The Commission Goes to Walmart: Changing Patterns of FTC Enforcement

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The FTC Act allows the FTC to recover monetary relief only in certain circumstances. Under Sections 5 and 19, the Commission can recover monetary relief in federal court by showing that a party violated a final cease and desist order issued through administrative processes. Until recently, the FTC extensively used Section 13 of the Act, which courts had interpreted to provide some pathways to monetary relief. But the Supreme Court recently ruled in AMG *that Section 13 only permits injunctive, rather than monetary, relief. After the case had been decided, many, including the FTC chair, predicted that this would erode the Commission's ability to police fraud and pursue monetary redress.*

However, that does not seem to be the case. A substantial majority of FTC enforcement actions still involve monetary redress of some form. The FTC continues to pursue such redress through novel interpretations of the laws it enforces. For instance, the FTC recently made headlines for initiating an enforcement action against Walmart using a novel interpretation of the Telemarketing Sales Rule. This approach, what I term to be a pattern of novel interpretation, raises serious concerns of notice and overbreadth, potentially leading to a system of regulation by enforcement.

A better alternative to the pattern of novel enforcement is Penalty Offense Authority. Sending parties notices of penalty offenses can achieve the same goal as the pattern of novel enforcement but with fewer drawbacks, particularly in areas of due process and notice. This Comment first discusses the circumstances that led to the pattern of novel enforcement and subsequently describes the drawbacks of this practice through examples of recent FTC actions before concluding with a discussion of how Penalty Offense Authority is superior.

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I. INTRODUCTION

One of the central missions of the FTC is to "[p]rotect the public from unfair or deceptive acts or practices in the marketplace"[1] To accomplish this, the FTC is empowered to enforce the FTC Act.[2] Since the Commission's founding in 1914, patterns of enforcement have shifted. Until recently, the FTC was highly reliant on bringing claims under Section 13(b) of the Act, utilizing it to seek permanent injunction and monetary redress in a single proceeding. The Supreme Court recently invalidated this practice, though the FTC may still seek monetary redress under different sections of the FTC Act and other laws it enforces. Despite worries that this decision would cripple the FTC, most enforcement actions continue to involve some form of monetary redress. This Comment argues that: (1) the FTC has compensated for the

1 *About the FTC*, FED. TRADE COMM'N, https://perma.cc/B8ZM-EDZX (last visited Jan 20, 2023).

2 15 U.S.C. §§ 41–58.

lack of Section 13(b) monetary redress through a pattern of seeking such redress in enforcement actions predicated on expansive and novel interpretations of statutes ("the pattern of novel interpretation"); (2) though this pattern of novel interpretations may help the FTC gain more authority to seek redress, it can have undesirable consequences, such as overbroad interpretations and regulation by enforcement; and (3) there are less worrisome paths to monetary redress, such as Penalty Offense Authority.

A. Statutory Backdrop

Sections 5 and 19 of the FTC Act provide a pathway for the FTC to seek monetary remedies in federal court. Section 5 of the FTC Act allows the Commission to enforce the Act through its administrative proceedings "if the Commission has 'reason to believe' that a party 'has been or is using any unfair method of competition or deceptive act in practice . . . .'"[3] Through this process, the FTC can obtain a cease and desist order from an administrative law judge and subsequently request civil penalties in district court for violations of that order.[4] Under Section 19 of the FTC Act, the FTC can recover monetary damages when a defendant "engages in any unfair or deceptive act or practice . . . with respect to which the commission has issued a final cease and desist order . . . ."[5] However, a court may only grant relief where the Commission "satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent . . . ."[6]

Section 13(b) of the Act pertains to situations in which the "Commission has reason to believe" that either a party "is violating or is about to violate" a provision enforced by the Commission or where injunction before the issuance of a complaint "would be in the interest of the public . . . ."[7] If these conditions are met, the FTC may, in some cases, obtain a "permanent injunction."[8] Unlike Sections 5 and 19, Section 13(b) does not explicitly authorize the FTC to seek monetary relief.

3 AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1346 (2021) (quoting 15 U.S.C. § 42(b)).
4 15 U.S.C. § 45.
5 15 U.S.C. § 57b(a)–(b).
6 15 U.S.C. § 57b(a)(2).
7 15 U.S.C. § 53(b).
8 *Id.*

B. Past Use of Section 13(b) to Seek Monetary Relief

The lack of a clear textual basis for monetary redress did not prevent the FTC from seeking it under Section 13(b). In fact, since the amendment of Section 13(b) in 1973, the FTC became highly dependent on Section 13(b) in policing fraud and pursuing monetary redress. In what became known as the "Section 13(b) Fraud Program", the Commission was able to "use . . . a single forum to attack fraudulent practices."[9] This procedure was effective because a "district court could not only issue an ex parte order freezing assets . . . [but] could also dispose of the case on the merits, ordering . . . the frozen assets be returned to the consumer and that a permanent injunction be issued."[10] In other words, the Section 13(b) Fraud Program provided the FTC with a one-stop-forum for all their enforcement needs. This avenue for enforcement sharply contrasts with the alternative path to achieving "complete final relief," in which "the Commission would need to litigate and win three separate actions: (1) a Section 13(b) preliminary injunction proceeding to obtain a preliminary asset freeze; (2) an administrative proceeding leading to a final cease and desist order; and (3) a district court action to obtain consumer redress under Section 19."[11]

Because of the efficiency of Section 13(b) actions, it is no surprise that "each successive Chairman embraced the program, improving and expanding it."[12] By the 21st Century, § 13(b) had become "one of the FTC's potent consumer protection programs."[13] The program became a "mainstay of the Commission's consumer protection program" to the point where it enabled the FTC to obtain $11.2 billion in relief between 2016 and 2022, an average of $1.8 billion per year.[14] With so much at stake for targets of FTC enforcement, this provision was frequently challenged. And in 2021, it would be killed.

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9 J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 3 (2013).

10 *Id.* at 27.

11 David M. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 11–12, FTC 90TH ANNIVERSARY SYMPOSIUM (2004), https://perma.cc/PXB3-C9RK.

12 Beales, *supra* note 9, at 4.

13 David Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 ANTITRUST 43, 43 (2004).

14 OFF. OF COMM'R REBECCA KELLY SLAUGHTER, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER JOINED BY CHAIR LINA M. KHAN REGARDING SECTION 12(B) OF THE FTC ACT (2022), https://perma.cc/Y487-CF2C.

II. Redress Under Section 13(b) is Dead

In late 2021, the Supreme Court held in *AMG Capital Management* that Section 13(b) could not be used for monetary redress.[15] Given the Commission's reliance on the Section 13(b) fraud program, many feared that this decision would cripple the FTC's ability to enforce the law and promote consumer protection. The decision spurred requests for congressional action, but such action has not been forthcoming. As it stands today, we live in a world where § 13(b) cannot be used to pursue monetary redress.

