No. 05-2785

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

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. One related case is currently pending in this Court, Secretary of Labor v. Koresko, Nos. 04-3614, 05-1140, 05-1946, and 05-2673. The Koresko appeals are fully briefed and set for argument on September 29, 2005. This case is related to the Koresko appeals because both cases concern administrative subpoenas issued by the U.S. Department of Labor as part of the same investigation under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this subpoena enforcement matter under ERISA, 29 U.S.C. §§ 1132(e), 1134(c), which incorporates by reference the enforcement provisions in section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. The action was brought in the Eastern District of Pennsylvania, where the employee benefit plan or plans at issue are administered. Joint Appendix ("JA") 19a-20a, 70a; see 29 U.S.C. § 1132(e)(2). The district court's order of May 5, 2005, granting the Secretary of Labor's petition to enforce her administrative subpoena is a final order. See In re Kaiser Aluminum & Chem. Co., 214 F.3d 586, 589 (5th Cir. 2000).

This Court has jurisdiction of the appeal under 28 U.S.C. § 1291. On May 30, 2005, appellant filed a timely notice of appeal from the May 5, 2005 order, within the 60 days permitted by Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 et seq., does not prohibit disclosure of information requested in a properly authorized administrative subpoena where the information does not pertain to a "customer" as defined in the Act.

2. Whether the district court correctly held that the Secretary is not required to establish jurisdiction and compliance with the Gramm-Leach-Bliley

Act, 15 U.S.C. §§ 6801 et seq., before a court can enforce a properly authorized administrative subpoena requesting information that is not related to a "consumer" as defined by the Act.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition below

This is an appeal from a May 5, 2005 order of the U.S. District Court for the Eastern District of Pennsylvania (McLaughlin, J.), granting a petition by the appellee Secretary of Labor ("Secretary") to enforce an administrative subpoena duces tecum issued to appellant Community Trust Company ("CTC"). JA 2a-14a. The subpoena seeks documents held by CTC as trustee for the Regional Employers' Assurance League Voluntary Employees Beneficiary Association ("REAL VEBA"), which is the subject of an investigation by the Secretary. JA 27a, 29a, 31a-37a. In that investigation, the Secretary is seeking to determine whether any person has violated ERISA in connection with the operations of the REAL VEBA, which funds and/or administers life insurance benefits provided to participating employers and their employees. JA 19a, 40a-41a, 87a.

On December 23, 2004, the Secretary issued the subpoena to CTC, seeking specified documents relating to "bank accounts opened or established with the Bank in the name of" entities including the REAL VEBA. JA 31a, 34a-35a. The

subpoena was issued and served pursuant to section 504 of ERISA, 29 U.S.C. § 1134(a)(1), (c).

CTC refused to comply with the subpoena, as directed by the REAL VEBA. JA 89a. Therefore, on January 25, 2005, the Secretary filed a petition to enforce the subpoena, supported by a memorandum of law and a declaration of her investigator, Fred Siegert. JA 19a-30a. On February 28, 2005, CTC filed a motion to dismiss the petition. JA 40a-47a. The parties filed additional written submissions, including CTC's motion to dismiss, JA 40a-64a, the Secretary's response, JA 69a-85a, and an affidavit of CTC president and CEO Susan A. Russell, JA 86a-91a. Following a show cause hearing on March 31, 2005, JA 92a-127a, the district court issued an order on May 5, 2005, granting the Secretary's petition to enforce the subpoena. JA 2a.

CTC again did not comply. Instead, on May 20, 2005, CTC moved the district court to stay its order pending appeal. JA 16a (Docket No. 10). On May 30, 2005, CTC filed its notice of appeal. JA 1a. On June 15, 2005, the district court denied the stay and ordered CTC to produce the subpoenaed documents by June 30, 2005. JA 129a-134a. On June 22, 2005, CTC filed a motion in this Court to stay the enforcement of the May 5, 2005 order pending appeal. This Court denied that motion on June 27, 2005. JA 17a (Docket No. 19).

On July 1, 2005, the Secretary moved the district court to find CTC in contempt for failing to comply with the Court's order of June 15, 2005. JA 17a (Docket No. 20). On August 17, 2005, the district court held a show cause hearing and ordered CTC to produce certain documents responsive to the subpoena by August 22, 2005. JA 18a (Docket Nos. 24-25). CTC did not comply, and instead filed a motion for reconsideration of the court's order to produce. JA 18a (Docket No. 28). The court held a telephone conference with the parties and on September 26, 2005, issued an order denying CTC's motion for reconsideration and finding CTC in contempt for failing to comply with the Court's order of August 17, 2005.

