Statement of Commissioner Noah Joshua Phillips
Regarding Ascension Data & Analytics
Commission File No. 1923126

December 14, 2020

The Commission today announced our most recent settlement resolving an alleged violation of the Gramm-Leach-Bliley Safeguards Rule ("Rule"), a critical facet of the Commission's data privacy and security enforcement program. According to the complaint, Ascension Data & Analytics ("Ascension") violated the Rule by failing to vet properly and oversee a provider of optical character recognition (OCR) services, and by failing to conduct appropriate risk assessments. This settlement requires Ascension to implement a comprehensive data security program including annual third-party assessments.

I write to address several points in Commissioner Chopra's dissenting statement.

Commissioner Chopra dissents because he believes the Commission should name Rocktop Partners, a company in the same corporate family as Ascension, as a respondent. Commissioner Chopra points to corporate affiliation and certain overlaps in management and facilities between the two firms, and other entities as well. It is not clear under what legal theory—whether veil piercing, common enterprise, or the like—he would name other defendants; but, without more, the facts alleged do not support doing so.[1]

In terms of relief, Commissioner Chopra argues that Rocktop will dissolve Ascension and set up a new firm or transfer its functions, just to avoid its obligations under the settlement. This is the kind of conduct characteristic of boiler rooms and other frauds. It is not clear to me why Rocktop—an entity regulated by the Securities and Exchange Commission—would dissolve and reconstitute an affiliate for the sole purpose of failing to oversee vendors, or otherwise evading this order.[2]

Commissioner Chopra also would have the Commission allege that Ascension's conduct was unfair. In the Gramm-Leach-Bliley (GLB) Act, Congress gave us a specialized data security statute, and the Safeguards Rule, promulgated pursuant to that Act, establishes liability under the facts alleged in this case.[3] We should use that authority, and here we are. I do not see what an additional

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[1] For example, Commissioner Chopra cites no facts to suggest that corporate formalities were not observed, that Ascension is under-capitalized, or that corporate form was abused to inoculate Rocktop from liability (mind the reader, for Ascension's failure to oversee a vendor) to justify piercing the corporate veil. Courts generally take a dim view of piercing the corporate veil without a substantial basis to do so. *See, e.g.*, *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365 (3d Cir. 2018) ("the corporate veil may be pierced only in extraordinary circumstances, such as when the corporate form would otherwise be misused to accomplish certain wrongful purposes") (internal citations and quotations omitted). And for good reason: the ability to make investments without risk of liability is foundational to the American legal and economic system.

[2] Commissioner Chopra cites *FTC v. Wyndham Worldwide Corp*., No. 2:13-cv-01887 (ES), 2014 WL 2812049, at *8 (D.N.J. June 23, 2014), for the proposition that companies other than frauds may reorganize in an effort to avoid responsibilities under FTC orders. Of course that is true, but that does not mean that every entity in a corporate family can or should be bound by every FTC order. And, certainly, that is not what the court—considering a motion to dismiss—held in that case.

[3] 15 U.S.C. § 6801 *et seq*; 16 C.F.R. Part 314. The limits of applying Section 5 to data security cases are precisely why the Commission, on a bipartisan basis, seeks data security legislation from Congress.

allegation of unfairness would achieve—certainly, no change in the remedy, and nothing better for consumers. What is more, when pleading that lax data security was unfair under Section 5, we need evidence to satisfy the unfairness test; that gets into thornier questions of whether the oversight failure here can constitute unfairness. Thanks to GLB, we need not answer that.

Commissioner Chopra claims that Ascension is being favored because, in the Commission's 2014 case against GMR Transcription Services, it pleaded an unfairness count. He attributes the difference in treatment to the small size of the respondent in that case. GMR was not a financial services firm, however, so the Commission could not have alleged a violation of the GLB Safeguards Rule in that case; and the respondent in this case, Ascension, is also a small company. It is not at all unusual for the Commission to charge a violation of the Safeguards Rule without an accompanying unfairness count.[4]

This is a strong case and a good result. I commend Staff for its thoughtful and energetic efforts to use the authority at our disposal to protect American consumers.

[4] *See, e.g.*, *TaxSlayer, LLC*, No. C-4626 (Nov. 8, 2017), https://www.ftc.gov/enforcement/cases-proceedings/162-3063/taxslayer; *James B. Nutter & Co.*, No. C-4258 (June 16, 2009), https://www.ftc.gov/enforcement/cases-proceedings/072-3108/james-b-nutter-company-corporation-matter; *United States v. American United Mortgage Co.*, No. 07-cv-7064 (N.D. Ill.), https://www.ftc.gov/enforcement/cases-proceedings/062-3103/american-united-mortgage-company-united-states-america-ftc. I am unaware of any case where we alleged a failure to oversee as a violation of *both* GLB and Section 5, as Commissioner Chopra would have us do here.