A. The Ruling

In *AMG Capital Management, LLC v. Federal Trade Commission*,[16] the FTC filed suit against Scott Tucker, who controlled several payday loan companies, alleging violations of Section 5(a) of the FTC Act.[17] Relying on Section 13(b), the Commission asked the district court for a permanent injunction and monetary relief through restitution and disgorgement. The district court granted the request, and Tucker appealed to the Ninth Circuit, alleging that Section 13(b) does not authorize such monetary relief. [18] The Ninth Circuit affirmed the district court, holding that Section 13(b) should be interpreted as "empower[ing] district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution."[19]

Reversing the Ninth Circuit, the Supreme Court answered the question "whether [Section 13's] statutory language authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement" with an unanimous "no."[20] The Court outlined how allowing such relief under Section 13(b) was inconsistent with the structure of the Act, which provides separate procedures for securing injunctive and monetary relief: "The Commission may obtain monetary relief by first invoking its administrative procedures and then § 19's redress provisions (which include limitations). And the Commission may use § 13(b) to obtain injunctive relief."[21] The Court reasoned that interpreting Section 13(b) to allow monetary damages would enable the Commission to "use § 13(b) as a substitute for § 5 and

15 AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1345 (2021).
16 *Id.*
17 *Id.*
18 *Id.* at 1345.
19 *Id.* at 1345.
20 *Id.* at 1344.
21 *Id.* at 1349.

§ 19" which "could not have been Congress' intent."[22] This is because, among other reasons, the "provision (§ 19) comes with certain important limitations that are absent in § 13(b)."[23] Specifically, "§ 19 applies only where the Commission begins its § 5 process within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order."[24] Another constraint under Section 19 that is not present in Section 13(b) is that "it applies only where 'a reasonable man would have known under the circumstances' that the conduct at issue was 'dishonest or fraudulent.'"[25] Because Section 13(b) does not mention monetary redress and lacks the procedural safeguards of the sections that do mention it, the Court unanimously held that it does not allow for monetary redress.

B. The Reaction

The holding in *AMG* caused quite a stir. The FTC immediately requested that Congress amend the FTC Act to allow for continued Section 13(b) enforcement of monetary remedies.[26] Acting FTC Chair Slaughter lamented the alleged gutting of the FTC's enforcement power, stating, "[w]ith this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole."[27] Such congressional action has yet to come. Commissioner Slaughter spoke of how Section 13(b) was instrumental in a wide variety of cases, ranging from scams targeting seniors and veterans to COVID-related fraud. According to Commissioner Slaughter, *AMG* and other decisions "significantly limited the Commission's primary and most effective tool for providing refunds to harmed consumers," and Congress must act to "clarify Section 13(b) of the FTC Act and revive the FTC's ability to enjoin illegal conduct and return to consumers money they have lost . . . ."[28]

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22 *Id.*

23 *Id.* at 1349.

24 *Id.*

25 *Id.*

26 *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC*, FED. TRADE COMM'N (Nov. 3, 2022), https://perma.cc/J5EH-KZ7E.

27 *Id.*

28 *The Urgent Need to Fix Section 13(b) of the FTC Act: Hearing Before the Comm. on Energy and Commerce Subcomm. on Consumer Protection and Commerce*, 117th Cong. (2021) (prepared statement of the Federal Trade Commission).

Beyond abstract fears of weakened enforcement authority, the ruling had an immediate impact on FTC litigation. At the time of the decision, the FTC had more than forty pending cases concerning monetary damages under Section 13(b) and "approximately 24 pending cases in which the FTC relied exclusively on Section 13(b) as authority for seeking monetary relief."[29] The commission alleged at an April 2021 hearing that a total of $2.4 billion was at stake in these cases.[30]

Others thought that *AMG* represented a Supreme Court wary of regulatory overreach. One commenter noted that "when an agency's interpretation of a remedy is too inconsistent with traditional equitable categories to be reined in through the application of equitable principles as in *AMG Capital*, the Court seems willing to step in and close off the agency's access to certain equitable remedies."[31] Similarly, that flows into the idea that "[t]he federal courts' treatment of SEC and FTC statutes is instructive of the courts' approach to agency discretion and interpretation of statutes generally, particularly given the Court's increasing move toward textualism."[32] Regardless of where the Court stands in its odyssey of degrees of deference to administrative agencies,[33] it is clear that the FTC lost a path to monetary redress.

Despite the intense reaction to the ruling, *AMG* does not constitute a blanket prohibition on the FTC seeking monetary remedies. First, the ruling does not affect the FTC's ability to seek civil penalties for violating statutes other than the FTC Act. The FTC has been granted the authority to enforce several laws and regulations such as the Telemarketing Sales Rule,[34] the Restore Online Shoppers' Confidence Act,[35] and the Gramm-Leach Bliley Act.[36] Nor does the ruling affect the FTC's ability to seek damages or redress in the manner prescribed by Section 5 and Section 19 of the FTC Act. Furthermore, as discussed later in this Comment,

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[29] M. Sean Royall, Richard Cunningham, & Olivia Adendorff, *A Watershed Moment? What Comes Next for the FTC in the Wake of AMG*, 35 ANTITRUST 103, 105 (2021).

[30] *Id.*

[31] Aiste Zalepuga, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. 2083, 2106 (2021); *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Law,* 133 HARV. L. REV. 852, 869 (2020) (discussing a growing movement of "administrative skepticism").

[32] *Id.*

[33] *See* Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 Duke L.J. 1015 (2021).

[34] 16 C.F.R. § 310 (2022).

[35] 15 U.S.C. § 8401–8405.

[36] 15 U.S.C. § 6805.

the FTC can pursue damages when acting in partnerships with states or in response to a party's actions after it has been warned with a notice of penalty offenses.

III. A PATTERN OF NOVEL STATUTORY INTERPRETATION HAS REPLACED SECTION 13(B)

Despite the cynicism about the FTC's ability to pursue monetary damages in the wake of *AMG*, the FTC remains highly active in seeking monetary damages. In fact, in the fourteen months since *AMG* came down, "86% of the FTC consumer protection cases closed . . . included monetary remedy either through the commission, through a state or directly to consumers."[37] The FTC was able to seek monetary relief in these cases through a combination of factors, mainly, "increased reliance [on] civil penalty authorities for rules – or for practices that are well known and established to be deceptive or unfair . . . [and] partnerships with states that have less restrictive laws about obtaining monetary remedies."[38]

After examining post-*AMG* enforcement actions, it appears that novel interpretations of rules and statutes other than the FTC Act have also allowed the FTC to seek monetary redress in a panoply of cases. This Comment will focus on how the Commission has used these novel arguments in enforcement actions to allow for monetary relief in the wake of *AMG*. Specifically, the Commission has brought actions supported by novel and expansive interpretations of the Telemarketing Sales Rule, the Restore Online Shoppers' Confidence Act, the Gramm-Leach-Bliley Act, and Section 19 of the FTC Act.

But first, some caveats. Though it would seem like the FTC is still very much in the business of pursuing monetary remedies, the 86% figure does not tell the whole story. As economist Andrew Stivers has explained, it may be that a high percentage of cases seek monetary damages due to selection, "i.e., due to the commission not bringing cases that were less likely to result in monetary remedy – rather than due to continued or increased success in imposing monetary remedies post-*AMG*."[39] Furthermore, because the FTC does not release sufficient information to understand how remedies were calculated, it is difficult to gauge how *AMG*

[37] Andrew Stivers, *How The FTC Is Imposing Monetary Remedies Post-AMG*, LAW360 (July 22, 2022), https://www.law360.com/articles/1513249/how-the-ftc-is-imposing-monetary-remedies-post-amg-.