B. Statement of the facts

The Secretary issued the subpoena in this case as part of an investigation into whether the REAL VEBA has violated the provisions of ERISA. JA 29a (Siegert Decl.); JA 33a-34a. Appellant Community Trust Company is the trustee for the REAL VEBA. JA 87a (Russell Aff.); CTC Br. 8-9. CTC is a state-chartered trust company that provides fiduciary services to individuals and other entities. JA 86a (Russell Aff.). The REAL VEBA is a multiple employer employee welfare benefit trust. JA 87a (Russell Aff.). It is not an individual or a partnership of five or fewer individuals. The REAL VEBA is a customer of CTC and maintains an account at CTC in its name. JA 87a-88a (Russell Aff.); CTC Br. 24-25.

The Secretary issued the subpoena to CTC because the investigation of the REAL VEBA could not proceed without the requested documents. JA 30a (Siegert Decl.). The subpoena was issued pursuant to section 504 of ERISA, 29 U.S.C. § 1134, and instructed CTC to appear at 10:00 a.m. on January 10, 2005, at the Secretary's Philadelphia Regional Office to testify and to produce certain documents pertaining to the relationship, operation and finances of the REAL VEBA's Health and Welfare Benefit Plan(s) and the VEBA trusts. JA 31a. The requested documents included documents identifying bank accounts opened or established with the Bank in the name of or for use by the REAL VEBA, Delaware Valley League, Penn Mont, Koresko & Associates, or any person, partnership, VEBA, plan, or trust related to or connected with these entities. JA 32a-37a. The subpoena issued to CTC did not request the account information of any individuals. Id.; JA 117a (hearing).

CTC received, read, and understood the Secretary's subpoena. JA 88a (Russell Aff.). However, it produced no documents. JA 29a-30a (Siegert Decl.). CTC did not assert that it withheld the documents because of a claim of privilege, and did not provide the Secretary with a privilege log. JA 30a.

After the Secretary petitioned the district court to enforce the subpoena, CTC claimed that REAL VEBA directed it not to release the documents. JA 89a (Russell Aff.). CTC claimed that REAL VEBA is the "authorized representative"

of every individual employee of every employer that participates in the REAL VEBA. JA 88a (Russell Aff.). CTC does not dispute that it possesses documents responsive to the subpoena

C. The district court decision

The district court enforced the Secretary's subpoena to CTC because it found that the Secretary had met the three requirements established in United States v. Westinghouse Electric Corp., 638 F.2d 570, 574 (3d Cir. 1980) for enforcement of an administrative subpoena. JA 4a. First, the court found that the inquiry was within the Secretary's "broad authority to conduct investigations to determine whether any person has violated or is about to violate Title I of ERISA." JA 4a-5a. Second, the court found that the Secretary's subpoena, which specified the documents and the date and location that the documents were to be produced, was sufficiently definite. JA 5a. Third, the court found that the requested documents, which pertained to the operation and administration of the Plan, were relevant to the investigation because CTC is the trustee of the Plan. Id.

The court rejected CTC's argument that the subpoena should be limited to determining whether the Plan is covered by ERISA. JA 5a. For purposes of a subpoena enforcement action, the court observed, an administrative agency's authority to investigate the existence of violations includes the authority to investigate coverage. JA 7a (citing Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir.

1982)). The court held that CTC's reliance on Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993), was inapposite because there the question of coverage was purely a matter of statutory interpretation. JA 6a. Where a question of statutory coverage is purely a question of law, as it was in Great Lakes, it may be ripe for decision at the subpoena-enforcement stage. JA 6a, 7a. In this case, however, the court reasoned, the question of ERISA coverage is not ripe because it "depends on the information sought in the subpoena." JA 7a.

