

Case No. 05-2785/05-4828

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner-Appellee,

v.

COMMUNITY TRUST COMPANY,
Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

THE SECRETARY OF LABOR'S PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

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REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e., the panel's decision is contrary to decisions of this court and the Supreme Court insofar as it refused to accord deference to the FTC's interpretation of a statute that it is charged with administering simply because the FTC is not a party to this case and insofar as it failed to follow established precedent regarding the question whether a subpoena is "properly authorized."

REASONS FOR GRANTING THE PETITION

This case presents two questions of exceptional legal and public significance: 1) whether the reasonable interpretation of ambiguous provisions of the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801, et seq., by the federal agency charged with administering and enforcing the statute as expressed in a regulation promulgated after notice and comment is entitled to deference, and 2) whether an exception to the privacy provisions of that statute for a "properly authorized" subpoena alter the long-established standards for administrative subpoena enforcement.

The Secretary believes that rehearing en banc is warranted because two aspects of the decision conflict with Third Circuit and Supreme Court precedent. First, the panel's holding that Federal Trade Commission ("FTC") regulations interpreting an ambiguous term in section 6809(4) of the GLBA "are persuasive, but no more, as to statutory interpretation" is contrary to Supreme Court precedent

regarding the level of deference accorded to agency regulations. See U.S. v. Mead Corp., 533 U.S. 218, 227 (2001); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The panel held that Chevron deference is not required where the Secretary cites regulations of the FTC, the agency charged with administering and enforcing the GLBA, to assist in construing an ambiguous term of the GLBA. The panel's holding appears to be based on the misperception that the Secretary sought deference for her own interpretation of the GLBA, rather than the interpretation of the FTC. While the misperception itself might be characterized as a mistake of fact not worthy of en banc consideration, the effect of that mistake is a construction of the GLBA that is at odds with the interpretation of the agency charged with administering and enforcing it, as well as with the interpretation of nearly all agencies with rulemaking authority under the statute, and is inconsistent with decisions of this Court and the Supreme Court regarding the deference to be afforded to the relevant administrative interpretation. As a result, the panel's mistake will have serious and widespread adverse consequences for the ability of federal, state and local authorities to obtain information necessary for law enforcement purposes.

Second, even if the panel's interpretation of section 6809(4) of the GLBA were correct, the Secretary was entitled to enforcement of her subpoena pursuant to section 6802(e)(8) of the GLBA, which excepts from the statute's notice requirement disclosure "to comply with a properly authorized civil, criminal, or

regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process" The Court ignored well-established standards for enforcing administrative subpoenas by requiring that the Secretary prove coverage in order to show that the subpoena is properly authorized. See U.S. v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 200 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943); FDIC v. Wentz, 55 F.3d 905, 908 (3d Cir. 1995). This requirement restricts the ability of federal agencies to investigate potential statutory violations where the question of jurisdiction turns on the nonpublic personal information sought in the subpoena. There is nothing in the GLBA – a statute intended to enhance competition in the financial services industry – or its legislative history to justify such a departure from precedent.

Rehearing by the panel or en banc is thus warranted.

STATEMENT

1. In 1999, Congress enacted the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801 et seq., to enhance competition and efficiency in the financial services industries by eliminating barriers to affiliations among financial services providers. See, e.g., Trans Union LLC v. FTC, 295 F.3d 42, 46-47 (D.C. Cir. 2002); N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 111-12 (D.D.C. 2003). A primary purpose of the Act is to facilitate the sharing of information within the financial services industry. Congress included in the Act certain privacy

protections to address secondary concerns about unrestrained access to consumers' nonpublic personal information. See generally 145 Cong. Rec. S13883 (daily ed. Nov. 4, 1999) (report on the Financial Services Modernization Act of 1999); 145 Cong. Rec. H11513 (daily ed. Nov. 4, 1999) (report on the GLBA).

The GLBA defines a "consumer" as "an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." 15 U.S.C. § 6809(9). The GLBA provides that "a financial institution may not . . . disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer . . . notice." 15 U.S.C. § 6802(a). That is, before disclosing a consumer's nonpublic personal information to a nonaffiliated third party, the financial institution must provide an opt-out notice that clearly informs the consumer of his or her right to elect to keep the information private. Id. at § 6802(b)(1). No opt-out notice is required, however, where one of the GLBA's enumerated exceptions is met. Id. at §§ 6802(b)(2), (e)(1)-(8).

2. The GLBA instructs the FTC, which has regulatory authority over state-chartered trust companies, and other agencies with regulatory authority over other financial institutions under the Act to "consult and coordinate" to prescribe "consistent and comparable" regulations "necessary to carry out the purpose of" the GLBA's privacy provisions. 15 U.S.C. § 6804(a)(1)-(2). As the FTC observed,

"the definition of 'consumer' [in the GLBA's privacy provisions] does not squarely resolve whether the beneficiary of a trust is a consumer of the financial institution that is the trustee." See 65 Fed. Reg. 33,646, 33,651 (May 24, 2000).

The FTC addressed this ambiguity in regulations issued through notice and comment rulemaking. 65 Fed. Reg. at 33,646. The FTC regulations provide that "an individual is not your consumer solely because he or she has designated you as trustee for a trust," or "because he or she is a beneficiary of a trust for which you are a trustee," or "because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary." 16 C.F.R. §§ 313.3(e)(2)(vi)-(viii).¹ The FTC provided additional clarification in the preamble to the regulations, noting, "when the financial institution serves as trustee of a trust, neither the grantor nor the beneficiary is a consumer or customer under the rule. Instead, the trust itself is the institution's 'customer,' and therefore, the rule does not apply because the trust is not an individual." 65 Fed. Reg. at 33,652.

¹ Six of the seven other agencies with rulemaking authority under the GLBA issued virtually identical provisions defining who is not a "consumer." See 12 C.F.R. § 216.3(e)(2)(vi)-(viii) (Federal Reserve Board); 12 C.F.R. § 573.3(e)(2)(vi)-(viii) (Office of Thrift Supervision); 12 C.F.R. § 40.3(e)(2)(vi)-(viii) (Office of the Comptroller of the Currency); 12 C.F.R. § 332.3(e)(2)(vi)-(viii) (Federal Deposit Insurance Corporation); 17 C.F.R. § 248.3(g)(2)(vi)-(viii) (Securities and Exchange Commission); and 17 C.F.R. § 160.3(h)(2)(v)-(vii) (Commodity Futures Trading Commission). The seventh agency issued a less detailed but entirely consistent definition. See 12 C.F.R. § 716.3(e)(v) (National Credit Union Administration) ("An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.").

3. In February 2004, the Department of Labor ("DOL") began an investigation into possible violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., involving the Regional Employers' Assurance Leagues' Voluntary Employees Beneficiary Association ("REAL VEBA"). As part of the investigation, the Secretary issued an administrative subpoena duces tecum to Community Trust Company ("CTC"), a state-chartered trust company that serves as the trustee of the REAL VEBA, seeking documents related to the REAL VEBA. As a state-chartered trust company, CTC is under the regulatory authority of the FTC for purposes of the GLBA.

CTC refused to comply with the subpoena on the basis that, among other things, it would violate financial privacy rights set forth in the GLBA. The Secretary petitioned to enforce the subpoena in the District Court for the Eastern District of Pennsylvania.

