likewise reveals no answer to this question, although one decision came close to adopting (and could be read as having adopted) the standard for "proper case" advocated in Beales & Muris. *See infra* note 99.

93. *Id*. (noting that "[t]he term ''proper'' simply means ''suitab[le],'' and does not tell us whether a case is one that is suitable for an award of" a Section 13(b) permanent injunction and that "the legislative history of Section 13(b) . . . does not specifically address this point").

94. *See id*. at n.146.

likely to recur.[95] That interpretation, however, would render the "proper cases" requirement completely superfluous, as it would simply duplicate the long-standing requirement for entry of a permanent injunction by a federal court that the Supreme Court enunciated (some two decades before Section 13(b) was added to the FTC Act) in *W.T. Grant*. Moreover, that interpretation would strip Section 13(b)'s separate "after proper proof" permanent injunction precondition of any possible independent meaning, because the "after proper proof" predicate to Section 13(b) permanent injunctive relief is where—if anywhere—Congress might reasonably be thought to have statutorily enshrined the *W.T. Grant* standard. We therefore find the FTC's interpretation of "proper cases" to be unpersuasive.

For similar reasons, we are not persuaded by interpretations that read "proper cases" to mean cases in which the FTC has satisfied one or more of the above-discussed statutorily specified preconditions for a Section 13(b) permanent injunction.[96] Under those interpretations the "proper cases" requirement accomplishes nothing, as the preconditions are all independently statutorily specified and thus there was no need for Congress to limit Section 13(b) permanent injunctions to "proper cases" to make those preconditions

---

95. *See, e.g.*, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, FTC v. Quincy Bioscience Holding Co. Inc., No. 1:17-cv-00124, at 43 (S.D.N.Y., filed June 12, 2022).

96. *See, e.g.*, Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment, FTC v. Quincy Bioscience Holding Co. Inc., No. 1:17-cv-00124, at 35 (S.D.N.Y., filed July 11, 2022) (arguing that "Section 13(b)'s provision for permanent injunctive relief in ''proper cases'' means cases in which the agency has either commenced a contemporaneous administrative proceeding and/or sought preliminary relief at the outset of the federal court litigation").

statutorily applicable to requests for permanent injunctive relief under Section 13(b) .

We believe the far most persuasive interpretation of "proper cases" is advanced by two former high-ranking FTC officials, Howard Beales III and Timothy J. Muris,[97] who argue that the interpretation of "proper cases" should focus on the circumstances where it made sense for Congress to permit the FTC to forego the standard FTC Act Section 5(b) administrative process, and instead resort to a Section 13(b) judicial proceeding, in seeking to have the violative conduct prospectively, and permanently, enjoined. They conclude such circumstances exist, and therefore a "proper case" for seeking a Section 13(b) permanent injunction exists, only where "the case presents a straightforward violation of Section 5 such that the FTC's expertise [and therefore an FTC Act Section 5(b) administrative proceeding in which such expertise could best be brought to bear] is not necessary."[98] A "proper case," per Beales & Muris, would therefore not be one where the FTC "seeks to advance or clarify the law."[99]

---

97. Beales & Muris, *supra* note 92.

98. *Id*. at 32.

99. *Id*. The approach advocated in Beales & Muris was quoted with apparent approval in *FTC v. Surescripts, LLC*, 424 F. Supp. 3d 92, 99 (D.D.C. 2020). There the court found "considerable weight to Surescripts's argument that 'proper cases' is not synonymous with 'all cases,' for such an interpretation would make the phrase superfluous." *Id*. at 98. But the court found that while authorities such as Beales & Muris "conclude that permanent injunctions are ill suited for cases requiring the FTC's expertise and the development of law through the administrative process," those authorities "do not then go on to preclude a case brought under circuit precedent." *Id*. at 100. Thus, because "[t]he FTC grounds its legal argument here in Circuit precedent," the court found that the FTC's complaint adequately alleged a "proper case" for Section 13(b) relief. *Id*. at 98. In *RCG Advances*, of course, the FTC had no circuit

> Had the Beales & Muris interpretation of "proper cases" been applied in *RCG Advances*, the district court surely would have rejected the FTC's request for a Section 13(b) permanent injunction. As the district court's summary judgment decision amply illustrates on repeated occasions, the FTC's theory of liability and relief in *RCG Advances* raised numerous novel, never-before-decided issues under FTC Act Section 5 and the GLBA Pretexting Prohibition and thus in no way, shape, or form "present[ed] a straightforward violation" of those statutes. Instead, it unambiguously was a case where the FTC sought to "advance or clarify the law."[100] For this further reason, then, we believe the district court's entry of a Section 13(b) permanent injunction in *RCG Advances* was in error.