The court also rejected CTC's argument that the Secretary must show "reasonable cause" to believe a violation exists to enforce an ERISA administrative subpoena. JA 7a. The court explained that the reasonable cause requirement "does not apply where, as here, the Secretary is seeking production of documents in response to a subpoena." Id. (citing 29 U.S.C. § 1134(a)(1)). The court noted that the Secretary had not overreached her regulatory authority because CTC, as the trustee of the plan, is a third party with knowledge that may be relevant to the investigation. JA 8a (citing United States v. Oncology Servs. Corp., 60 F.3d 1015, 1019-20 (3d Cir. 1995)). Finding that the Secretary had "made a prima facie showing of statutory authority, legitimate purpose, and relevance," the court stated that "[t]he burden shifts to CTC to provide compelling reasons why the subpoena should not be enforced." JA 8a.

The court then addressed CTC's arguments that enforcement of the subpoena would intrude on individual privacy rights protected by the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801 et seq., or the Right to Financial Privacy Act of 1978 ("RFPA"), 12 U.S.C. §§ 3401 et seq. The court concluded that this case falls within the GLBA provision exempting financial institutions from the Act's notice requirements where disclosure of personal information is required "to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities." JA 9a (quoting 15 U.S.C. § 6802(e)(8)). The court thus found it unnecessary to address the Secretary's alternative argument that the REAL VEBA is not a "customer" as defined in the GLBA. JA 9a.

The court also rejected CTC's argument that the RFPA requires the Secretary to certify in writing that it has complied with certain notice requirements before CTC can release any documents. JA 10a. According to the court, the key issue is whether the subpoenaed documents were the financial records of a "customer," defined in the RFPA 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." JA 10a (quoting 12 U.S.C. § 3401(5)). The court found CTC's "strained reading" of the provision – so that the phrase "in

relation to an account maintained in the person's name" applies only where the financial institution is acting or has acted as a fiduciary – unacceptable and contrary to "a common sense and logical approach to the grammatical structure." JA 11a.

The court then examined cases addressing the RFPA's definition of "customer," as well as the RFPA's legislative history, and concluded that "the government is not required to give notice to individual customers unless the government is seeking access to financial records related to an account maintained in the individual's name." JA 13a. In this case, since the only relevant CTC account is maintained in the name of the REAL VEBA, not in the names of individual employees, the court found the RFPA inapplicable. JA 13a-14a.

STATEMENT OF THE STANDARD OF REVIEW

The enforcement of an administrative subpoena will be affirmed on appeal unless the district court abused its discretion. Univ. of Med. & Dentistry v. Corrigan, 347 F.3d 57, 64 (3d Cir. 2003); NLRB v. Frazier, 966 F.2d 812, 815 (3d Cir. 1992). An 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." Frazier, 966 F.2d at 815 (quoting Int'l Union v. Mack Trucks, Inc., 820 F.2d 91, 95 (3d Cir. 1987)). The review of a district court's

interpretation of a federal statute is de novo. Gagliardo v. Connaught Labs, Inc., 311 F.3d 565, 570 (3d Cir. 2002).

SUMMARY OF THE ARGUMENT

The district court correctly held that the RFPA and the GLBA do not excuse CTC's refusal to disclose information requested in the Secretary's properly authorized administrative subpoena. The RFPA only protects from disclosure customer information related to accounts that are in the customer's name. The account maintained by CTC is in the name of the REAL VEBA. The REAL VEBA is not a "customer" as that term is defined by the RFPA because it is not "an individual or partnership of five or fewer individuals." According to well-settled case law, this statutory definition of a customer is dispositive. The Supreme Court has instructed that the RFPA's terms must be strictly construed. Therefore, CTC's argument that entities like the REAL VEBA are "customers" under the RFPA has no merit.

Similarly, the GLBA does not justify CTC's refusal to produce the information requested in the Secretary's subpoena. Congress did not intend for the GLBA to provide sweeping privacy protenctions. The GLBA only protects the privacy interest of "consumers", and the REAL VEBA is not a consumer under the Act because it is not "an individual or the legal representative of an individual." CTC's argument that a "consumer" includes entities like the REAL VEBA does not

comport with the plain meaning of the provision. Additionally, regulations implementing the GLBA's privacy provisions specifically provide that entities like the REAL VEBA – including trusts and employee benefit plans – are not consumers.

Moreover, the GLBA permits disclosure of otherwise protected information to comply with a properly authorized subpoena. The Secretary's subpoena, issued pursuant to her broad powers to investigate potential ERISA violations, was properly authorized by the district court. The Secretary is not required to show that the REAL VEBA is covered by ERISA in order for her subpoena to be properly authorized. Nothing in the GLBA changes the standards for subpoena enforcement. Furthermore, in this case, the question of ERISA coverage hinges on factual information sought by the subpoena. Thus, the district court correctly held that the GLBA does not protect from disclosure the information requested in the Secretary's properly authorized subpoena.