The district court entered judgment for the Secretary, finding that one of the GLBA's exceptions – which permits disclosure "to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities," 15 U.S.C. § 6802(e)(8) – was met. Based on well-established standards for administrative subpoena enforcement, the district court held that DOL's subpoena was "properly authorized," and that the DOL need not establish jurisdiction to conduct the investigation.

4. CTC appealed the decision, and this Court reversed. See Chao v. Community Trust Co., 474 F.3d 75 (3d Cir. 2007) (attached). The panel rejected the Secretary's argument – based on the FTC's interpretation of who is not a "consumer" under the GLBA – that neither the individual beneficiaries nor the REAL VEBA qualify as "consumers" of CTC. The panel acknowledged that "financial institutions like CTC, a state-chartered non-banking trust, are within the catch-all regulatory ambit of the FTC." Id. at 84 (citing 15 U.S.C. § 6805(7)). According to the panel, however, agency regulations are entitled to controlling-weight deference under Chevron "only when the agencies are enforcing their own regulations." Community Trust Co., 474 F.3d at 84-85 (emphasis in original). "When an agency seeks to piggyback upon another agency's regulation for its own enforcement purposes, such deference is inappropriate." Id. at 85.

The panel also stated that it need not defer to the FTC regulations "because of the possibility of multiple, conflicting regulatory interpretations of the GLBA by the various agencies with overlapping rulemaking authority under [the] GLBA." Community Trust Co., 474 F.3d at 85. The panel held that the Secretary should not be entitled to "pick and choose between conflicting regulations," and then select the "convenient" one. Id. "In such a situation," according to the panel, "federal regulations are persuasive, but no more, as to statutory interpretation." Id. The panel concluded that the REAL VEBA beneficiaries are consumers because

they "obtain" financial services from CTC, and that the REAL VEBA qualifies as a consumer "if it is the beneficiaries' legal representative." Id.

The panel also held that the Secretary had not established that her investigation was properly authorized, stating that "[i]mplicit in the term 'properly authorized' is a finding of jurisdiction to undertake the investigation." Community Trust Co., 474 F.3d at 87. According to the panel, "[i]n order to make GLBA's protections meaningful, before private consumer financial information is released by a financial institution to the DOL, the Secretary must establish jurisdiction to conduct the investigation." Id. at 88. Because the Secretary had not established jurisdiction to conduct the investigation, the panel held that the subpoena was not "properly authorized" and that the GLBA's administrative subpoena exception did not apply.

The panel vacated the lower court's orders enforcing the subpoena and finding CTC in contempt and remanded the case for further proceedings.

ARGUMENT

- I. Rehearing is warranted to correct the panel's erroneous holdings regarding the law of deference which are contrary to Supreme Court and Third Circuit precedent.

The first fundamental flaw in the majority's decision is its failure to follow the analytical course prescribed by the Supreme Court in Chevron, 467 U.S. 837.

In Chevron, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that

agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (internal citations omitted). According to the Court, "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Mead Corp., 533 U.S. at 227 (citing Bragdon v. Abbott, 524 U.S. 624, 642 (1998); Skidmore v. Swift, 323 U.S. 134 (1944)). As such, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Mead, 533 U.S. at 227-28 (citing Chevron, 467 U.S. at 844). Chevron deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Mead, 533 U.S. at 226.

The panel was incorrect to hold that the FTC's interpretation of who is not a "consumer" under the GLBA is "persuasive, but no more." Community Trust Co., 474 F.3d at 85 (citing Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003); Amerada Hess Pipeline Corp. v. Fed. Energy Regulatory Comm'n, 117

F.3d 596, 600 (D.C. Cir. 1997)).² The FTC is the agency with authority to administer and enforce the GLBA's privacy provisions against financial institutions like the ones at issue here, and the regulation, promulgated after notice and comment under an express delegation of statutory authority, directly addresses the question of statutory coverage in this case. The Supreme Court and the Third Circuit have repeatedly deferred to agency interpretations of ambiguous statutes in cases in which the agency itself was not a party. See, e.g., Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238-239 (2004); Smiley v. Citibank, 517 U.S. 735, 739-744 (1996); Matinchek v. John Alden Life Ins. Co., 93 F.3d 96, 100 (3d Cir. 1996) (deferring to DOL's interpretation of ERISA).

Here, the FTC's regulation, promulgated after notice and comment under an express delegation of statutory authority, is legislative rulemaking entitled to the highest level of deference. Chevron, 467 U.S. at 842-43; Mead, 533 U.S. at 229-30. As such, the FTC's regulation "should be accorded controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections, 118 F.3d 168, 171 (3d Cir. 1997) (citing Babbitt v. Sweet Home Chapter of Comtys. for a Great Oregon, 515 U.S. 687 (1995)). Moreover, the preamble accompanying regulations should be accorded the same treatment as the regulations – controlling weight deference

² Both cases cited by the panel address whether deference is appropriate when one agency interprets the regulations of another agency. These decisions are not applicable to the facts of this case, where the Secretary did not ask the panel to defer to her interpretation of the FTC's regulation.

unless it is arbitrary, capricious, or manifestly contrary to the statute – because it is part of the agency's official interpretation of the legislation. See Yeskey, 118 F.3d at 171 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 510-12 (1994)).

The panel was also incorrect to suggest that "the mere fact that that there could be conflicting regulations [regarding the same statutory term] should preclude Chevron deference." Community Trust Co., 474 F.3d at 85 (with no citation to authority). First, the FTC is the agency with regulatory authority over CTC and the REAL VEBA for purposes of the GLBA and, therefore, it should be irrelevant that other agencies have regulations covering the other financial institutions within their jurisdiction. Moreover, the agencies' regulations are virtually identical. See fn. 1, supra. As one district court noted, in rejecting an argument that Chevron deference should not apply where Congress has directed numerous agencies to administer the statute, "the six defendant agencies and the SEC . . . coordinated their efforts and issued similar sets of regulations, each of which is designed to support the others, rather than to undermine them. Thus . . . there is no inter-agency conflict here." See Individual Reference Servs. Group, Inc. v. FTC, 145 F. Supp. 2d 6, 24 n.12 (D.D.C. 2001), aff'd sub nom., Trans Union LLC v. FTC, 295 F.3d 42 (D.C. Cir. 2002).

In this case, the panel's decision creates disuniformity among the circuits. Because the FTC's regulation was promulgated under notice and comment, the regulation has "the effect of law" in all other circuits. See Mead, 533 U.S. at 230.

That means that, if the panel's decision stands, the law on whether a trust beneficiary qualifies as a "consumer" of the trustee of that trust under the GLBA will be different in the Third Circuit than in the rest of the country. Moreover, for all such cases in this Circuit, the panel's decision now throws aside the FTC's clear definition of who is not a "consumer" under the GLBA in favor of an unclear regime under which the GLBA's ambiguous definition of "consumer" is subject to differing interpretations. Panel rehearing or en banc rehearing is warranted in order to correct this result.

- II. Rehearing is warranted because the panel misconstrued the purpose of the GLBA and the scope of its privacy protections to announce a new standard for administrative subpoena enforcement that is inconsistent with Supreme Court and Third Circuit precedent.