[38] *Id.*

[39] *Id.*

has affected the amount of monetary relief sought.[40] Nor does this analysis account for changes in FTC leadership, which may significantly affect the Commission's operations. In her recent letter of resignation, Commissioner Wilson noted a significant decline in consumer protection actions under Chair Lina Khan due to the "tarnishing of . . . reputation, the diminution of . . . efficacy, and the exodus of . . . experienced personnel" that the agency has suffered of late.[41]

A. A String of Novel Arguments

1. *Walmart* and the Telemarketing Sales Rule

Our tour of novel arguments begins with the FTC's interpretation of the Telemarketing Sales Rule ("TSR") in its pending enforcement action against Walmart in *FTC v. Walmart*.[42] In the times before *AMG*, this would be a classic use case for Section 13(b) because there is not a final cease and desist order. However, without the Section 13(b) program, the FTC uses other means to seek monetary redress in the form of extremely broad interpretation of the Telemarketing Sales Rule. However, this may stretch the Act further than the text can bear. As I discuss below, the TSR claims were recently dismissed by the Northern District of Illinois in *Walmart*, lending credence to the idea that some of the interpretations advocated by the FTC are beyond the pale.[43]

The TSR prohibits any "deceptive telemarketing act or practice."[44] Prohibited practices include: failure to disclose certain material information prior to a customer's consent to pay; "misrepresenting, directly or by implication," certain material information in the sale of goods or services; certain actions "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization"; and "[m]aking a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution."[45]

40 *Id.*
41 Letter of Resignation from Comm'r Christine S. Wilson, Fed. Trade Comm'n, to President Joe Biden (March 2, 2023), https://perma.cc/N5BD-U33A.
42 Complaint, FTC v. Walmart Inc., No. 1:22-cv-03372 (N.D.I.L. Jun. 28, 2022), https://perma.cc/293P-MSNX.
43 Fed. Trade Comm'n v. Walmart Inc., No. 22 CV 3372, 2023 WL 2646741 (N.D. Ill. Mar. 27, 2023).
44 16 C.F.R. § 310.
45 16 C.F.R. § 310.3.

The rule also prohibits assisting and facilitating such actions. It is a violation of the TSR "for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule."[46] Courts have interpreted the assisting and facilitating language to mean that a "claim of assisting or supporting a violation of the [TSR] requires that there be an underlying violation of the [TSR]" by another party.[47] Substantial assistance also requires that the defendant actively participate in the unlawful conduct.[48]

a) The Conventional Application of the Telemarketing Sales Rule

A typical application of the TSR involves the FTC pursuing an enforcement action against a party based on an allegation of deceptive marketing of a product or service over the telephone. Recent examples of traditional TSR litigation include *FTC v. Moneta Management Inc*,[49] *FTC v. Human Resource Development Services, Inc*,[50] and *SEC v. Warrior Trading, Inc*.[51] All these cases involve the prosecution of a defendant who actually played a role in telemarketing, unlike the Walmart case.

Moneta concerns a company that operated fake student debt relief and marketed to victims of the scam using the telephone. The FTC brought claims under Sections 13(b) and 19 of the FTC Act and Telemarketing Sales Rule. The commission alleged that the defendant Moneta was "helping . . . [another person's] . . . criminal student loan debt relief scheme obtain merchant accounts," which brought in "tens of millions of dollars from tens of thousands of consumers."[52]

Human Resources involved calls to potential students from a dishonest medical school. Like *Moneta* and *Automatic Funds*, the Commission brought actions under Sections 13(b) and 19 of the

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46 *Id.*

47 *See, e.g.*, Kornea v. J.S.D Mgmt., Inc., 366 F. Supp. 3d 660, 669 n.33 (E.D. Pa. 2019).

48 Schatz v. Rosenberg, 943 F.2d 485, 497 (4th Cir. 1991).

49 Complaint for Permanent Injunction and Other Equitable Relief at 1, FTC v. Moneta Mgmt., No. 9:21-cv-81139 (S.D. Fla. Jun. 29, 2021), https://perma.cc/XE34-94F5.

50 Complaint at 5, FTC v. Hum. Res. Dev. Servs., Inc., No. 1:22-cv-01919 (N.D. Ill. Apr. 14, 2022), https://perma.cc/8JB4-V6VV.

51 Complaint at 23, FTC v. Warrior Trading, Inc., No. 3:22-cv-3004 (D. Mass. Apr. 19, 2022), https://perma.cc/N8G5-L3C6.

52 Complaint in *Moneta Mgmt.*, *supra* note 46, at 1.

FTC Act and the TSR. The alleged scam involved enticing students to apply to a medical school in the Caribbean by providing statistics that inflated employment outcomes. This alleged scam involved extensive interaction with consumers on the telephone. The defendants would "respond to incoming calls and place outgoing telephone calls to contact potential students and conduct a sales pitch" for enrollment. [53] The scheme fits well within the purview of the TSR.

As with the first two cases, the FTC brought the action against Warrior Trading under Sections 13(b) and 19 of the FTC Act and the Telemarketing Sales Rule. This case involved Warrior Trading selling trading strategies where "during its telephone calls with consumers, [it] repeats and reinforces the earnings claims it makes in its YouTube videos, Free Day Trading Webinars, social media, and other online advertising."[54] As with the first three cases, this again fits squarely within the scope of the TSR.

b) Walmart *and a Novel Interpretation of the TSR*

While the cases described above show a straightforward application of the TSR, the FTC advances a much more complicated and novel interpretation in *FTC v. Walmart, Inc.*[55] Walmart offers financial services at its customer service desk and money centers in select stores. Customers can transfer money at Walmart, which will subsequently use a third-party company like Moneygram to transfer the funds. The FTC alleges that Walmart failed to take certain precautions to prevent transfers induced by fraud. Some of this fraud, the FTC alleges, has been perpetrated by telemarketers who have their victims transfer money from Walmart.[56]

Under the TSR, the FTC alleges that Walmart both directly violated the TSR and assisted and facilitated violations by others. The assisting and facilitating argument depends on: 1) classifying Walmart as a "seller" under the Act and, 2) showing direct TSR violations by other parties. The FTC alleges that as a seller, Walmart allowed cash-to-cash transactions and provided "'substantial assistance or support'" to telemarketers while knowing "'or consciously avoiding knowing' that the seller or telemarketer

53 Complaint in *Hum. Res. Dev. Servs.*, *supra* note 50, at 5.
54 Complaint in *Warrior Trading*, *supra* note 48, at 23.
55 Complaint, FTC v. Walmart Inc., No. 1:22-cv-03372 (N.D.N.Y. Jun. 28, 2022), https://perma.cc/293P-MSNX.
56 *Id.*

is engaged in practices that violate"[57] the TSR. To further support the assisting and facilitating claim, the FTC alleges that Walmart "and its employees have provided substantial assistance or support to sellers or telemarketers who Defendant or its employees knew or consciously avoided knowing" of such assistance.[58]