ARGUMENT

It has long been established that a district court will enforce an administrative subpoena 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 the statute have been followed." FDIC v. Wentz,

55 F.3d 905, 908 (3d Cir. 1995) (citing United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)). In this appeal, it is undisputed that each of those elements is met. CTC argues instead that its compliance with the subpoena would violate two financial privacy laws, the Right to Financial Privacy Act and the Gramm-Leach-Bliley Act. As the district court held, those arguments are without merit.

I. THE RIGHT TO FINANCIAL PRIVACY ACT DOES NOT PROHIBIT DISCLOSURE OF THE INFORMATION REQUESTED IN THE SECRETARY'S PROPERLY AUTHORIZED ADMINISTRATIVE SUBPOENA BECAUSE REAL VEBA IS NOT A "CUSTOMER" AS DEFINED IN THE ACT

The district court properly concluded that the Right to Financial Privacy Act of 1978 ("RFPA"), 12 U.S.C. §§ 3401 et seq., does not apply in this case because it protects only information related to an account held in a customer's name, and the REAL VEBA is not a "customer" as that term is defined in the RFPA. JA 12a, 14a (discussing Pittsburgh Nat'l Bank v. United States, 771 F.2d 73, 76 (3d Cir. 1985), and the RFPA's legislative history). The RFPA provides that no government authority may have access to information contained in the financial record of any "customer" from a financial institution unless certain requirements are met. 12 U.S.C. § 3402, see also 12 U.S.C. § 3413(a) ("Nothing in this title prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.").

The RFPA defines a "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 that person's name." 12 U.S.C. § 3401(5) (emphasis added). A "person," in turn, is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4).

Based on a plain reading of the RFPA's definition of a customer, courts have uniformly held that the RFPA only protects "those who maintain accounts in their names at financial institutions." United States v. Daccarett, 6 F.3d 37, 51-52 (2d Cir. 1993) (emphasis added); accord Duncan v. Belcher, 813 F.2d 1335, 1338 (4th Cir. 1987) (definition of customer turns on "whether the individual maintains the financial account in his or her name only"); Ridgeley v. Merchs. State Bank, 699 F. Supp. 100, 102 (N.D. Tex. 1988). CTC contends that the REAL VEBA is the "authorized representative" of every individual employee of every employer that participates in the REAL VEBA. Br. 24. But even if that were true (which the Secretary does not concede and the appellant has not proven), CTC does not claim to have separate accounts in the name of each of those individual employees. Rather, CTC concedes that the account it maintains is in the name of the REAL VEBA. Br. 24-25.

REAL VEBA is not a "customer" within the plain meaning of the RFPA because it is not "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4), (5). In Pittsburgh National Bank, this Court confirmed that "[b]y its terms, the [RFPA] pertains only to the financial records of individuals and small partnerships. Only those entities are 'customers' as defined by section 3401(5)." 771 F.2d at 75. This limited definition, according to this Court, is dispositive. Id. (citing Spa Flying Serv., Inc. v. United States, 724 F.2d 95, 96 (8th Cir. 1984) and Donovan v. Nat'l Bank, 696 F.2d 678, 683 (9th Cir. 1983)). A different reading "would circumvent the purpose of the [RFPA] in protecting the financial records of only individuals and small partnerships, and would allow any large entity to argue that it is really just the representative of its constituent members." Ridgeley, 699 F. Supp. at 102. Plans like the REAL VEBA are simply not "customers" under the RFPA. Nat'l Bank, 696 F.2d at 683-84 (employee benefit plans do not qualify as customers); Donovan v. U.A. Local 38 Plumbers & Pipe Trades Pension Fund, 569 F. Supp. 1488 (N.D. Cal. 1983) (pension funds do not qualify as customers).