---

precedent on which to ground its interpretations of the GLBA Pretexting Prohibition, so the FTC's GLBA Pretexting Prohibition claim in *RCG Advances* was not a "proper case" for Section 13(b) relief under the test employed in *Surescripts*.

100. *See, e.g.*, Alysa Hutnik, Donnelly McDowell & John Villafranco, *"FTC Continues Push for Civil Penalties with Important Implications for Financial Institutions and MLMs*," JDSUPRA (June 16, 2021), www.jdsupra.com/legalnews/ftc-continues-push-for-civil-penalties-6913247/ (describing FTC's penalty theory under the GLBA Pretexting Prohibition in *RCG Advances* as a "novel theory" that is "likely to be tested in litigation").

C. *What Do the District Court's RCG Advances Rulings Regarding the FTC's Ability to Enforce the GLBA Pretexting Prohibition Imply Regarding the FTC's Ability to Enforce the GLBA Security Requirement?*

The district court's rulings in *RCG Advances* also have significant implications regarding the FTC's enforcement authority with respect to the GLBA Pretexting Prohibition's sister provision, namely, the GLBA Security Requirement, and the Safeguards Rule enacted thereunder by the FTC. As discussed above, the linchpin of the enforcement authority theory the FTC advanced and the district court accepted in *RCG Advances* with respect to the GLBA Pretexting Prohibition was the statutory language in the GLBA that (via the FDCPA) expressly provided for any violation of the GLBA Pretexting Prohibition to be treated as a violation of the prohibition on unfair and deceptive trade practices contained in Section 5(a) of the FTC Act and/or as a violation of a trade regulation rule promulgated by the FTC under the FTC Act.[101] The GLBA contains no comparable statutory language with respect to the GLBA Security Requirement and/or rules promulgated by the FTC thereunder, however . Rather, with respect to enforcement of those components of the GLBA, the GLBA merely provides, in Section 505(a)(7), that the GLBA Security Requirement and the rules promulgated by the FTC thereunder are to be enforced by the FTC "[u]nder the Federal Trade Commission Act."[102]

Looking at the phrase "[u]nder the [FTC] Act" in isolation, it might be imaginable that Congress intended by that phrase for violations of the GLBA Security Requirement and the rules promulgated by the FTC thereunder to be deemed violations of (1) the prohibition on unfair and deceptive trade practices

101. See Parts III.A and III.B *supra*.

102. 15 U.S.C. § 6805(a)(7).

contained in Section 5(a) of the FTC Act, or (2) a "trade regulation rule" promulgated by the FTC under the FTC Act,[103] or (3) both. But when that phrase is viewed alongside the GLBA's separate language *expressly* providing for any violation of the GLBA Pretexting Prohibition to be treated as a violation of *both* the prohibition on unfair and deceptive trade practices contained in Section 5(a) of the FTC Act *and* a violation of a trade regulation rule promulgated by the FTC under the FTC Act, it becomes manifestly untenable to read the phrase "[u]nder the Federal Trade Commission Act" as being intended to accomplish that very same outcome with respect to the GLBA Security Requirement and the rules promulgated by the FTC thereunder. If that were Congress's intent, then why didn't Congress use the very same language to specify the FTC's enforcement authority with respect the GLBA Security Requirement and the rules promulgated by the FTC thereunder that Congress used to specify the FTC's enforcement authority with respect to the GLBA Pretexting Prohibition? After all, the GLBA Security Requirement and the GLBA Pretexting Prohibition were enacted simultaneously in 1999 as the linchpins of GLBA Title V (entitled "Privacy"), with the GLBA Security Requirement being the foundation of Subtitle A of GLBA Title V ("Disclosure of Nonpublic Personal Information") and the GLBA Pretexting Prohibition being the foundation of Subtitle B of GLBA Title V ("Fraudulent Access to Financial Information"). That being the case, how can it be that Congress would have used the phrase "under the [FTC] Act" in order to give the FTC the very same enforcement authority with respect to the GLBA Security Requirement and the rules promulgated by the FTC thereunder that Congress expressly gave to the FTC, by means of dramatically different language, with respect to the GLBA Pretexting Prohibition?