Specifically, among other counts, the FTC alleges Walmart assisted those who "[i]nduced consumers to pay for goods or services or charitable contributions through the use of false or misleading statements . . . ."[59] Additionally, Walmart is alleged to have "[r]equested or received payment of a fee or consideration in advance of consumers obtaining a loan where the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan for the person . . . ."[60] Finally, the FTC alleges that Walmart "[a]ccepted cash-to-cash money transfers as payment for goods or services offered or sold through telemarketing or for charitable contributions solicited or sought through telemarketing," which brings them under the scope of the act.[61]

Walmart denies all these claims and challenges their statutory and constitutional basis. Beginning with the constitutional challenge, Walmart contends that "Congress violated the Constitution when it amended the FTC Act to grant the independent FTC the executive litigation outlined in 15 U.S.C. §§ 45(m), 57b, and 53(b)."[62] Under *Humphrey's Executor v. U.S.*, the Supreme Court held that the FTC, as organized in 1935, was not a part of the executive power, as a commissioner could only be removed for "inefficiency, neglect of duty, or malfeasance."[63] The Court subsequently held that agencies headed by a single unremovable individual could exercise "only . . . quasi-legislative or quasi-judicial powers" which did not include the ability to "seek daunting monetary penalties against private parties on behalf of the United States in federal court . . . ."[64]

Interesting constitutional questions aside, regarding the TSR, Walmart claims that there was no underlying violation of the TSR, and that they did not provide substantial assistance to

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57 *Id.* at 56.

58 *Id.* at 57.

59 *Id.*

60 *Id.*

61 *Id.* at 58.

62 Memorandum of Law in Support of Walmart Inc.'s Motion to Dismiss at 13, FTC v. Walmart Inc., No. 1:22-cv-03372 (N.D.I.L. Jun. 28, 2022).

63 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

64 *Id.*

any underlying violation. As for the underlying violations claim, Walmart argues it cannot be considered a seller or telemarketer under the act because it is not the primary actor. Walmart contends that the FTC cannot meet the burden of proving that they (1) operated "in connection with" a "plan, program, or campaign" that (2) was "conducted to induce the purchase of goods or services or a charitable contribution," (3) made "use of one or more telephones," and (4) "involve[d] more than one interstate telephone call . . . ."[65] And, according to Walmart, that's the ballgame, because failure to adequately allege facts supporting any of these elements requires dismissal.[66]

As for the claim of substantial assistance, Walmart argues that neither the processing of money transfers nor a failure to adopt a recommended but not required antifraud procedure qualifies as substantial assistance. Walmart claims that "the FTC made clear in promulgating Section 310.3(b) that this element incorporates standard aiding-and-abetting principles from tort and securities law,"[67] which does not bring them into the fold as they claim that they were not even negligent. Finding Walmart liable here would eliminate any degree of culpability in the telemarketing sales rule. Furthermore, "'active participation' requires 'something more than routine professional services provided to the primary wrongdoer.'"[68]

The district court agreed. In a partial win for Walmart, the district court dismissed the TSR claims, while denying the motion to dismiss the Section 5 allegations. The court relied on two principle justifications for dismissing the claims. First, the FTC did not allege underlying violations by other parties with sufficient specificity, precluding a finding that Walmart could be providing substantial assistance to those parties.[69] More relevant to the novelty of the argument, the district court held that substantial assistance requires "more than casual or incidental help to a telemarketer."[70] So there is a class of transactions between telemarketers and parties like Walmart with "little or no relation

65 Memorandum of Law in *Walmart*, *supra* note 59, at 15.

66 *Id.*

67 *Id.* at 17.

68 *Id.*

69 Fed. Trade Comm'n v. Walmart Inc., No. 22 CV 3372, 2023 WL 2646741, at *11 (N.D. Ill. Mar. 27, 2023).

70 *Id.* at *12 (citing 16 C.F.R. § 310.3(b)); *see also* FTC v. Chapman, 714 F.3d 1211, 1216 (10th Cir. 2013).

to the conduct that violates the Rule."[71] And the district court, guided by general principles of aiding and abetting, determined that, in general, "[p]rocessing routine transactions isn't substantial assistance."[72] Processing transactions can only constitute assistance if they are not routine in that "a defendant knows enough about the underlying fraud" which would make "an ordinary transaction become[] extraordinary" and trigger liability.[73] But because the FTC failed to connect "Walmart's general awareness of red flags and fraud with specific knowledge about the vast majority of money transfers at issue in this case, such that processing those transactions became something other than routine."[74]

This is a significant victory for Walmart and has some big-picture implications to ideas of notice and due process. The Chamber of Commerce and Retail Litigation Center filed an amicus brief supporting Walmart's motion to dismiss extensively discussing these concerns.[75] They contend a lack of due process in the allegedly unfair enforcement of the TSR due to lack of notice.[76] Echoing Walmart, they also claim that "the 'substantial assistance' element incorporates traditional aiding-and-abetting principles into the Section 310.3(b) claim and requires 'something more than routine professional services provided to the primary wrongdoer,' such that the conduct rises to the level of 'active participation' in the unlawful acts of another."[77] The Chamber believes "the FTC's action seeks to expose businesses providing routine, lawful services to massive regulatory uncertainty, legal costs . . . based on shaky authority and a contorted interpretation of rules meant to regulate telemarketing."[78] Whether courts accept or—as here—reject novel interpretations has significant implications for the FTC's ability to seek monetary redress.

To sum it up, it does not appear that the FTC could recover financially under Section 5 or Section 19 due to the lack of a final cease and desist on which such claims for monetary redress must

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71 *Complying with the Telemarketing Sales Rule*, FED. TRADE COMM'N, https://perma.cc/PYY3-WB67 (last visited Jan 20, 2023).

72 Fed. Trade Comm'n v. Walmart Inc., No. 22 CV 3372, 2023 WL 2646741, at *13 (N.D. Ill. Mar. 27, 2023) (collecting cases).

73 *Id.* (collecting cases).

74 *Id.* at *14 (collecting cases).

75 Brief for Chamber of Commerce of the United States of America & Retail Litigation Center, Inc. as Amici Curiae Supporting Defendant, Fed. Trade Comm'n v. Walmart Inc., No. 22 CV 3372, 2023 WL 2646741 (N.D. Ill. Mar. 27, 2023).