CTC tries to read National Bank to suggest that the RFPA protects the financial records of employees in an employee benefit plan. Br. 22-23. On the contrary, as this Court recognized in Pittsburgh National Bank, 771 F.2d at 75, National Bank specifically held that the RFPA does not protect the records of

employee benefit plans because the plans are not individuals or partnerships of five or fewer individuals. 696 F.2d at 683. CTC selectively mentions one part of the opinion where the court stated that the RFPA theoretically could protect records which disclose transactions between individual bank customers and plans. Id. at 684. But the Ninth Circuit reserved that factual question only because it could not determine, on the state of the record in that case, whether the subpoena might reach transactions that involved not only employee benefit plans but also individual customers of the Bank. Id. at 683-84. Here, in contrast, CTC does not claim that it has accounts in the names of any individual customers who are also employees covered by the REAL VEBA. Consequently, only the part of the National Bank decision holding that the RFPA does not protect the records of employee benefit plans is relevant to this dispute. The decision does not stand for the proposition that bank "customers" other than individuals or partnerships are protected by the RFPA.

CTC also attempts to circumvent the plain meaning of the statute and well-settled case law by arguing that REAL VEBA's "account exists constructively or equitably in the names of the individual employees for whose benefit it is maintained." Br. 25. CTC offers no case law or other legal authority to support this novel approach, and has suggested that the issue is a matter of first impression. JA 110a (March 31, 2005 hearing transcript). This is simply untrue. Many courts

have explored the RFPA's definition of "customer" and reached the conclusion that the account must be in the individual's name. See supra pp. 13-14.

CTC also relies on generalizations and unspecific citations to legislative history to suggest that its creative construction of "customer" is warranted because "a strict construction of the [RFPA] will defeat its intent and purpose." Br. 25-26. The Supreme Court, however, said over twenty years ago that the RFPA's terms should be strictly construed. SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745 (1984) ("The most salient feature of the [RFPA] is the narrow scope of entitlements it creates," and "it carefully limits the kinds of customers to whom it applies."). Because there is no constitutional right to privacy in financial records, see United States v. Miller, 425 U.S. 435 (1976), any "rights" must flow directly from the RFPA itself, and the RFPA grants no rights to entities like the REAL VEBA.

CTC also argues, purportedly applying the "doctrine of last antecedent" to the RFPA's definition of "customer", that the phrase "in relation to an account maintained in the person's name" qualifies only the phrase it immediately follows ("for whom a financial institution is acting or has acted as a fiduciary"). Br. 26-27. If Congress had intended to require that the account be maintained in the person's name only in the case of individuals for whom a financial institution is acting as a fiduciary, it would not have inserted a comma between the two phrases. The

doctrine of last antecedent "is not an absolute and can assuredly be overcome by other indicia of meaning." Barnhart v. Thomas, 540 U.S. 20, 26 (2003). The only reasonable reading of the RFPA's definition of customer is the same reading applied by every court that has addressed the issue: a person (or their authorized representative) who utilizes a service of a financial institution, as well as a person (or their authorized representative) for whom a financial institution acts as a fiduciary, is not a "customer" entitled to the RFPA's protections unless the service used by the person or the actions taken by the fiduciary on behalf of the person are in relation to an account maintained in the person's name.

II. THE SECRETARY IS NOT REQUIRED TO ESTABLISH JURISDICTION AND COMPLIANCE WITH THE GRAMM-LEACH-BLILEY ACT BEFORE A COURT CAN ENFORCE A PROPERLY AUTHORIZED ADMINISTRATIVE SUBPOENA REQUESTING INFORMATION THAT IS NOT RELATED TO A "CONSUMER" AS DEFINED BY THE ACT

In 1999, Congress passed 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). Privacy advocates, concerned about unrestrained access by large institutions and their affiliates to customer information, lobbied for curbs on the use of 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). Congress responded with the GLBA's privacy provisions, which are codified at 15 U.S.C. §§ 6801-6809.

Nothing in the text of the privacy provisions of the GLBA reveals an intent to shield financial institutions. Rather, their purpose is to protect the privacy interests of customers (and consumers) of such institutions. See 15 U.S.C. § 6801.[1] Moreover, Congress did not want even consumer privacy interests to trump the need for information in all circumstances. See 15 U.S.C. § 6802(e) (exceptions to the GLBA's notice requirements).[2] The GLBA's privacy provisions merely

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[1] The GLBA distinguishes between a "consumer" and a "customer" of a financial institution. A "consumer" is an individual who obtains a financial product or service from a financial institution that is primarily for personal, family, or household purposes. 15 U.S.C. § 6809(9). A "customer" is a type of consumer, namely, an individual who has an ongoing relationship with the financial institution under which the financial institution provides a financial product or service. 15 U.S.C. § 6809(11). While both consumers and customers qualify for certain privacy protections under the GLBA, they are subject to different notice requirements. See, e.g., 15 U.S.C. § 6803. Appellant does not argue that the REAL VEBA is a "customer" under the GLBA.