---

103. *See* FTC's definition of the term "trade regulation rule," *supra* note 10.

The answer to that question, we suggest, is that it simply cannot be that the language of GLBA Section 505(a)(7) creates the very same FTC enforcement authority with regard to the GLBA Security Requirement and the rules promulgated thereunder by the FTC that GLBA Section 522(a) (via the FDCPA) creates for the FTC with regard to the GLBA Pretexting Prohibition. Instead, the far more reasonable reading of GLBA Section 505(a)(7) is that it gives the FTC a far more limited enforcement authority, restricting the FTC's enforcement of the GLBA Security Requirement and the rules promulgated by the FTC thereunder to situations where the act or practice in question would otherwise be actionable "under the [FTC] Act."

So when (if ever) would a violation of the Safeguards Rule enacted by the FTC under the GLBA Security Requirement be in and of itself actionable by the FTC under the FTC Act? The answer appears to us to be "likely never," at least as matters currently stand. The FTC Act creates four mechanisms by which the FTC can take enforcement action thereunder: (1) filing an administrative complaint seeking a cease-and-desist order under FTC Act Section 5(b); (2) filing a civil action seeking a civil monetary penalty under FTC Act Section 5(m)(1)(A) or (B); (3) filing a civil action seeking injunctive relief under FTC Act Section 13(b); or (3) filing a civil action seeking consumer redress under FTC Act Section 19. As shown below, none of these mechanisms currently creates FTC enforcement authority with respect to a mere violation of the FTC's Safeguards Rule.

Section 5(b) Administrative Complaint. FTC Act Section 5(b) authorizes the FTC to file an administrative complaint for the purpose of seeking a cease-and-desist order with respect to an act or practice that the FTC finds to be unfair or deceptive in violation of FTC Act Section 5(a).[104] A

104. *See* 15 U.S.C. § 45(b).

violation of the FTC's Safeguards Rule, standing alone, would not ipso facto constitute a violation of FTC Act Section 5(a), however, for three reasons. First, as noted above, there is no statute deeming a violation of the FTC's Safeguards Rule to be a violation of FTC Act Section 5(a) or an FTC trade regulation rule.[105] Second, the FTC Safeguards Rule does not itself deem violations thereof to be violations of FTC Act Section 5(a), and even if it did that aspect of the FTC's Safeguards Rule would be beyond the FTC's rulemaking authority, because the FTC's Safeguards Rule was enacted by the FTC under GLBA Sections 501(b) and 505(b)(2), not under FTC Act Section 18(a)(1)(B), which is the FTC's sole authority to enact trade regulation rules, i.e., rules that "define with specificity acts or practices which are unfair or deceptive acts or practices" violative of Section 5(a).[106] Third, nothing in the FTC's Safeguards Rule itself conditions an act or practice only being found to violate the rule if the act or practice meets either (1) the three-prong test set forth in FTC Act Section 5(n), satisfaction of which is a necessary precondition to any act or practice being found

105. Compare, by way of contrast, (1) Section 814(a) of the FDCPA, 15 U.S.C. § 1692l(a) (in granting FDCPA enforcement authority to the FTC, expressly providing that "a violation of [the FDCPA] shall be deemed an unfair or deceptive act or practice in violation of [the FTC] Act" and that the FTC shall have the power address FDCPA violations "in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule"); and (2) Section 1303(c) of the Childrens Online Privacy Protection Act ("COPPA"), 15 U.S.C. § 6502(c) (in granting COPPA enforcement authority to the FTC, expressly providing that "a violation of a regulation prescribed [by the FTC] under [COPPA Section 1303(a)] shall be treated as a violation of a [FTC trade regulation rule]").

106. *See* 15 U.S.C. § 57a(a).