76 *Id.*

77 *Id.*

78 *Id.*

be predicated. Due to the lack of a cease and desist, in a pre-*AMG* world, this would be a natural application of Section 13(b) if the Commission wanted to seek monetary redress. However, after *AMG*, the FTC had to shoehorn in the Telemarketing Sales Rule in what seems to be an evasive move that stretches the scope of the rule more than it can bear. As the four cases above illustrate, even in the post-*AMG* world of more novel enforcement, the Walmart case stands alone as the only case in which the FTC is interpreting the substantial assistance provision of the rule to find liability for actions on Walmart's part that did not even involve the use of a telephone. As the Chamber's brief points out, this raises concerns about due process and fair notice requirements.[79]

2. An Increasingly Broad Interpretation of ROSCA

The trend of novel and aggressively broad interpretation of rules is not limited to the TSR. The FTC has also been undertaking enforcement actions based on a highly expansive interpretation of the Restore Online Shoppers' Confidence Act ("ROSCA").[80] The commission alleges violations of the Act where companies offering subscription services allegedly fail to disclose details about the underlying product or service being provided in the subscription. This practice contrasts the more conventional interpretation, which finds violations in failure to disclose information about the subscription, such as the billing method and autorenewal policies. Given trends in the economy towards subscription services, such an interpretation, if validated, would enable the FTC to pursue enforcement against a much wider range of parties and actions than the more conventional interpretation. Thus, in the following cases, the novel interpretation of ROSCA allows the FTC to seek monetary relief much as they had under Section 13(b).

a) Moviepass

In the Matter of Moviepass, Inc.,[81] the FTC brought an enforcement action alleging violations of the FTC Act and ROSCA in the company's marketing of a subscription service for admission to movie theaters. The Commission alleges that MoviePass

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79 *Id.* at 4 (citing FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012)).

80 15 U.S.C. § 8403.

81 Complaint, Moviepass, Inc., et al., FTC File No. 1923000 (F.T.C.) (Oct 1, 2021), https://perma.cc/XZ3F-GG76.

implemented several programs that made it difficult for customers to use their passes. This case is novel in that it marks the first time the FTC has applied ROSCA, which was previously only used concerning "negative option features," also known as subscriptions where one must opt-out to end the service, to the underlying product sold through the negative option feature. In other words, the FTC is using the presence of a negative option feature, which is not a per se violation of the act, as a hook to police alleged fraud in the underlying product.

MoviePass marketed a service to customers in which they could supposedly gain unlimited access to movie theaters for a flat monthly fee. The service proved popular, gaining over 3 million subscribers, but it was unprofitable for parent company Helios and would lead them to operate at a substantial loss.[82]

Allegedly in response to this lack of profitability, MoviePass implemented two new features, which the FTC calls "Password Disruption" and "Ticket Verification." The Password Disruption feature forced a group of subscribers to change their passwords, but the process often failed, locking subscribers out of their accounts. The Ticket Verification program required a group of subscribers to take pictures of their ticket stubs to verify that they were the sole users of their MoviePass. However, the automated verification system often failed, resulting in subscription cancellation.[83]

ROSCA prohibits negative option marketing on the internet unless it meets specific requirements. As defined in the Act, negative option marketing is "a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer."[84] In this case, the negative option was the MoviePass subscription which would automatically renew unless it was cancelled.[85] ROSCA requires that a party conducting negative option marketing: (1) discloses "all material terms of the transaction before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before charging the consumer's credit card . . . ; and (3) provides simple mechanisms for a consumer to stop recurring charges . . . ."[86]

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82 *Id.*
83 *Id.*
84 16 C.F.R. § 310.2(w).
85 Complaint in *Moviepass*, *supra* note 81.
86 15 U.S.C. § 8403.

Finding a violation here requires a novel interpretation of ROSCA. In a dissenting statement, Commissioner Noah Phillips noted that "[t]he novelty here is that, for the first time, the Commission is treating a deception about the characteristics of the underlying product—not the negative option feature—as a violation of ROSCA."[87] In other words, the fraud is the Moviepass, not how one pays for it. Widespread adoption of this interpretation would result in a regime where the commission could "seek civil penalties against all businesses that use online negative option features where the Commission determines that there has been any material deception" regardless of whether it had anything to do with the negative option feature.[88] The dissenting statement highlighted the connection to *AMG* as did Commissioner Wilsons's concurring statement, which stated that "[t]he temptation to test the limits of our remaining sources of authority is likely to be strong."[89]

b) Wealthpress

Another example of the FTC applying an expansive interpretation of ROSCA comes in the recently settled case *FTC v. Wealthpress Holdings LLC*.[90] Defendant WealthPress sold services that recommended trading strategies in financial markets. WealthPress used targeted advertisements on websites like YouTube. The FTC alleges that these advertisements contained misleading and fraudulent claims by people held out to be experts who often did not make the trades they were touting. Once customers had subscribed to the service, WealthPress allegedly made similar misrepresentations about their trading performance where the supposed experts expounded on their skill in making trades that did not in fact occur. As the Commission describes, "[d]efendants or their purported experts comb through historical price data to identify significant price changes, and then purport to have made wildly profitable 'trades' capitalizing on them."[91]

As with MoviePass, WealthPress used negative options with an auto-renewal feature. When subscribing to the service, there is a link to terms and conditions below the section where

[87] Dissenting Statement of Commissioner Noah Joshua Phillips, In re MoviePass, Inc., FTC File No. 1923000 (F.T.C.) (Jun. 7, 2021), https://perma.cc/5R56-N2DB.

[88] *Id.*

[89] Concurring Statement of Commissioner Christine S. Wilson, In re MoviePass, Inc., FTC File No. 1923000 (F.T.C.) (Jun. 7, 2021), https://perma.cc/PS25-KE9M.

[90] Complaint, FTC v. Wealthpress Holdings LLC, No. 3:23-cv-00046 (S.D. Fla. Jan. 12, 2023), https://perma.cc/UE85-XPRN.

[91] *Id.* at 26.

customers enter their payment information. These terms include a disclaimer that "WealthPress does not represent that any account will or is likely to achieve profits or losses similar to those discussed on the Site."[92]

As previously noted, ROSCA requires the disclosure of "all material terms of the transaction before obtaining the consumer's billing information . . . ."[93] As in *MoviePass*, the supposed nondisclosure of terms and conditions here has more to do with the underlying product than the negative option. The fraud was not occurring in the fact that Wealthpress operated on a subscription basis, but rather in the underlying product which misrepresented past performance. So the alleged fraudulent conduct occurred in the service subscribed to, not the implementation of the subscription or negative option feature itself. However, the FTC argues that because certain terms and conditions relating to investment risk were "set out in an easily-overlooked page of their website" and were often material, WealthPress violated ROSCA.[94] Concurring, Commissioner Wilson, who expressed some concern about overbroad ROSCA enforcement in *MoviePass*, agreed that this conduct represented a ROSCA violation "based on the highly specific facts of this matter . . . ."[95] Commissioner Wilson argues that because the disclaimers about future profits were embedded in the terms of the transaction, they constituted material information about the service that was not disclosed before billing information was requested, in violation of the Act's criteria for permissible negative option features.

This expansive interpretation creates a line-drawing problem given the nature of modern e-commerce. Today's online shoppers are flooded with disclaimers—often linked to on checkout pages—and few shoppers read these disclaimers.[96] Would the result in *WealthPress* have been different if the link to the terms and conditions appeared before the section of the site where consumers entered their billing information? What if it was horizontally parallel to it on the website?

Beyond fun line-drawing hypotheticals, the question of whether ROSCA can be violated through information related to the underlying product rather than the negative option looms

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92 *Id.* at 28.

93 15 U.S.C. § 8403.

94 Complaint, FTC v. Wealthpress Holdings LLC, No. 3:23-cv-00046 at 28.

95 Concurring Statement of Commissioner Christine S. Wilson, FTC v. WealthPress, Inc., FTC File No. 212 3002 (F.T.C.) (Jan. 13, 2023).

