

FTC Continues Push for Civil Penalties with Important Implications for Financial Institutions and MLMs

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The FTC yesterday took two actions that on their face seemed part of the regular course, but that could signal notable changes for financial institutions and multi-level marketing companies. First, the FTC [filed](#) an amended complaint against RCG Advances, a merchant cash advance provider, alleging that the company violated the Gramm-Leach-Bliley Act and seeking civil penalties under a novel theory of its statutory authority. Second, the FTC [announced](#) that it plans to review the Business Opportunity Rule this year and Commissioner Chopra issued a statement signaling that he will push to expand coverage of the Rule to include MLMs and other direct sellers not currently covered.

Civil Penalties for GLBA Violations

The FTC first sued RCG Advances in June 2020, alleging that the company deceived small businesses by misrepresenting terms of cash advances and then using unfair collection practices to compel them to pay. The initial [complaint](#) also alleged that the companies made unauthorized withdrawals from consumers' accounts and sought a permanent injunction and consumer redress under Section 13(b) of the FTC Act. As we've covered extensively in our [13\(b\) blog](#), the Supreme Court's unanimous decision in *AMG Capital Management* foreclosed the capacity to seek consumer redress, and thus the amended complaint removes that reference while otherwise mirroring the substantive allegations of the initial complaint.

The new complaint also adds a count alleging violations of GLBA for use of fraudulent statements to customers in an attempt to obtain consumer information. GLBA is generally intended to protect consumer financial privacy by limiting when financial institutions can disclose consumers' nonpublic personal information. In the amended complaint, the FTC cites a seldom cited provision of GLBA that prohibits any person from "obtain[ing] or attempt[ing] to obtain . . . 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."

The FTC then advances a novel theory to assert that it has the authority to obtain civil penalties under GLBA because it empowers the FTC to enforce it "in the same manner and with the same power and authority as the [FTC] has under the Fair Debt Collection Practices Act [FDCPA]." The Dodd-Frank Act amended the FDCPA in 2010 to provide that violations may be enforced "in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule." Notably, the GAO as recently as February 2019 issued a [report](#) noting that the "FTC does not have civil penalty authority for violations of requirements under the Gramm-Leach-Bliley Act (GLBA)."

The limits of this theory are likely to be tested in litigation, but it's clear that the FTC continues to make good on its promise to push for creative monetary solutions in the wake of the *AMG* decision. Yesterday's action follows last week's new use of the Restore Online Shoppers' Confidence Act (ROSCA) to obtain civil penalties for alleged misrepresentations unrelated to negative option offers themselves, as we covered [here](#).

Expanding Coverage of the Business Opportunity Rule

Within an hour of announcing the amended complaint against RCG seeking civil penalties, the FTC also signaled that it would seek to expand another civil penalty authority by altering the coverage of the Business Opportunity Rule. Published in 2011, the Business Opportunity Rule requires sellers of "business opportunities" to provide certain earnings disclosure documents in writing and prohibits specified misrepresentations related to earnings potential.

In the rulemaking record, the FTC considered and deliberately excluded MLMs from coverage on the grounds that "the varied and complex structure of MLMs makes it exceedingly difficult to make an accurate earnings disclosure and likely would require different disclosures for different levels of participation in the company." In yesterday's announcement, Commissioner Chopra issued a [statement](#) signaling that he supports reversing that decision and revising the Rule to cover MLMs and potentially others in what he refers to as the "gig economy," which would in turn open up the FTC's civil penalty authority for income misrepresentations by those entities.

With Chopra likely to depart the Commission soon to head the CFPB, the question is whether other commissioners, including now confirmed Commissioner Lina Khan, will take up the cause.