[2] The GLBA's privacy protections are much weaker than those initially sought by privacy advocates. See, e.g., 145 Cong. Rec. E2363, E2364 (daily ed. Nov. 11, 1999) ("The privacy provisions in the bill are not strong enough.") (extension of remarks, Rep. Watt); S. Rep. 106-44, at 67 (1999), available in 1999 WL 266803 ("The reported bill . . . fails to include important consumer protection provisions that passed the Committee overwhelmingly last year.") (additional view of Sens.

require that financial institutions provide consumers notice of their disclosure policy, 15 U.S.C. § 6803, and give consumers the opportunity to "exercise" a "nondisclosure option" before nonpublic personal information is released to a nonaffiliated third party. 15 U.S.C. § 6802(b)(1)(c).

Because, as discussed below, the REAL VEBA is not a "consumer" as that term is defined by the GLBA, 15 U.S.C. § 6809(9), the GLBA's privacy protections do not apply to the information requested in the Secretary's subpoena. Even if they do apply, the Secretary is not required to comply with them in this instance because Congress specifically exempts from the GLBA's protections information that is requested in a properly authorized subpoena. 15 U.S.C. § 6802(e)(8).

A. The information requested in the Secretary's subpoena does not pertain to a "consumer" as that term is defined by the GLBA

As the Secretary argued below, JA 75a-76a, the GLBA does not protect documents relating to the REAL VEBA, because the REAL VEBA is not a

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Sarbanes et al.). Thus, the final version of the bill reflects a compromise. Compare 145 Cong. Rec. E2343 (daily ed. Nov. 10, 1999)("American consumers will benefit from increased access, better services, greater convenience and lower costs.") (extension of remarks, Rep. Royce); with 145 Cong. Rec. E2296 (daily ed. Nov. 8, 1999) ("[T]he glaring absence of any financial privacy provisions for affiliated entities. . .is a sorry mistake. . . .In effect, we are creating a financial privacy vacuum.") (extension of remarks, Rep. Stark).

"consumer" as defined in that Act.[3] A "consumer," as defined by the GLBA, is "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) (emphasis added). The REAL VEBA, by its own description a multiple-employer welfare benefit trust, is plainly not an individual.

CTC, the trustee for the REAL VEBA, argues that the REAL VEBA is a consumer entitled to the GLBA's protections because it "is the legal representative of the individuals who receive benefits through the Plan." Br. 15-16 (citing JA 88a, 121a-122a). That argument, however, is directly contrary to regulations adopted by the Federal Trade Commission under the GLBA.[4]

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[3] Although the court below did not address this argument, this Court may affirm the decision of the district court on alternative grounds not reached by the district court. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 761 n.1 (3d Cir. 2004) (appellate court may affirm a result reached by the district court for reasons that differ from the conclusions of the district court if the record supports the judgment); Narin v. Lower Merion Sch. Dist., 206 F.3d 323, 333 n.8 (3d Cir. 2000) (appellate court may affirm a decision on grounds other than those relied on by the district court); Wagner v. Penn West Farm Credit, 109 F.3d 909, 911 (3d Cir. 1997) (appellate court may uphold judgment on any proper theory, even if not raised by parties first in trial court, if there is no prejudice to other party).

[4] As noted in the preamble to the Federal Trade Commission ("FTC")'s proposed regulations implementing the GLBA's privacy provisions, "[m]any entities that come within the [GLBA's] broad definition of financial institution will likely not be subject to the disclosure requirements . . . because not all financial institutions have 'consumers' or establish 'customer relationships.'" 65 Fed. Reg. 11,174, 11,177 (Mar. 1, 2000).

The governing FTC regulations explicitly provide that an individual is not a "consumer" under the GLBA solely because he or she "has designated [the financial institution] as trustee for a trust," "is a beneficiary of a trust for which [the financial institution is] a trustee," or "is a participant or a beneficiary of an employee benefit plan that [the financial institution] sponsor[s] or for which [the financial institution] act[s] as a trustee or fiduciary." 16 C.F.R. § 313.3(e)(2)(vi), (vii), (viii). Thus, the REAL VEBA is not a "consumer" under the GLBA as that term has been defined in rules entitled to controlling-weight deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See 15 U.S.C. § 6804(a)(1) (delegation of rulemaking authority to FTC); Trans Union, 295 F.3d at 47, 48, 51 (giving Chevron deference to the FTC's reasonable construction of other GLBA terms).