The second fundamental flaw in the panel's decision is its failure to follow well-established precedent in this Circuit and in the Supreme Court regarding the standards for administrative subpoena enforcement. The panel's departure from precedent is unjustified because nothing in the GLBA or its legislative history suggests that Congress intended the Act to change the criteria an administrative subpoena must meet in order to be "properly authorized."

Under Supreme Court precedent, an agency with broad subpoena authority such as that granted by section 504 of ERISA, 29 U.S.C. § 1134, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." U.S. v. Powell, 379 U.S. 48, 57 (1964) (citation omitted). An agency is also generally not required to establish that a subpoenaed entity is

covered by the statute in order to obtain enforcement of the subpoena. Oklahoma Press Publ'g Co., 327 U.S. at 200 (under section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, district courts are called upon to enforce subpoenas "without express condition requiring showing of coverage");³ Endicott Johnson Corp., 317 U.S. at 509 (district court was not "authorized to decide the question of coverage itself"); I.C.C. v. Gould, 629 F.2d 847, 851 (3d Cir. 1980) (noting that "the cases that have examined analogous issues of jurisdiction of other agencies have consistently accorded broad latitude to the agencies' powers, including 'jurisdiction to determine jurisdiction' by summary procedures").

The panel's departure from precedent is unjustified. A finding of jurisdiction to undertake the investigation is in no way "implicit" in the term "properly authorized" in the GLBA. Community Trust Co., 474 F.3d at 87. Nor is the panel's holding necessary to make the GLBA's privacy protections "meaningful." Id. Indeed, "[t]he purpose of the Act was not to create rights but to allow for enhanced competition among entities that hitherto could not compete with each other. The protection of confidential information was ancillary to that goal." Am. Family Ins. Co. v. Roth, No. 05C3839, 2005 WL 3700232, at *8 (N.D. Ill. Aug. 5, 2005). As such, the GLBA merely requires financial institutions to provide "opt-out" notice before sharing a consumer's nonpublic personal information. And,

³ Under section 504(c), 29 U.S.C. § 1134(c), the provisions of sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. § 49, 50, are made applicable to the investigative jurisdictions, powers, and duties of the Secretary.

even more importantly, Congress carved out wide exceptions to the opt-out notice requirement, making clear that it did not intend for the Act's privacy protections to prohibit a financial institution from disclosing information to comply with Federal, State, or local government laws, rules, other legal requirements, investigations, subpoenas, summonses, or judicial process. See 15 U.S.C. § 6802(e)(8). In fact, there is nothing in the text of the GLBA or its legislative history to suggest that Congress was concerned with government access to nonpublic personal information. The panel was completely unjustified to conclude that Congress intended the words "properly authorized," appearing as they do in a broad exception to the GLBA's privacy protections, to alter long-accepted standards for administrative subpoena enforcement, and to thereby limit the ability of federal agencies to investigate potential crimes.

The case law makes clear that federal agencies with broad subpoena authority such as that granted by section 504 of ERISA, 29 U.S.C. § 1134, need not – and often cannot – establish jurisdiction at the subpoena enforcement stage. If the panel's decision stands, and the Secretary is required to prove that she has jurisdiction over an ERISA plan before her subpoena of nonpublic personal information can be considered "properly authorized" in this Circuit, her ability to investigate potential violations of ERISA will be severely restricted, particularly

where, as here, the question of jurisdiction turns on the very information sought by the subpoena.⁴

CONCLUSION

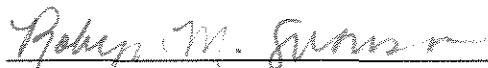
For the foregoing reasons, the Secretary respectfully requests that the Court grant panel rehearing or en banc rehearing.

Respectfully submitted,

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MARCH 5, 2007

⁴ Moreover, the Secretary is not required to establish that the REAL VEBA is an employee benefit plan in order for her investigation to be properly authorized. Even if the REAL VEBA itself is not an employee benefit plan, employers who fund their employees' benefits through the REAL VEBA create employee benefit plans over which the Secretary has jurisdiction. See, e.g., Donovan v. Dillingham, 688 F.2d 1367, 1372 n.10 (11th Cir. 1982) (en banc) ("[E]ven though [the MEWA in question] is not an employee benefit welfare plan, [it] may nonetheless be subject to ERISA's fiduciary responsibilities if it is a fiduciary to employee benefit plans established or maintained by other entities.").

EXHIBIT 1

Briefs and Other Related Documents
 Chao v. Community Trust Co.C.A.3 (Pa.),2007.
 United States Court of Appeals,Third Circuit.
 Elaine L. CHAO, Secretary of Labor, United States
 Department of Labor

v.
 COMMUNITY TRUST COMPANY, Appellant.
 Nos. 05-2785, 05-4828.

Argued on March 9, 2006.
 Opinion Filed Jan. 19, 2007.

Background: Department of Labor (DOL) initiated investigation into alleged fiduciary duty violations of Employee Retirement Income Security Act (ERISA), involving multiple-employer/employee welfare benefit trust. DOL Secretary issued subpoena duces tecum to trustee. Trustee refused to furnish personal private financial information specific to employees receiving benefits under trust. The United States District Court for the Eastern District of Pennsylvania, Mary A. McLaughlin, J., 2005 WL 1084619, granted DOL's petition to enforce subpoena, denied trustee's motion for a stay of enforcement pending appeal, found trustee in contempt, and fined trustee. Trustee appealed.

Holdings: The Court of Appeals, Roth, Circuit Judge, held that:


(1) Right to Financial Privacy Act (RFPA) did not bar enforcement of the Secretary's administrative subpoena;

(2) as a matter of first impression, "trust exception" to RFPA's definition of "person" would not be carved out solely on the principles of the common law of trusts;

(3) trust's role as a legal representative of beneficiaries was sufficient to qualify trust as a "consumer" of trustee, under Gramm-Leach-Bliley Act (GLBA); and

(4) Secretary had to establish jurisdiction to conduct investigation before trustee could release private consumer financial information to DOL.

Vacated and remanded.
 West Headnotes

[1] Labor and Employment 231H 66


231H Labor and Employment
 231HII Government Regulation in General
 231Hk66 k. Review. Most Cited Cases
 Court of Appeals had jurisdiction over an appeal from an order enforcing Department of Labor's (DOL) administrative subpoena, which was a final order. 28 U.S.C.A. § § 1291, 1294(1).

[2] Administrative Law and Procedure 15A 683

15A Administrative Law and Procedure
 15AV Judicial Review of Administrative Decisions
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 15Ak681 Further Review
 15Ak683 k. Scope. Most Cited Cases
 Court of Appeals reviews orders enforcing administrative subpoenas for abuse of discretion, which occurs when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

[3] Federal Courts 170B 776

170B Federal Courts
 170BVIII Courts of Appeals
 170BVIII(K) Scope, Standards, and Extent
 170BVIII(K)1 In General
 170Bk776 k. Trial De Novo. Most Cited Cases
 Court of Appeals reviews the District Court's interpretation of federal statutes de novo.

[4] Contempt 93 66(7)

93 Contempt
 93II Power to Punish, and Proceedings Therefor
 93k66 Appeal or Error
 93k66(7) k. Review. Most Cited Cases

Federal Courts 170B 813

170B Federal Courts
 170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and
Matters of Procedure in General. Most Cited Cases
Court of Appeals reviews the denial of stays from
injunctive relief pending appeal, including from
contempt orders, for abuse of discretion.