96 *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546 (2014).

large. While some may argue that fraud is fraud and it shouldn't matter whether it is in the terms of the negative option feature or the underlying product, that argument runs counter to the due process concerns underlying the *AMG* decision and law in general. If textual and due process constraints must yield to the crusade against fraud, the court would not have banished the Section 13 fraud regime in *AMG*.

3. *RCG* and the GLBA

The FTC has also relied on a novel interpretation of the Gramm-Leach-Bliley Act ("GLBA") to pursue monetary damages in enforcement actions.[97] The GLBA allows the FTC to seek damages in certain circumstances where a party uses fraud to gain access to customer information of a financial institution.[98] The FTC webpage on the Act describes it as requiring "financial institutions – companies that offer consumers financial products or services like loans, financial or investment advice, or insurance – to explain their information-sharing practices to their customers and to safeguard sensitive data."[99] From this description, it would seem that the Act is focused on the privacy angle of consumer protection.

But the FTC now has other thoughts. In *RCG,* the Commission used the Act to pursue monetary remedies against a party for actions that had nothing more to do with information sharing and sensitive data than any other transaction.[100] This represents an expansive interpretation that could bring many transactions under the scope of the GLBA, thus presenting a similar issue of notice as the Walmart case.

In *RCG*, the FTC alleges that the defendants advertised fraudulent financial products to consumers. RCG and the co-defendants allegedly provided consumers with merchant cash advances, consisting of "immediate funds in a specific amount in exchange for consumer's agreement to repay a higher amount from future business receivables."[101] However, RCG allegedly withdrew more than the agreed upon amount, known as the "Total

97 15 U.S.C. § 6821.

98 *Id.*

99 *Gramm-Leach-Bliley Act*, FED. TRADE COMM'N (Mar. 25, 2023), https://perma.cc/V7YE-2CEL.

100 FTC v. RCG Advances, LLC, No. 20-cv-4432, 2020 WL 9718871 (S.D.N.Y. August 13, 2020).

101 Complaint at 6, FTC v. RCG Advances, LLC, No. 20-cv-4432 (S.D.N.Y. June 10, 2020).

Purchase Amount."[102] The defendants further misrepresented whether their product required a personal guaranty. They operated the scheme by obtaining banking numbers and passwords from consumers so that they could transfer money from their accounts.[103]

To violate the GLBA, a person must "obtain or attempt to obtain . . . customer information of a financial institution relating to another person . . . by making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution . . . ."[104] The GLBA instructs that it "shall be enforced by the Federal Trade Commission in the same manner and with the same power and authority as the Commission has under the Fair Debt Collection Practices Act to enforce compliance with such Act."[105] The Fair Debt Collection Practices Act in turn calls for the Commission to "enforce the provisions . . . in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule."[106] As a result, the FTC argues that the manner of enforcement bounces back to them, and that courts can grant redress to consumers under Section 19 of the act.

However, the ability of the FTC to seek monetary relief in cases of GLBA violations is far from clear. As the Government Accountability Office points out, the GLBA "includes a provision directing federal regulators and FTC to establish standards for financial institutions to protect against any anticipated threats or hazards to the security of customer records."[107] Monetary redress requires the FTC to "identify affected customers and any monetary harm they have experienced."[108] But because such harm to privacy and security is difficult to quantify, the "FTC lacks a practical enforcement tool for imposing civil money penalties." [109] Consequently, the "GAO recommend[ed] that Congress consider giving the FTC civil penalty authority to enforce GLBA's safeguarding provisions."[110] So according to the GAO, to allege monetary redress with any degree of certainty, the Commission must

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102 *Id.* at 5.
103 *Id.* at 33–44.
104 15 U.S.C. § 6821(a).
105 15 U.S.C. § 6822.
106 15 U.S.C. § 1692(l).
107 U.S. GOV'T ACCOUNTABILITY OFF., ACTION NEEDED TO STRENGTHEN OVERSIGHT OF CONSUMER REPORTING AGENCIES (2019), https://perma.cc/V7YP-4V6M.
108 *Id.*
109 *Id.*
110 *Id.*

claim a different type of harm than the GLBA intended to address.

The GAO's analysis underscores that the GLBA is understood to concern matters of privacy, not overcharging as seen in *RCG*. This privacy-centric interpretation is further evidenced by the Conference Report for the bill, which indicates that the Act targeted parties who obtained information "misrepresenting the identity of the person requesting the information or otherwise misleading an institution or customer into making unwitting disclosures of such information."[111] The FTC does not allege that there was any such unwitting disclosure, but that they had lied about the Total Purchase Amount. Although this claim could be textually permissible, it does not seem to square with the purpose of the Act. Ultimately, the defendants agreed to settlement terms that included more than $2.7 million in damages to injured consumers.[112] *RCG* is yet another example of the FTC's pattern of novel interpretations, which seem to bring everything under the sun into a statute that the FTC is enforcing.

The FTC's interpretation of the GLBA in *RCG* likely has far-reaching consequences. In *RCG*, the FTC argued that the GLBA applied because the defendants were engaging in fraud and the customers were providing them with payment details. If this standard is adopted for the GLBA, any action that involves deception in conjunction with payment information is brought in under the Act. This scope covers much of what the FTC hopes to deter through its consumer protection mission. This interpretation of GLBA also parallels the novel interpretation of ROSCA discussed above in that it applies a statute intended to regulate one specific area of a transaction, negative options or the sharing of private information, to the underlying product or conduct of the actor in other parts of the transaction. If these interpretations can stand, then it would seem that the FTC is well on its way to restoring the power it lost in *AMG*.

4. *Resident Homes* and a Novel Interpretation of Redress

Another example of a novel FTC enforcement practice concerns the manner in which damages are calculated in a settlement. *In matter of Resident Homes*, the FTC initiated an enforcement action in response to the alleged violation of a 2018 order

[111] H.R. REP. NO. 106-434, at 173 (Nov. 2, 1999).

[112] Stipulated Order, FTC v. RCG Advances LLC, No. 20-cv-4432-LAK (S.D.N.Y. Jan. 5, 2022).

which prohibited the defendant from representing that its product was made in the USA unless certain conditions were met.[113] In the present action, the FTC alleged that Resident Homes violated the terms of the order by advertising its mattress as "proudly made with 100% USA-made premium quality materials" despite knowing that the statement was false.[114]

The novelty in *Resident Homes* is found in the terms of the new order. Rather than going to court and seeking civil penalties for violating the order, which is the practice laid out in Section 19 of the FTC Act, the FTC began a *de novo* administrative action.[115] The proposed settlement contains monetary redress of $753,300. In a dissenting statement, Commissioners Noah Phillips and Christine Wilson claim that "the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages."[116] However, Commissioner Rohit Chopra justifies this arguably excessive redress by enlarging the pool of those who are damaged. As he puts it: "Consequential damages in Made in USA fraud can be considerable, particularly when it comes to harms to law-abiding businesses whose sales were siphoned."[117] This idea is based on the language of Section 19, which states that courts can "grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be."[118] While this represents a novel interpretation of the FTC Act, rather than one of the other acts that the FTC is empowered to enforce, it is yet another example of a novel interpretation increasing the FTC's power to seek monetary redress.