In the preamble to its final regulations implementing the GLBA, the FTC further addressed the applicability of the GLBA's privacy provisions to trusts. The FTC recognized that "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." 65 Fed. Reg. 33,646, 33,651 (May 24, 2000). The FTC reasonably resolved that ambiguity by treating a trust as a legal entity separate and distinct from either the grantor or the beneficiary of the trust. As the preamble explained, "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.

In suggesting that any individual who passively "receives benefits" from a financial institution is a consumer under the GLBA, Br. 15-16, CTC also ignores the plain import of the phrase "obtains from a financial institution." 15 U.S.C. § 6809(9). To "obtain" means "[t]o 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). Appellant's construction of the term is thus not supported by a plain reading of the provision. Because there is no constitutional right to privacy in personal financial records, see Miller, supra, and Congress did not intend for the GLBA to provide sweeping privacy protections, see supra pp. 19-20, the terms of the GLBA must be narrowly construed. Deferring to the FTC's reasonable construction of the law, the REAL VEBA simply does not qualify as a "consumer" entitled to the GLBA's protections.

B. Even if the requested information is protected by the GLBA, it is exempt in this instance under the GLBA's exception permitting disclosure to comply with a properly authorized subpoena

In the alternative, as the district court correctly held, the documents sought by the Secretary fall within the GLBA exception permitting disclosure to comply with a properly authorized subpoena. The GLBA permits financial institutions to disclose confidential consumer information when necessary 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) (emphasis added). The second clause of this exception plainly applies to this case, as the district court properly authorized the Secretary's investigation and subpoena of CTC. In fact, CTC conceded at the March 31, 2005 show cause hearing that the GLBA does not apply if the Secretary's subpoena is properly authorized. JA 114a.

Contrary to CTC's contention (Br. 17), the Secretary need not make a threshold showing that the REAL VEBA is covered by ERISA in order for her subpoena to be "properly authorized." The Secretary's subpoena was "properly authorized" by the district court upon a showing "that the investigation will be

conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within [her] possession, and that the administrative steps required by the statute have been followed." FDIC v. Wentz, 55 F.3d 905, 908 (3d Cir. 1995) (citing United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)). Nothing in the GLBA changes or adds to the long-established standards for enforcing administrative subpoenas. That is, the Secretary does not need to show that a law has been violated. Donovan v. Shaw, 668 F.2d 985 (8th Cir. 1982). Rather, "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 208-09 (1946). And section 504 of ERISA grants the Secretary broad powers to investigate potential ERISA violations, including the power to require the submission of records. 29 U.S.C. § 1134(a)(1), (c). Thus, the Secretary may examine documents or interview anyone with knowledge that may be relevant to her investigation, including third parties who do not have obligations under ERISA. See, e.g., United States v. Oncology Servs. Corp., 60 F.3d 1015, 1019 (3d Cir. 1995).

CTC's argument simply ignores the middle clause of 15 U.S.C. § 6802(e)(8), the provision most relevant to this dispute, which expressly permits disclosure to comply with a properly authorized regulatory investigation or subpoena. Despite

the fact that the three clauses of the exception are stated in the alternative, and separated by semicolons, CTC focuses only on the third clause of the exception, and argues (Br. 17) that the Secretary has an "affirmative obligation to establish jurisdiction" over the Plan. Id. Thus, according to CTC's unnatural reading of section 6802(e)(8), CTC is not obligated to respond to the subpoena because the Secretary has not shown that ERISA provides her with "jurisdiction" over the REAL VEBA. Br. 17. In other words, CTC argues that the third clause of 15 U.S.C. § 6802(e)(8), which appears to be aimed at the respective jurisdictions of various federal banking regulatory agencies, see 15 U.S.C. § 6805(a), somehow limits the Secretary's investigative authority under ERISA. That position is completely untenable.