[5] Administrative Law and Procedure 15A
🔗357

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative
Agencies, Officers and Agents
15AIV(B) Investigations
15Ak356 Witnesses
15Ak357 k. Subpoenas in General. Most
Cited Cases
To enforce an administrative subpoena, an agency
must demonstrate that the subpoena meets the
following threshold requirements: (1) the inquiry
must be within the authority of the agency; (2) the
demand for production must not be too indefinite;
and (3) the information sought must be reasonably
relevant to the authorized inquiry.

[6] Administrative Law and Procedure 15A
🔗357

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative
Agencies, Officers and Agents
15AIV(B) Investigations
15Ak356 Witnesses
15Ak357 k. Subpoenas in General. Most
Cited Cases
If the government makes preliminary showing that an
administrative subpoena meets threshold
requirements for enforcement, the burden then shifts
to the respondent to prove that enforcement of the
subpoena would be improper.

[7] Records 326 🔗31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations Limiting Access;
Offenses. Most Cited Cases
Beneficiaries of multiple-employer/employee welfare
benefit trust were not "customers" of trustee, within
meaning of Right to Financial Privacy Act (RFPA),
as trustee did not maintain accounts in the names of
beneficiaries, and, thus, financial records, sought by

Department of Labor's (DOL) administrative
subpoena, were not protected from disclosure as
records of trustee's customers. Right to Financial
Privacy Act of 1978, § 1101(5), 12 U.S.C.A. §
3401(5).

[8] Statutes 361 🔗196

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k196 k. Relative and Qualifying
Terms, and Their Relation to Antecedents. Most
Cited Cases
The doctrine of last antecedent requires qualifying
words, phrases, and clauses to be applied to the
words or phrase immediately preceding, and are not
to be construed as extending to and including others
more remote.

[9] Statutes 361 🔗196

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k196 k. Relative and Qualifying
Terms, and Their Relation to Antecedents. Most
Cited Cases
The rule of the last antecedent is not an absolute and
can assuredly be overcome by other indicia of
meaning.

[10] Banks and Banking 52 🔗151

52 Banks and Banking
52III Functions and Dealings
52III(C) Deposits
52k151 k. Depositors' Passbooks and
Accounts. Most Cited Cases
Court of Appeals would not carve out a "trust
exception" to Right to Financial Privacy Act's
(RFPA) definition of "person" solely on the
principles of the common law of trusts. Right to
Financial Privacy Act of 1978, § 1101(4), 12
U.S.C.A. § 3401(4).

[11] Labor and Employment 231H 🔗408

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(A) In General
231Hk408 k. Regulatory Supervision. Most

Cited Cases

Federal Trade Commission (FTC) regulations defining term “consumer” were not entitled to controlling-weight deference in Department of Labor (DOL) matter to determine whether enforcement of DOL subpoena against trustee of multiple-employer/employee welfare benefit trust would violate Gramm-Leach-Bliley Act's (GLBA) prohibition on disclosure of consumer financial information to unaffiliated third parties. Gramm-Leach-Bliley Act § 509(9), 15 U.S.C.A. § 6809(9); 16 C.F.R. § § 313.3(e)(2)(vi-viii).

[12] Administrative Law and Procedure 15A
416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect

15Ak416.1 k. In General. Most Cited Cases

While the Court of Appeals gives agencies' regulations controlling-weight deference, it is only when agencies are enforcing their own regulations.

[13] Administrative Law and Procedure 15A
416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect

15Ak416.1 k. In General. Most Cited Cases

When an agency seeks to piggyback upon another agency's regulation for its own enforcement purposes, controlling-weight deference is inappropriate, both because of differences in agency expertise and because of the fact that deference follows Congressional delegation.

[14] Administrative Law and Procedure 15A
416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect

15Ak416.1 k. In General. Most Cited Cases

When it is possible for an agency to pick and choose between conflicting regulations, the agency should not be entitled to choose the convenient one and then receive *Chevron* deference; the mere fact that there could be conflicting regulations should preclude *Chevron* deference.

[15] Labor and Employment 231H 408

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(A) In General
231Hk408 k. Regulatory Supervision. Most Cited Cases

Multiple-employer/employee welfare benefit trust served as a legal representative of its beneficiaries and this role was sufficient to qualify trust as a “consumer” of trustee, under Gramm-Leach-Bliley Act (GLBA), in proceeding to determine whether enforcement of Department of Labor's (DOL) administrative subpoena would violate GLBA's prohibition on disclosure of consumer financial information to unaffiliated third parties, where plan beneficiaries obtained financial services from trustee, including payment of insurance policy premiums and provision of ministerial financial services. Gramm-Leach-Bliley Act § § 502, 509(4), 15 U.S.C.A. § § 6802, 6809(4).

[16] Labor and Employment 231H 408

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(A) In General
231Hk408 k. Regulatory Supervision. Most Cited Cases

To make Gramm-Leach-Bliley Act's (GLBA) protections of consumer financial information meaningful, Secretary of Department of Labor (DOL) had to establish jurisdiction to conduct investigation into alleged fiduciary duty violations of Employee Retirement Income Security Act (ERISA), involving multiple-employer/employee welfare benefit trust, before trustee could release private consumer financial information to DOL. Gramm-Leach-Bliley Act § 502(e)(8), 15 U.S.C.A. § 6802(e)(8); Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[17] Administrative Law and Procedure 15A
357

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative

Agencies, Officers and Agents
15AIV(B) Investigations
15Ak356 Witnesses
15Ak357 k. Subpoenas in General. Most
Cited Cases

Administrative subpoenas will be enforced when the agency shows that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by statute have been followed.

*77 Howard M. Radzely, Esquire, Solicitor of Labor, Timothy D. Hauser, Esquire, Associate Solicitor for Plan Benefits Security, Robyn M. Swanson, Esquire (Argued), Elizabeth Hopkins, Esquire, Counsel for Appellate and Special Litigation, Karen L. Handorf, Esquire, Counsel for Appellate and Special Litigation, United States Department of Labor, Office of the Solicitor, Ellen L. Beard, Esquire, Senior Appellate Attorney, Washington, DC, for Appellee. Lowell R. Gates, Esquire (Argued), Albert N. Peterlin, Esquire, Matthew J. Eshelman, Esquire, Gates, Halbruner & Hatch, P.C., Lemoyne, PA, for Appellant.

Before ALDISERT, and ROTH ^{FN*}, Circuit Judges, RODRIGUEZ ^{FN**}, District Judge.

FN* Judge Roth assumed senior status on May 31, 2006.

FN** The Honorable Joseph H. Rodriguez, Senior United States District Judge for the District of New Jersey, sitting by designation.

ROTH, Circuit Judge.