"unfair" within the meaning of Section 5(a),[107] or (2) the three elements of a valid claim under Section 5(a)'s deception prong, as those elements are laid out in the FTC's 1983 Policy Statement on Unfairness.[108] That being the case, the conclusion is inescapable that the FTC has no authority "under the [FTC] Act", and thus has no authority of any sort, to remedy an alleged violation of the Safeguards Rule by means of a cease-and-desist order entered under FTC Act Section 5(b), unless the FTC alleges and proves that the alleged Safeguards Rule violation also independently violated FTC Act Section 5(a)'s prohibition on unfair and deceptive trade practices.

Perhaps in tacit recognition of this deficiency in its Safeguards Rule enforcement arsenal, most of the FTC's enforcement actions under the Safeguards Rule have indeed alleged both a Safeguards Rule violation and an independent violation of FTC Act Section 5(a). But not always. As Commissioner Phillips pointed out in his statement regarding the FTC's 2020 administrative complaint against Ascension Data & Analytics, LLC, that complaint (as well as several prior FTC administrative complaints) alleged a violation of the Safeguards Rule without also alleging an independent

107. *See* FTC Act Section 5(n), 15 U.S.C. § 45(n) (providing that the FTC shall have no authority to declare an act or practice violative of FTC Act Section 5(a) as being "unfair" "unless the act or practice [1] causes or is likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition").

108. *See* FTC Policy Statement on Deception (Oct. 14, 1983), *available at* https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception (specifying that a valid claim under FTC Act Section 5(a)'s deception prong requires showing an act or practice that is (1) likely to mislead (2) a reasonable consumer (3) in a material way).

violation of FTC Act Section 5(a).[109] Evidently, then, a school of thought may exist at the FTC that the FTC somehow *does* have authority to remedy an alleged violation of the Safeguards Rule by means of a cease-and-desist order entered under FTC Act Section 5(b)—regardless of whether the alleged Safeguards Rule violation also independently violated FTC Act Section 5(a)'s prohibition on unfair and deceptive trade practices. As Commissioner Phillips rightly pointed out in his statement in *Ascension Data & Analytics*, having such authority would be quite convenient for the FTC, as it may often be difficult for the FTC to show that the act or practice in question violated not only the Safeguards Rule, but also FTC Act Section 5(a), given the heightened requirements for proving an violation of Section 5(a)'s unfairness and deception prongs.[110] But to date there is no *litigated* case where a court has found that the FTC in fact has such authority. And as other recent litigated cases regarding the FTC's enforcement authority under the FTC Act show only too well, courts that are asked to rule on that authority give short shrift to whether the authority being claimed by the FTC would be helpful to the FTC's mission or has long been exercised by the FTC (or both).[111] Instead, such courts focus on the relevant statutory language and apply that language

109. *See* Statement of Commissioner Noah Joshua Phillips Regarding Ascension Data & Analytics (Dec. 14, 2020), at p.2 and n.4, *available at* www.ftc.gov/system/files/documents/public_statements/1584714/phillips_ascension_statement_final_for_posting.pdf.

110. *See id*. at p.2.

111. For example, in the *AMG*, *Shire*, and *LabMD* rulings discussed *infra* in note 112, the courts rejected longstanding FTC interpretations of its enforcement authority that, according to the FTC, significantly advanced the FTC's consumer protection mission.

as written.[112] In like fashion, one would expect a court that is asked to rule on the FTC's claimed authority to remedy an alleged violation of the Safeguards Rule by means of a cease-and-desist order entered under FTC Act Section 5(b) to reject that claim as being directly at odds with the relevant statutory language. One would further expect such a court, in so doing, to follow the lead of other courts by ignoring the FTC's arguments that the FTC had long purported to exercise such authority and that the FTC's having such authority would serve its consumer-protection mission.