To support its contention that the Secretary is required to establish jurisdiction over an ERISA plan before the subpoena is authorized, CTC cites a case from the Seventh Circuit where the court held that "the question of regulatory jurisdiction is properly addressed at the subpoena enforcement stage if it is ripe for determination," and the question is ripe "where it is a matter of law, not fact." Br. 19 (discussing Reich v. Great Lakes Indian Fish & Wild Life Commission, 4 F.3d 490 (7th Cir. 1993)). According to CTC, the coverage question in this case is ripe for decision at the subpoena enforcement stage because the plan at issue is a

VEBA and it is purely a question of law whether VEBAs are covered by ERISA. Br. 19.

CTC's reliance on Great Lakes is misplaced. While the coverage question in that case (whether a Commission with Indian tribal status is subject to the Fair Labor Standards Act) was purely a question of law, 4 F.3d at 491-92, the coverage question here hinges on the factual information sought by the subpoena. Even assuming that the REAL VEBA qualifies as a voluntary employee beneficiary association within the meaning of the Internal Revenue Code, 26 U.S.C. § 501(c)(9), its tax status does not control whether it is an ERISA-covered plan. See Office of Pension & Welfare Benefit Programs, U.S. Dep't of Labor, ERISA Advisory Op. No. 96-25A, 1996 WL 634362, at *4 n.3 (Oct. 31, 1996). Instead, whether an arrangement is an employee benefit plan covered by Title I of ERISA is a question of fact to be answered in light of all the surrounding circumstances. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 790 (3d Cir. 1998); Donovan v. Dillingham, 688 F.2d 1367, 1375 (11th Cir. 1982) (en banc).

As this Court has previously recognized, a multiple employer welfare arrangement ("MEWA") like the REAL VEBA may be covered by ERISA (in whole or in part) in two different ways. Gruber, 159 F.3d at 786-90; see also 29 U.S.C. § 1002(40) (definition of MEWA). First, the MEWA or VEBA as a whole may be a covered ERISA plan if certain requirements are met. Specifically, "the

group of employers that establishes and maintains the plan must be a 'bona fide' association of employers 'tied by a common economic or representation interest, unrelated to the provision of benefits,'" and "the employer-members of the organization that sponsors the plan must exercise control, either directly or indirectly, both in form and in substance, over the plan." Gruber, 159 F.3d at 787 (citations omitted).

In the alternative, some or all of the individual employers who obtain benefits for their employees through a MEWA may have established their own, single-employer ERISA-covered plans. Gruber, 159 F.3d at 788-90. As this Court has acknowledged, "if an employer adopts for its employees a program of benefits sponsored by a group or association that does not itself constitute an 'employer' or an 'employee organization,' such an employer or employee organization may have established a separate, single-employer (or single employee organization) employee benefit plan covered by Title I of ERISA." Id. at 788 (citing ERISA Advisory Op. No. 96-25A, 1996 WL 634362, at *3). Applying those coverage principles here, the Secretary cannot determine, until she conducts an investigation, either whether the REAL VEBA as a whole is an ERISA plan, or whether the REAL VEBA administers, funds or provides other services to single-employer ERISA plans.

CTC also claims that the district court decision is in error because it is based on an ERISA case decided prior to the enactment of the GLBA. Br. 18 (discussing Donovan v. Shaw, 668 F.2d 985 (8th Cir. 1982)). That argument is completely without merit, as CTC identifies nothing in the GLBA that purports to amend ERISA or to change the longstanding standards for enforcement of administrative subpoenas. Repeals by implication are strongly disfavored. See Branch v. Smith, 538 U.S. 254, 273 (2003). Accordingly, the enactment of the GLBA had no effect on the Secretary's authority to conduct an investigation pursuant to ERISA. [5]

[5] CTC is also mistaken in assenting that the Secretary has an "affirmative duty" to establish "compliance with" the GLBA before CTC can disclose any financial information. Br. 13-14, 20. Even if the GLBA's privacy protections did apply to the information requested in the Secretary's subpoena, CTC (not the Secretary) is responsible for providing to the consumer a notice that complies with the GLBA's requirements. 15 U.S.C. § 6802(a).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the district court's order enforcing the Secretary's subpoena.

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Pursuant to Fed. R. App. P. 32(a)(5), (6), and (7), I hereby certify that the brief for the petitioner-appellee, Elaine L. Chao, Secretary of Labor, complies with the typeface, style and volume requirements because it was prepared using Microsoft Office Word 2003 utilizing the Times New Roman 14 point font and contains 6,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2005, two paper copies of the foregoing Brief for the Secretary of Labor as Petitioner-Appellee was served using Federal Express, postage prepaid, upon the following counsel of record:

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