This appeal presents the question of when a district court may enforce a government agency's subpoena *duces tecum* against a financial institution in light of two statutes which protect private consumer financial information, the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401, *et seq.* and the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6801 *et seq.*

I. Factual and Jurisdictional Background

In February 2004, the United States Department of Labor (DOL) initiated an investigation into unspecified fiduciary duty violations of the Employee

Retirement Income Security Act of 1974, 29 *78 U.S.C. § 1001 *et seq.* (ERISA), involving the Regional Employers' Assurance Leagues' Voluntary Employees' Beneficiary Association (REAL VEBA). REAL VEBA is a multiple-employer/employee welfare benefit trust. The individual employees, who are beneficiaries of the REAL VEBA Trust, receive various benefits from the trust, including life insurance. REAL VEBA pays the premiums of each participant's separate insurance policy. REAL VEBA does not, however, maintain separate accounts in each participant's name. Each participant in REAL VEBA has executed a limited power of attorney for REAL VEBA to act on his or her behalf.

As part of her investigation, the Secretary of Labor issued an administrative subpoena *duces tecum* to Penn-Mott Benefit Services, Inc., the REAL VEBA plan administrator, and to John J. Koresko. Koresko is the sole shareholder in Koresko and Associates, a law firm that represents Penn-Mott. Penn-Mott has no employees or assets. Penn-Mott and Koresko refused to comply with the subpoena based on attorney-client privilege and financial privacy rights. As a result, in April 2004, the Secretary instituted an enforcement action in the Eastern District of Pennsylvania. Our Court ultimately ordered in *Chao v. Koresko*, 2005 WL 2521886 (3d Cir. Oct. 12, 2005), 2005 U.S.App. LEXIS 22025, that the subpoenas against Penn-Mott and Koresko be enforced.^{FN1}

FN1. As of the date of oral argument in this case, Koresko had not complied with the subpoena and the District Court had ordered his incarceration for contempt, Order of Incarceration, *Chao v. Koresko*, 2006 WL 463495 (E.D.Pa., Feb. 23, 2006), and denied stay of the order pending appeal. Order Denying Stay Pending Appeal of Order to Incarcerate, *Chao v. Koresko*, No. 04-mc-74 (E.D.Pa. March 7, 2006).

Community Trust Company (CTC) is state-chartered trust company. It is the trustee of REAL VEBA and maintains an account in REAL VEBA's name. CTC accepts deposits for policy premiums to be paid for certain benefits, such as life insurance, for specific employee beneficiaries. CTC maintains the deposits, invests them in a money market account, and remits payment of the premiums to insurance companies for individual employees' policy premiums. The Secretary, in December 2004, issued a second subpoena *duces tecum* to CTC, directed at the REAL

VEBA documents.

CTC maintains a copy of the REAL VEBA Trust organizational documents, such as the trust agreement.^{FN2} However, the vast majority of the documents covered by the CTC subpoena contain personal private financial information specific to each employee receiving benefits under the REAL VEBA Trust. CTC claims that the subpoena requires it to disclose documents which are either personal financial records of REAL VEBA beneficiaries or copies of documents which the Secretary has already received from the respondents in *Koresko*.^{FN3} Therefore, CTC refused to furnish the information, arguing that it would violate financial privacy rights set forth in the RFPA and the GLBA.

FN2. The DOL received copies of these organizational documents from the respondents as a result of the *Koresko/Penn-Mott* subpoena.

FN3. At oral argument, counsel for the DOL stated that the materials requested in the subpoena to Penn-Mott and *Koresko* substantially overlap with the materials requested in the CTC subpoena.

On January 1, 2005, the Secretary filed a petition to enforce the CTC subpoena in the District Court for the Eastern District of Pennsylvania. CTC filed a motion to dismiss under Fed.R.Civ.P. 12(b)(1) and *79 12(b)(6). CTC argued that the Secretary could not enforce the subpoena because REAL VEBA is not covered by ERISA and, therefore, the Secretary lacked jurisdiction to issue the subpoena.^{FN4} CTC claims that, because the scope of the investigation is beyond the Secretary's investigatory authority, CTC is forbidden by the GLBA and the RFPA from releasing the information.

FN4. The Secretary of Labor has broad authority to conduct investigations to determine whether any person has violated or is about to violate Title I of ERISA. 29 U.S.C. § 1134.

The District Court held that the plain language of the RFPA made its protections inapplicable to REAL VEBA and that the Secretary did not need to establish jurisdiction to enforce the subpoena under the GLBA. Accordingly, the District Court entered

judgment for the Secretary and ordered CTC to comply with the subpoena. CTC then moved for a stay of enforcement pending appeal. The District Court denied the motion, found CTC in contempt for refusing to comply with the subpoena, and fined CTC.

CTC has appealed the District Court's rulings that DOL did not need to establish jurisdiction and that REAL VEBA is not protected by the RFPA. CTC has also appealed the District Court's denial of the stay of enforcement pending appeal. We consolidated the denial of stay and contempt ruling with the initial appeal.

[1] The District Court exercised jurisdiction under 28 U.S.C. § 1331, 15 U.S.C. § 49, and 29 U.S.C. § § 1132 and 1134. CTC challenged this jurisdiction on the bases discussed below. We have jurisdiction under 28 U.S.C. § § 1291 and 1294(1) because this is an appeal from an order enforcing an administrative subpoena, which is a final order. *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 589 (5th Cir.2000).

[2][3] We review orders enforcing administrative subpoenas for abuse of discretion. *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir.1995). Abuse of discretion occurs when "the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir.1992). We review the District Court's interpretation of federal statutes *de novo*. *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570 (3d Cir.2002).

[4] We also review the denial of stays from injunctive relief pending appeal, including from contempt orders, for abuse of discretion. *Socialist Workers Party v. Att'y Gen. of the United States*, 419 U.S. 1314, 1315, 95 S.Ct. 425, 42 L.Ed.2d 627 (1974).

II. Discussion

[5][6] To enforce an administrative subpoena, an agency must demonstrate that the subpoena meets certain threshold requirements. *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 128 (3d Cir.1981) (en banc). Those requirements are "(1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry." *United States v. Westinghouse Elec. Corp.*, 638 F.2d

570, 574 (3d Cir.1980). “If the government makes this preliminary showing, the burden then shifts to the respondent to prove that enforcement of the subpoena would be improper....” *Wheeling-Pittsburgh*, 648 F.2d at 128.

CTC objects to the District Court's enforcement of the subpoena on the grounds that the District Court erred as a matter *80 of law in its rulings that enforcement was not barred by the RFPFA and the GLBA. CTC also claims that the subpoena was not issued within the authority of the Department of Labor to investigate. CTC finally contends that the District Court erred in not deferring enforcement pending appeal.

A. Right to Financial Privacy Act

The RFPFA was enacted by Congress “to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity.” 1978 U.S.C.C.A.N. 9273, 9305. The RFPFA seeks to strike a balance between the right of privacy of customers and the need for law enforcement agencies to obtain financial records as a part of legitimate investigations. *Id.* CTC contends that because the specific requirements of the RFPFA were not met, CTC has an affirmative obligation not to, directly or indirectly, produce the financial records of its customers to any government authority. For that reason, CTC asserts that the District Court erred in holding that the RFPFA did not bar enforcement of the subpoena.

The RFPFA provides that, unless a statutory exception applies:

no Government authority may have access to or obtain copies of, or the information contained in the financial records of any *customer* from a financial institution unless the financial records are reasonably described and-

...

(2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 1105 [12 U.S.C. § 3405]....

12 U.S.C. § 3402 (emphasis added). None of the statutory exceptions to section 3402 apply in this case. Rather, the question under the RFPFA is whether the financial records, sought by the subpoena, are records of CTC's “customers.”