Section 5(m)(1) Action for Penalties. FTC Act Section 5(m)(1) authorizes the FTC to file a civil action for the purpose of seeking to recover a civil monetary penalty with respect to an act or practice that either violates a trade regulation rule[113] or was previously found unfair or deceptive by

112. *See, e.g.*, AMG Capital Mgmt., LLC. v. FTC, 593 U.S. 67 (2021) (rejecting FTC's interpretation of term "injunction" in FTC Act Section 13(b) as including equitable monetary relief, on the ground that plain meaning of the word "injunction" defeated the FTC's interpretation); FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 161 (3d Cir. 2019) (rejecting as being impossible to square with the plain language of FTC Act Section 13(b)(1) the FTC's position that it can state a claim for a permanent injunction under Section 13(b) of the FTC Act without pleading that the defendant is violating or is about to violate a law enforced by the FTC); LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018) (rejecting, as being at odds with the plain meaning of FTC Act Section 5(n), FTC's interpretation that satisfaction of Section 5(n)'s three-prong test is not merely necessary, but sufficient, to make an act or practice "unfair" within the meaning of FTC Act Section 5(a)); LabMD, Inc. v. FTC, 678 F. App'x 816, 821 (11th Cir. 2016) (rejecting FTC's interpretation of the phrase "likely to cause" in FTC Act Section 5(n) to mean "significant risk," on the ground that dictionary meaning of the word "likely" made it impossible to "read the word 'likely' to include something that has a low likelihood" of occurring).

113. *See* 15 U.S.C. § 45(m)(1)(A).

a final FTC cease-and-desist order under FTC Act Section 5(b).[114] As discussed above, the Safeguards Rule is not a trade regulation rule, and a Safeguards Rule violation could not in and of itself be the basis for an FTC cease-and-desist order under FTC Act Section 5(b). The FTC therefore has no authority "under the [FTC] Act" to seek a Section 5(m)(1) civil monetary penalty merely by reason of a violation of the Safeguards Rule.[115]

Section 13(b) Action for Injunctive Relief. FTC Act Section 13(b) authorizes the FTC to file a civil action for the purpose of seeking injunctive relief whenever the FTC "has reason to believe . . . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by" the FTC.[116] As the Safeguards Rule is a "provision of law enforced by" the FTC, this language at first blush seems to authorize the FTC to seek injunctive relief where a person "is violating, or is about to violate," the Safeguards Rule. But read as a whole, FTC Act Section 13(b) negates the FTC's having any such authority. As discussed in Part III.B *supra*, under FTC Act Section 13(b)(2),[117] Section

---

114. *See* 15 U.S.C. § 45(m)(1)(B).

115. *See* United States Government Accountability Office Report to Congressional Requesters, GAO-19-196, Consumer Data Protection: Actions Needed to Strengthen Oversight of Consumer Reporting Agencies, at 32 (Feb. 2019) ("GLBA, one of the key laws governing the security of consumer information, does not provide FTC with civil penalty authority."). Nor does the FTC have any authority to remedy a Safeguards Rule violation by seeking a civil monetary penalty under FTC Act Section 5(l), first because only the Department of Justice has authority to seek such a penalty, and second because a Section 5(l) penalty must be predicated on a violation of an FTC order, and the FTC (as shown above) has no authority to enter a Section 5(b) cease-and-desist order based on a mere violation of the Safeguards Rule.

116. *See* 15 U.S.C. § 53(b)(1).

117. 15 U.S.C. § 53(b)(2).

13(b) injunctive relief is permitted only where it would be in the interest of the public to enter such relief "pending the issuance of a [Section 5(b)] complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final." In other words, Section 13(b) injunctive relief is available only where the FTC would be entitled to seek a Section 5(b) cease-and-desist order with respect to the violation of law in question. That being the case, if (as we believe we have shown above) the FTC has no authority to seek a Section 5(b) cease-and-desist order merely because a person "is violating, or is about to violate" the Safeguards Rule, the FTC likewise has no authority to seek Section 13(b) injunctive relief with respect to such a violation, because such relief could never be entered (as Section 13(b)(2) expressly requires) pending the issuance and final disposition of a Section 5(b) administrative complaint as to that violation.

Section 19 Action for Consumer Redress. FTC Act Section 19(b) authorizes the FTC to file a civil action for the purpose of seeking consumer redress in the circumstances identified in FTC Act Section 19(a), namely, where a person engages in an act or practice that either violates a trade regulation rule or was previously found unfair or deceptive by a final FTC cease-and-desist order under FTC Act Section 5(b).[118] As discussed above, the Safeguards Rule is not a trade regulation rule, and a Safeguards Rule violation could not in and of itself be the basis for an FTC cease-and-desist order under FTC Act Section 5(b). The FTC therefore has no authority "under the FTC Act" to seek Section 19 consumer

118. *See* 15 U.S.C. § 57b(a)(1).