B. The Role of these Novel Interpretations in the FTC's Enforcement Strategy.

In the four cases described above, despite the ruling in *AMG*, the FTC promoted novel and expansive interpretations of the statutes it enforces to obtain monetary relief. In the Walmart

113 Complaint, Resident Home LLC., et al., FTC File No. 2023179 (F.T.C.) (Jun 22, 2022).

114 *Id.* at 3.

115 Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, In re Resident Home LLC., FTC File No. 2023179 (F.T.C.) (Jun 22, 2022).

116 *Id.*

117 Statement of Commissioner Rohit Chopra, In re Resident Home LLC., FTC File No. 2023179 (F.T.C.) (Jun 22, 2022).

118 15 U.S.C. § 57b(b).

case, we see the reach of the Telemarketing Sales Rule broadened to those on the periphery of a telemarketing scam, even though questions of culpability abound. In the ROSCA cases, the interpretation argued for by the Commission would seem to allow monetary redress in any claim against a service provider who utilizes a negative option feature, even though the negative option itself may not be deceptive. Similarly, in *RCG*, the Commission advocates for an interpretation of the GLBA that could seemingly reach any conduct by a financial services provider, not just conduct that raises privacy concerns. Finally, the Commission seeks an expansive definition of redress itself in *Resident Homes*. While the FTC may have lost the trusty howitzer of Section 13(b) monetary redress, they seek to rebuild their arsenal in the war on fraud through novel interpretations.

For the FTC, there may be some value in enforcement actions even when they do not result in a winning lawsuit. In a recent interview, FTC Chair Lina Khan noted that "if you don't try, the message that sends out to the world is that the enforcers don't think there's a problem in the market. Whereas if you try, even if you lose, that then creates the message for Congress" to change the law so that the Agency can prevail in the future.[119]

Under this logic, the enforcement actions like those against Walmart are a win-win situation for the FTC. Beyond the relief granted by the court, winning the lawsuit provides judicial vindication of a novel interpretative method that can be used to police fraud in the future. Parties may be deterred from legal conduct beyond the statute's reach if they know that such arguments could find success in expanding the Act's scope. This in turn means they are more likely to settle once an enforcement action has been initiated. If the FTC were to lose the suit, it would have more evidence with which to make its plea to Congress that Section 13(b) must be amended to provide for enforcement.

However, it should be noted that the way in which Congress would amend Section 13(b) is unclear and a potentially risky proposition for the Commission. The process of Amending the Act would "likely . . . lead to a broader congressional referendum on the Act as a whole."[120] A broader referendum could lead to "various members of Congress seeking to amend the Act in ways

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[119] Guy Rolnik, *Q&A with FTC Chair Lina Khan*, PROMARKET (June 3, 2022), https://perma.cc/C9JZ-JF73.

[120] Christopher Olsen & Stephen Schultze, *FTC Authority Under Siege: Monetary and Injunctive Relief at Risk in Courts as Congress Contemplates A Response*, 20 ANTITRUST SOURCE 1, 8 (2021).

unrelated to the 13(b) issues currently in dispute."[121] While "some members are likely to seek broader FTC rulemaking authority[,] . . . others may use the opportunity to press for the transfer of powers from the agency . . . ."[122] So while the FTC may seek a simple amendment to the FTC Act, the amendment process may result in a more significant change that "leaves the future of FTC monetary—and potentially injunctive—relief in jeopardy."[123]

And even if the FTC is uncertain about their prospects for victory in these novel lawsuits, seeking monetary relief under a novel theory may provide a thumb on the scale in favor of settlement for the parties involved. In the wake of *AMG*, some observers hypothesized that a lack of Section 13(b) monetary relief "may significantly increase the likelihood of settlements . . . [because] the FTC's monetary demand was the principal driver of litigation from the inception; in other words, had the FTC only been seeking injunctive relief," the matters would have already been settled.[124] Therefore reintroducing monetary damage under a novel interpretation may make parties less likely to settle because the FTC is able to extract remedies via judgment. This depends, of course, on the likelihood that the FTC would prevail at trial. If they are less likely to prevail, settlement will be less likely, so a portion of this analysis depends on whether the FTC succeeds in these novel actions.[125]

How such variability in the frequency of settlements would impact consumers and the FTC's mission is an unresolved question. Such settlements bring to attention the "growing concern that agencies fail to adequately consider the public interest—and the interests of harmed consumers directly affected by malfeasance—when settling claims against corporate entities."[126] Such concern is founded on the lack of "binding obligations on most agencies, including the FTC, to give voice and consideration to the public interest."[127] In any case, though the merits of settlement are disputed, the point remains that the deployment of novel interpretations could have a significant impact on the frequency of such settlements.

121 *Id.*

122 *Id.*

123 *Id.*

124 M. Sean Royall, Richard Cunningham, & Olivia Adendorff, *A Watershed Moment? What Comes Next for the FTC in the Wake of* AMG, 35 ANTITRUST 103, 105–06. (2021).

125 *Id.*

126 Jackson L. Frazier, *Perfecting Participation: Arbitrariness and Accountability in Agency Enforcement*, 96 N.Y.U. L. REV. 2094, 2098 (2021).

127 *Id.* at 2108.

C. The Risks of Novel Enforcement

In sum, the FTC has been making a variety of novel arguments to support enforcement of statutes other than the FTC Act. As statements dissenting and concurring from agency action have noted, this tactic seems at least partially to respond to the Agency's inability to pursue monetary damages under Section 13(b) of the FTC Act. Assuming the FTC can win these enforcement actions, it would seem that reports of the agency's power being gutted by *AMG* are greatly exaggerated. But with the great power of the FTC comes great responsibility, and the pattern of novel interpretation creates risks to the Commission and the public.

The pattern of novel interpretation fits within a pattern of aggressive and potentially meritless enforcement actions by the Commission. Professor Zywicki claims the Walmart lawsuit is part of a response to *AMG*, stating that it is a "far-fetched effort to end-run the Supreme Court's decision last year that limited the FTC's ability to recover money damages in some cases."[128] Put differently, the FTC lost an important tool in *AMG*. Yet rather than enforce the FTC Act through Sections 5 and 19—as the *AMG* decision contemplated—they are attempting to revive Section 13(b) through penalty enforcement actions under the Telemarketing Sales Rule, even if it does not fit the bill. The same course of action can be seen in the cases under ROSCA, the GLBA, and in the Agency's interpretation of redress to injured consumers. This practice seems to carry over to FTC antitrust enforcement as well. In the arena of antitrust, this philosophy has been described as "bringing risky cases that use novel legal arguments to stop corporate mergers and nurture competition. Their goal is to stretch the uses of antitrust law beyond the ways it has been applied for decades . . . ."[129]

Without a clearly delineated interpretation of the rules and statutes they enforce, the Commission risks raising the specter of what some have termed "regulation by enforcement." Regulation by enforcement begins when an agency "depends too heavily on its enforcement cases as a substitute for engaging in official

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128 Yiwen Lu, *FTC Sues Walmart, Alleging It Let Scammers Access Money Transfer Service*, WASH. POST (June 29, 2022), https://perma.cc/NPU8-5XCK.