The RFPFA defines “customer” as: any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, *in relation to an account maintained in the person's name.*

12 U.S.C. § 3401(5) (emphasis added). The RFPFA defines “person,” in turn, as “an individual or a partnership of five or fewer individuals.” 12 U.S.C. § 3401(4).

The District Court held that the REAL VEBA beneficiaries are not customers of CTC because REAL VEBA does not maintain accounts at CTC in plan beneficiaries' names. Instead, the court determined that REAL VEBA was CTC's customer, but because the RFPFA protects only “customers” who are individuals or small partnerships, 12 U.S.C. § 3401(4), REAL VEBA does not qualify as a “customer” under the RFPFA. Therefore, the RFPFA does not bar enforcement of the subpoena.

CTC urges to the contrary that the definition of “customer” should be read so that the final phrase in section 3401(5), “in relation to an account maintained in the person's name,” modifies only “a financial institution [that] is acting or has acted as a fiduciary” rather than modifying the whole subsection, including “any person or authorized representative of that person.” Accordingly, CTC argues that, on the basis of its limited power of attorney, it is the “authorized representative” of the REAL VEBA plan beneficiaries who utilize its services. Since the requirement that the account be in “the person's name” applies only to fiduciaries, the RFPFA applies here to prevent disclosure of the beneficiaries' information.

*81 [7] Because CTC does not maintain accounts in the names of the REAL VEBA beneficiaries, however, if the final phrase modifies both clauses of the subsection—the authorized representative clause and the fiduciary relationship clause—then under the language of the RFPFA the plan beneficiaries are not “customers” of CTC.

[8][9] CTC presents four arguments in support of its reading of RFPFA section 3401(5). First, CTC argues that the canon of statutory construction known as the “doctrine of last antecedent” counsels in favor of limiting the phrase “in relation to an account maintained in the person's name” to modifying the phrase immediately preceding it, not both clauses of RFPFA section 3401(5). The doctrine of last

antecedent requires “qualifying words, phrases, and clauses to be applied to the words or phrase immediately preceding, and are not to be construed as extending to and including others more remote.” *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 365 (3d Cir.2004). But “this rule [of the last antecedent] is not an absolute and can assuredly be overcome by other indicia of meaning...” *Id.* (citing *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003) (applying the rule of last antecedent to statutes)).

CTC's statutory construction argument is undone by a comma. In *J.C. Penney*, this Court applied the rule to a phrase in an insurance contract that had no commas. 393 F.3d at 365 (citing *Resolution Trust Corp. v. Nernberg*, 3 F.3d 62 (3d Cir.1993)). In *Resolution Trust Corp.*, we noted that “[t]he use of a comma to set off a modifying phrase from other clauses may indicate that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrases.” 3 F.3d at 65 (citing *Nat'l Sur. Corp. v. Midland Bank*, 551 F.2d 21, 34 (3d Cir.1977) (lack of a comma limited application of the qualifying language to the word immediately preceding it)).

In this case, there are two telltale commas. Not only is the modifying phrase “in relation to an account maintained in the person's name” set off by a comma, but the phrase to which CTC would like to limit the language, “or for whom a financial institution is acting or has acted as a fiduciary,” is also set off by commas. Under normal rules of grammar (which we assume Congress followed), a phrase that is set off by commas can be excised from a sentence. Thus, in this case, if we excise the second “fiduciary” clause of section 3401(5), it would leave the modifying phrase “in relation to an account maintained in the person's name” to qualify the initial phrase “any person or authorized representative of that person who utilized or is utilizing any service of a financial institution”. Because the CTC account is in REAL VEBA's name and REAL VEBA is not a “person” under the RFPA, we conclude that CTC's statutory construction argument does not hold water.

[10] Second, CTC argues that the RFPA's definition of “person” in section 3401(4) is inapplicable because REAL VEBA is a trust, which is a non-entity. CTC argues that in the case of a trust, we should look to the underlying entities—the trust settlors and beneficiaries. In light of the beneficiaries' equitable interest in the corpus of the trust, CTC argues that the beneficiaries qualify as

“customers”—whatever the title of the CTC account, the “customers” are the individual REAL VEBA beneficiaries and their legal representative, the plan administrator. The question of the status of a trust in relation to section 3401(4) is a question of first impression. A trust differs from a corporation, large partnership, LLC, *et cetera*. Looking to the equitable beneficiaries of a trust—the real parties in interest—rather *82 than to its legal owner is hardly a novel principle in trust law. Here, the privacy interests at stake are not the REAL VEBA's, but those of its beneficiaries'. While the Secretary claims that a broader reading of section 3401(4) would “allow any large entity to argue that it is really just the representative of its constituent members,” we are not convinced by this slippery slope argument. See *Ridgeley v. Merchs. State Bank*, 699 F.Supp. 100, 102 (N.D.Tex.1988). We believe that it is possible to draw a principled distinction between a trust and other entities. Nonetheless, we decline to do so here; we are not inclined to carve out a “trust exception” to RFPA's definition of “person” solely on the principles of the common law of trusts.

Moreover, CTC's argument has no support in existing statute or caselaw. In *Pittsburgh National Bank*, we held that we are bound by the RFPA's unambiguous definition of “customer.” 771 F.2d 73, 75-76 (3d Cir.1985) (holding that a corporation is not a person for section 3401(4)). CTC's policy argument fails to get around the plain statutory language that makes RFPA protections applicable only to accounts maintained *in the customers'* names. That is, RFPA requires a customer to hold both equitable and legal title. Thus, even if CTC is managing funds for REAL VEBA beneficiaries, applicable to the interests of these individual beneficiaries, CTC does not maintain accounts in the beneficiaries' names. Accordingly, this argument also fails.

Third, CTC argues that we should follow the Ninth Circuit's ruling in *Donovan v. National Bank of Alaska*, 696 F.2d 678 (9th Cir.1983). *National Bank of Alaska* involved a scenario very similar to this case. In *National Bank of Alaska*, the Secretary of Labor served an administrative subpoena *duces tecum* on the bank to determine if there was a violation of ERISA plans the bank administered. *Id.* at 680. The subpoena required the bank to produce the general plan documents for all the plans it administered. *Id.* The subpoena stated that upon receipt of the initial information, the Secretary would select twenty-five plans for more thorough examination, for which it requested “[a]ll documents maintained by the bank relating to transactions or

dealings with, for or on behalf of the employee benefit plans selected....” *Id.* The bank was concerned that the additional information might include personal financial records of plan beneficiaries.

The Ninth Circuit opined that “[w]here the Department [of Labor] requests records which disclose transactions of bank customers with the plans, its request would fall within the scope of the Financial Privacy Act, and, absent certification, the bank may legally refuse to produce those records.” *Id.* at 683-84. The court held that the RFPA was not an obstacle to enforcement of the first part of the subpoena. *Id.* at 684. The court went on, however, to comment on the second part:

As for the second part of the subpoena, absent selection of the actual plans to be investigated, neither the Department [of Labor] nor the bank has any way of knowing whether any individual privacy rights might be affected. The bank cannot refuse to comply with the subpoena as a whole on the basis of its vague allegations that it might be required at some time in the future to produce records in violation of the Financial Privacy Act.