> redress merely by reason of a violation of the Safeguards Rule.

If, as we believe we have shown above, none of the mechanisms by which the FTC can take enforcement action "under the [FTC] Act" currently creates FTC enforcement authority with respect to a mere violation of the FTC's Safeguards Rule, doesn't that mean that Congress accomplished nothing by giving the FTC authority to enforce the GLBA Security Requirement and the rules enacted by the FTC thereunder "under the [FTC] Act"? And doesn't interpreting that congressional grant of enforcement authority to be a legal nullity call into question the validity of that interpretation? We think the answer to both these questions is "no." The FTC's lack of enforcement authority regarding violations of the Safeguards Rule stems not from some deficiency in the statutory language that Congress used in granting that authority (as we have interpreted that language), but rather from a deficiency in the way the FTC exercised the rulemaking authority that Congress gave it by means of the GLBA Security Requirement and GLBA Section 505(b)(2). Specifically, the FTC chose to exercise its GLBA Security Requirement rulemaking authority by enacting the Safeguards Rule *under the GLBA*, rather than enacting it as a trade regulation rule *under FTC Act Section 18(a)(1)(B)*. As our above discussion of the FTC Act's enforcement mechanisms shows, if the Safeguards Rule had been enacted not under the GLBA, but rather as a trade regulation rule, then violations thereof would ipso facto violate FTC Act Section 5(a), and such violations would, therefore, open the door to remedies under Sections 5(b), 5(m)(1), 13(b), and 19 of the FTC Act.

That being the case, the FTC's lack of enforcement authority in regard to violations of the Safeguards Rule can and should be addressed not by the FTC's adopting (and asking the courts to bless) an untenable interpretation of the phrase "under the [FTC] Act" as used in GLBA Section 505(a)(7), but instead by the

FTC's exercising its authority "under the [FTC] Act" to implement the GLBA Security Requirement by means of a trade regulation rule, rather than by means of a rule enacted merely under the GLBA.[119] As then-Commissioners Phillips and Wilson recently stated:

> The Supreme Court['s *AMG*] decision . . . made clear that the words of a statute matter. Those words trump the policy preferences of commissioners. That decision should have been a wake-up call, a reminder to the [FTC] that, no matter how egregious the conduct or righteous our cause, the [FTC] is not entitled to go beyond the bounds of what the law permits. If we continue to flout the limits of our authority, the [FTC] should fully expect additional rebukes from the courts.[120]

IV. CONCLUSION

The district court's recent rulings in *RCG Advances* open the door to a very broad reading of the substantive scope of the GLBA Pretexting Prohibition and the remedies available to the

---

119. We recognize that the process involved in enacting the Safeguards Rule as a trade regulation rule would have been far more cumbersome than the process involved in enacting the Safeguards Rule under the GLBA and, indeed, might have resulted in the trade-regulation-rule version of the Safeguards Rule having significant substantive differences from the Safeguards Rule as enacted by the FTC. *See* FTC Act Section 18(b), 15 U.S.C. § 57a(b) (specifying the process the FTC is required to follow in enacting trade regulation rules). But requiring the FTC to follow that process regarding the Safeguards Rule, as cumbersome as it may be, simply requires the FTC to comply with the congressionally mandated process for the FTC to promulgate rules under the GLBA Security Requirement that will be enforceable by the FTC "under the FTC Act."

120. Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, In the Matter of Resident Home LLC, Commission File No. 2023179 (Oct. 7, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597270/resident_home_dissenting_statement_wilson_and_phillips_final_0.pdf.

FTC for a violation of that prohibition. That reading is, we believe, either clearly erroneous or at a minimum highly questionable in a number of respects. Moreover, the reasoning of those rulings casts doubt on whether the FTC currently has *any* viable remedy available to it—even the ability to obtain a mere cease-and-desist order—for a violation of the GLBA Security Requirement or the so-called "Safeguards Rule" promulgated by the FTC thereunder.