Id. at 684. Thus, because *National Bank of Alaska*, at the stage at which it was decided, dealt only with organizational documents, not individual beneficiary accounts, it is distinguishable.

*83 Finally, CTC argues that under the District Court’s ruling, the right to financial privacy, the right protected by the RFPA, can be circumvented by the government depending upon which entity, in the chain of entities involved in the provision of financial services, the government chooses to be subject to the subpoena. According to CTC, the government could obtain documents to which it is not otherwise entitled simply by issuing a subpoena to an entity one step removed from the entity that maintains the direct account relationship with the individual customer. It is axiomatic that the executive branch may not do indirectly what Congress has forbidden it to do directly, particularly when privacy rights are involved.

Nevertheless, even though we may agree that, under the RFPA, it is the REAL VEBA beneficiaries who should be protected, we cannot reshape clear statutory language. Moreover, the Supreme Court has made clear that RFPA is to be narrowly construed. See *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 745, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984). Congress enacted the RFPA in response to *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619,

48 L.Ed.2d 71 (1976), in which the Supreme Court held that there is no constitutional right to privacy of financial records. If Congress is dissatisfied with the treatment its legislative creation gives to a trust like the REAL VEBA trust held by CTC, Congress can rectify the situation.

Thus, we conclude that the District Court correctly found that the RFPA does not bar the enforcement of the Secretary’s administrative subpoena.

B. Gramm-Leach-Bliley Act

CTC also contends that enforcement of the subpoena would violate the GLBA’s prohibition on disclosure of consumer financial information to unaffiliated third parties. GLBA section 6802, entitled “Obligations with respect to disclosures of personal information,” provides that:

(a) Notice Requirements. Except as otherwise provided in this subtitle, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 503 [15 U.S.C. § 6803].

(b) Opt Out.

(1) In general. A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless-

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 504, that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

(C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

15 U.S.C. § § 6802(a)-(b).

The GLBA defines “nonpublic personal information” as: personally identifiable financial information-

(i) provided by a consumer to a financial institution;

(ii) resulting from any transaction with the consumer or any service performed for the consumer; or

*84 (iii) otherwise obtained by the financial institution.

15 U.S.C. § 6809(4)(A).

If section 6802 applies to REAL VEBA, then CTC, as a financial institution, is prohibited from releasing any of the subpoenaed information, other than the REAL VEBA plan documents, to the Secretary, a nonaffiliated third party, unless an exception applies. The threshold question is whether section 6802 applies to REAL VEBA.

1. Is REAL VEBA a “Consumer” Under Gramm-Leach-Bliley?

For section 6802 to apply to REAL VEBA, REAL VEBA must be a “consumer” under section 6809(4). The parties disagree, however, as to whether REAL VEBA is a “consumer.” The District Court did not address this question; it ruled for DOL on other grounds.^{FN5} The Secretary has, nonetheless, urged us to consider affirming the District Court on this alternative basis, as we are permitted to do. *E.g.*, *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 761 n. 1 (3d Cir.2004).

FN5. The District Court found that the GLBA explicitly exempted CTC because the disclosure was required “to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities.” 15 U.S.C. § 6802(E)(8). As we explain *infra*, we do not agree with this conclusion.

GLBA defines “consumer” as: an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

15 U.S.C. § 6809(9).

Obviously, REAL VEBA is not an individual. CTC, however, argues that REAL VEBA is still a “consumer” because its power of attorney from the beneficiaries makes it “the legal representative of the individuals who receive benefits through the Plan.” The Secretary contends that CTC’s claim to be REAL VEBA’s legal representative cannot be maintained in the face of Federal Trade Commission (FTC) regulations adopted under the GLBA.

GLBA section 6804(a)(1) provides rulemaking authority to various regulatory agencies for the

particular types of financial institutions within their regulatory purview. 15 U.S.C. § 6804(a)(1). Section 6805(7) provides that financial institutions like CTC, a state-chartered non-banking trust, are within the catch-all regulatory ambit of the FTC. 15 U.S.C. § 6805(7). FTC regulations provide examples of who is not a “consumer” under GLBA section 6809(9):

(vi) An individual is not your consumer solely because he or she has designated you as trustee for a trust.

(vii) An individual is not your consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(viii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

16 C.F.R. § § 313.3(e)(2)(vi)-(viii).

[11][12][13] The Secretary argues that the FTC definitions demonstrate that REAL VEBA is not a consumer under the GLBA. The Secretary, however, mistakenly attributes to FTC definitions the interpretative weight we would give in a DOL matter to those of the DOL. While we give agencies’ regulations controlling-weight deference, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), it is only when agencies are enforcing *their own* *85 regulations. *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C.Cir.2003) (“we do not generally accord deference to one agency’s interpretation of a regulation issued and administered by another agency”); *Amerada Hess Pipeline Corp., v. Fed. Energy Reg. Comm’n*, 117 F.3d 596, 600 (D.C.Cir.1997). When an agency seeks to piggyback upon another agency’s regulation for its own enforcement purposes, such deference is inappropriate—both because of differences in agency expertise and because of the fact that deference follows Congressional delegation. *Id.* at 601.

[14] Indeed, in the case of the GLBA, there is no reason to give FTC regulations deference in their interpretation by the Secretary of Labor because of the possibility of multiple, conflicting regulatory interpretations of the GLBA by the various agencies with overlapping rulemaking authority under GLBA section 6804(a)(1). It is conceivable that two or more agencies could create reasonable, but different, interpretative regulations regarding the same statutory term. The GLBA itself foresaw this possibility and its language urges agencies to

coordinate their regulations to the extent possible. See 15 U.S.C. § 6804(a)(2). When it is possible for an agency to pick and choose between conflicting regulations, the agency should not be entitled to choose the convenient one and then receive *Chevron* deference. The mere fact that there could be conflicting regulations should preclude *Chevron* deference.

Thus, in the case before us, the Secretary is in the same position as a private party who might bring an action. In such a situation, federal regulations are persuasive, but no more, as to statutory interpretation. For that reason, we reject the Secretary's argument that REAL VEBA is not a consumer because it fails to fall within FTC regulations defining that term.

[15] Our analysis of the situation leads us to the following conclusion: REAL VEBA serves as a legal representative of its beneficiaries and this role is sufficient to qualify REAL VEBA as a "consumer" of CTC under the GLBA if the plan beneficiaries are "individuals who obtain services from CTC."

The Secretary urges that REAL VEBA is not a consumer within section 6809(9) because the plan beneficiaries are not "individuals[] who obtain" services directly from CTC; rather, the beneficiaries "passively" receive benefits from the financial institution—this passive receipt does not amount to "obtaining." Thus, according to the Secretary, the beneficiaries are not themselves consumers, and their legal representative is not a consumer. The Secretary's definition of "obtain" is, however, dubious.

The parties both rely on a dictionary definition of "obtain": "To come into the possession or enjoyment of (something) by one's own effort or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get." *The Oxford English Dictionary*, vol. 10, at 669 (2d ed.1989). Under this definition, it is clear that REAL VEBA beneficiaries "obtain" financial services from CTC, namely the payment of insurance policy premiums and the provision of ministerial financial services. We conclude that this is sufficient to qualify REAL VEBA beneficiaries as consumers and, thus, to qualify REAL VEBA a consumer if it is the beneficiaries' legal representative.

2. Was the Subpoena Properly Authorized?

[16] The Secretary, however, goes on to argue that,

even if REAL VEBA is a "consumer" and entitled to the protections *86 of GLBA section 6802(a), a statutory exception to section 6802(a), applies here. Section 6802(e)(8) provides that 6802(a):

[S]hall not prohibit the disclosure of nonpublic personal information—...

(8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

15 U.S.C. § 6802(e)(8). The District Court found that the section 6802(e)(8) exception applied in this case even though the Secretary's jurisdiction to conduct the investigation had not yet been determined. The District Court considered that the question of statutory coverage of REAL VEBA under ERISA was "not ripe for decision because it is not a legal issue, but rather one that depends on the information sought by the subpoena ... [and] the secretary is not required to demonstrate that the Plan is covered by ERISA prior to seeking enforcement." The District Court did not cite any Third Circuit law for this last proposition; instead, it relied on a ruling by the Eighth Circuit Court of Appeals in *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir.1982).

CTC disputes the District Court's ruling. CTC argues that the burden of proof of jurisdiction is on the Secretary and asserts that REAL VEBA is not covered by ERISA. The Secretary does not dispute that it bears the burden of proof of jurisdiction. Rather, it argues that the question is not ripe and that DOL needs the subpoenaed information to determine jurisdiction.

CTC claims that the District Court erroneously relied on preGLBA ERISA caselaw to determine if the investigation was properly authorized. Specifically, the District Court relied on *Shaw* in which the Eighth Circuit held that the Secretary could conduct an investigation before jurisdiction had been determined:

It is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute. This question, reserved for initial determination by the administrative agency seeking judicial enforcement of its subpoena cannot be

resolved before the agency has had an opportunity to examine the relevant records. Thus, in a subpoena enforcement action, the agency cannot be required to demonstrate that the very matter or entity it seeks to investigate under its statutory investigatory powers is covered by the enabling statute since the “(authority) to investigate the existence of violations ... include(s) the authority to investigate coverage.”

668 F.2d at 989 (citations omitted, ellipsis and parentheses in original). CTC argues that *Shaw* is contrary to the spirit of the GLBA and relies on the Seventh Circuit’s opinion in *Reich v. Great Lakes Indian Fish and Wildlife Commission*, which held that the Secretary was required to establish regulatory jurisdiction in order to enforce a subpoena. 4 F.3d 490 (7th Cir.1993).

The coverage question in *Great Lakes* was a question of law. In the instant case, however, regulatory jurisdiction involves questions of fact: (1) whether “the group of employers that establishes and maintains the plan” is “a ‘bona fide’ association of employers ‘tied by a common economic or representation interest, unrelated to the *87 provision of benefits’ ” and (2) whether “the employer-members of the organization that sponsors the plan” exercise control, directly or indirectly, in both form and substance, over the plan. *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 787 (3d Cir.1998). Moreover, in ruling on the subpoena in *Koresko*, we adopted *Shaw* and held that the District Court properly enforced administrative subpoenas without inquiring into the question of the agency’s jurisdiction because “coverage by the statute is not an element of [the Secretary]’s prima facie case, and lack of coverage is not a defense to enforcement...” 2005 U.S.App. LEXIS 22025, at *10 (3d Cir. Oct. 12, 2005). *Koresko*, however, did not consider *Shaw* vis-à-vis the GLBA because the subjects of the subpoena in that case were not financial institutions. For that reason, *Koresko* and Penn-Mott were not able to invoke the GLBA as a defense. Therefore, *Koresko* is distinguishable on this point.

GLBA section 6802(e)(8) has three clauses, each of which provides an exception to section 6802(a)-(b). The Secretary relies on the second clause, which provides an exception to GLBA’s prohibitions in order to “to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities...” 15 U.S.C. § 6802(e)(8). The Secretary argues that the second clause is a separate exception to the GLBA from the first and third clauses of section 6802(e)(8)

and that the language in the second clause does not require a finding of agency jurisdiction, in distinction to the third clause, which does expressly require the existence of jurisdiction to undertake the investigation. The Secretary claims that the second clause of section 6802(e)(8) is well within the ambit of *Shaw* and *Koresko*.

We find this distinction unconvincing. Implicit in the term “properly authorized” is a finding of jurisdiction to undertake the investigation. Applying *Shaw* and *Koresko* to the CTC subpoena would make a nullity of the GLBA’s “properly authorized” language. Because disclosure is a bell that cannot be unrung, a later review of jurisdiction would not undo the harm from a disclosure that violated the GLBA and which might involve costly document production.

In this case, jurisdiction should be relatively easy for the Secretary to determine simply on the basis of REAL VEBA plan documents, which do not contain protected personal financial information and which appear to have already been turned over to the Secretary. To the extent that these documents are inadequate, the Secretary is entitled to significant document production from Penn-Mott and *Koresko*. Indeed, these organizational documents would appear to be adequate for a determination of jurisdiction, as the question of ERISA coverage relates to the role of the employers who are the plan sponsors, not to the beneficiary-employees. See, e.g., *Gruber*, 159 F.3d at 787.

[17] It is well-established that administrative subpoenas will be enforced when the agency shows that “the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, *that the information demanded is not already within the agency’s possession*, and that the administrative steps required by statute have been followed.” *Wentz*, 55 F.3d at 908 (emphasis added). We are aware of *Koresko*’s intransigence in complying with the District Court’s enforcement order that we affirmed. Nonetheless, we consider the information to be in the Secretary’s possession because she is entitled to it by *88 court order.^{FN6}

FN6. We also note that if the Secretary were willing to pay for pre-production redaction of personal information from the requested documents, neither the GLBA nor the RFPA would be implicated by the subpoena because there would not be a release of

personal financial information.

Therefore, we hold that the District Court erred in ruling that the issue of the Secretary's jurisdiction was not ripe for adjudication. In order to make GLBA's protections meaningful, before private consumer financial information is released by a financial institution to the DOL, the Secretary must establish jurisdiction to conduct the investigation.

C. Stay of Enforcement Pending Appeal and Civil Contempt

The District Court denied CTC's motion to stay enforcement pending appeal. When CTC refused to comply with its order, the District Court held CTC in contempt and fined CTC \$250 a day, explaining that "CTC has refused to comply with Court orders-even an order to which it agreed.... The Court has no choice but to hold CTC in civil contempt." While CTC did refuse to comply with a properly issued court order, in light of our reversal of the District Court's subpoena enforcement order, we will vacate its ancillary contempt order.

III. Conclusion

For the reasons stated above, we will vacate the District Court's orders enforcing the subpoena, denying the stay, and finding CTC in contempt, and we will remand this case to the District Court for further proceedings consistent with this opinion.

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Chao v. Community Trust Co.
474 F.3d 75, 39 Employee Benefits Cas. 2520

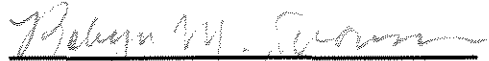
Briefs and Other Related Documents (Back to top)

- 05-4828 (Docket) (Oct. 31, 2005)
- 05-2785 (Docket) (Jun. 9, 2005)

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2007, two paper copies of the foregoing Secretary of Labor's Petition for Panel Rehearing and Rehearing En Banc were served using Federal Express, postage prepaid, upon the following counsel of record:

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