129 David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, N.Y. TIMES (Dec 7, 2022), https://perma.cc/VT69.

rulemaking."[130] This course of action is often disfavored because it involves the implementation of "regulatory policies in the financial markets through . . . enforcement actions and consent orders where the general public has no notice or opportunity to comment on the potential reforms."[131] Critics of regulation by enforcement would prefer a regulatory regime where the Commission "clearly and explicitly articulate[s] prospective rules for all potentially prosecutable conduct before tak[ing] enforcement actions to stop these practices."[132] When the FTC uses such broad interpretations of rules and statutes, they risk the downsides of regulation by enforcement. These interpretations find their genesis not in formal rulemaking, but rather from the stroke of a pen in a complaint.

However, the FTC has also been on an aggressive campaign of formal rulemaking, as seen in the recently unveiled rule limiting noncompete agreements.[133] This subsequently raises the question of whether a scenario involving both extensive rulemaking and novel enforcement of existing rules and statutes raises the same concerns as novel enforcement standing alone. I would contend that it does. If anything, because there are more rules entering the fray, a pattern of novel interpretation may lead to less certainty in the marketplace as the FTC now has more text to construe exceptionally broadly. In today's era of the administrative state, rulemaking is the cornerstone of due process. But it cannot serve such a role when the rules are interpreted so broadly as to swallow the benefits of rulemaking. Parties cannot effectively comment on rules when they do not know how they will be interpreted. They cannot be put on notice if a novel and atextual interpretation can emerge from the ether and grant authority for an enforcement action against them.

IV. PENALTY OFFENSE AUTHORITY IS A PREFERABLE WAY TO SEEK REDRESS

As shown above, the FTC has made extensive use of novel interpretation of statutes and rules in the wake of *AMG*. But with such broad and novel interpretations comes a high degree of uncertainty for actors in the marketplace and the shadow of

130 Lisa Stifler, *The Consumer Financial Protection Bureau, the First Six Years: A Necessary Cop on the Beat, Reflections on the Fisher Memorial Program*, 71 CONSUMER FIN. L.Q. REP. 191, 202 (2017).

131 *Id.*

132 *Id.*

133 Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

regulation through enforcement. Two alternative methods of enforcement, the Penalty Offense Authority and state partnerships, may allow the FTC to vigorously prosecute anti-consumer behavior while maintaining principles of notice and fairness.

A. Penalty Offense Authority

Penalty Offense Authority gives the FTC the ability to seek civil penalties from a party after the FTC has put them on notice.[134] This notice usually takes the form of a letter describing past litigation and the proscribed conduct.[135] The FTC can then combat the initial instances of anti-consumer behavior through a cease-and-desist order while pursuing enforcement actions for civil penalties in subsequent cases of similar behavior. Due to its substantial protections for due process and the guarantee of notice, this approach seems preferable to enforcement through the pattern of novel statutory interpretation shown above.

1. The Mechanism for Civil Penalty Authority

Penalty Offense Authority is grounded in Section 5(m)(1)(B) of the FTC Act, which allows "the Commission . . . [to] seek penalties against a party that engages in conduct it knows has been determined to be unlawful in a Commission order."[136] In order to seek civil penalties, the commission must first have "issued a final cease and desist order . . . following" a Section 5(b) administrative proceeding and "determined in that order that a particular practice is unfair or deceptive."[137] Second, it must show that "[a] party has engaged in that practice after the Commission's . . . order became final . . . with actual knowledge that the practice is unfair or deceptive."[138] "In other words, when parties are on notice that the Commission has condemned certain practices in a litigated final order, these practices can become 'penalty offenses'—offenses that carry with them the threat of significant civil penalties."[139]

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134 15 U.S.C. § 45(m)(1)(B)

135 *See* Press Release, *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus*, FED. TRADE COMM'N (Apr. 24, 2020), https://perma.cc/3CF2-L6VP.

136 Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PENN. L. REV. 71, 82–83 (2021).

137 *Id.* at 82.

138 *Id.*

139 *Id.*

The FTC has recently begun an aggressive campaign of putting companies on notice for penalty offenses. Though actual knowledge is undefined in the statute, one unambiguous way to trigger liability is to apprise parties of the Commissions' prior determinations, which then exposes them to penalty liability if they engage in similar practices. These practices then become penalty offenses with respect to those on notice. The commission recently sent a notice of penalty offenses to over 1,100 businesses concerning false money-making claims.[140] They sent a similar notice to over 700 firms concerning endorsements.[141] And finally, they sent over 70 notices to for-profit colleges.[142]

An example of how the civil penalty authority plays out through notice of civil penalties can be seen in another recent FTC enforcement action against Walmart.[143] In that complaint, the FTC alleges that certain towel sets that Walmart advertised as bamboo were made of Rayon. In 2009, the FTC announced three settlements and one administrative action against marketers "who improperly labeled and advertised rayon textile products as 'bamboo'"[144] and circulated the news of the settlements "throughout the marketplace."[145] The FTC also sent Walmart a letter indicating "that certain of its acts or practices in connection with the advertising and labeling of textile fiber products may violate the Textile Act and the Textile Rules and constitute unfair or deceptive acts or practices under Section 5 of the FTC Act . . . ."[146] The letter also contained "a synopsis of previously litigated decisions issued by the Commission . . . ."[147] The Commission had thus performed the requisite steps to seek civil penalties under Section 5(m)(1)(B) of the act.[148]

2. The Benefits of Penalty Offense Authority

a) Compared to the Section 13(b) Fraud Program

Compared to the Section 13(b) Fraud Program, former FTC Commissioner (now Director of the Consumer Financial

140 *Notices of Penalty Offenses*, FED. TRADE COMM'N (Mar. 25, 2023), https://perma.cc/PH37-X6E6.
141 *Id.*
142 *Id.*
143 Complaint, FTC v. Walmart, No. 1:22-cv-00965 (D.D.C. Apr. 8, 2022).
144 *Id.* at 13.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*

Protection Bureau) Rohit Chopra points to three advantages of the Penalty Offense Authority: deterrence, lower litigation risk, and market-wide impact. Due to the punitive nature of civil penalties as compared to the "rigid formula" where "an award generally could not exceed the amount" that limited the Section 13(b) fraud program, civil penalties may provide greater deterrence.[149] Similarly, the 13(b) fraud program left the door open to substantial litigation surrounding the calculation of restitution and disgorgement.[150] Lastly, through notices of penalty offenses, civil offense authority can reach the market quicker than litigating each case under the Section 13(b) Fraud Program.

In fact, Penalty Offense Authority may even complement the current state of Section 13(b). It is important to remember that Section 13(b) applies where a party "is violating or is about to violate" a provision of law enforced by the Commission or where injunction prior to the issuance of a complaint "would be in the interest of the public . . . ."[151] This means that the FTC could act fast to seek injunction under the Section 13(b). In a world where consumers face ever-evolving threats, it would appear that Notices of Penalty Offenses, requiring final litigation of a previous order and a notice of penalty offense, do not operate as the dynamic tool that Section 13(b) does. But Section 13(b) is not gone after *AMG*, it simply cannot be used to pursue monetary remedies. The two can arguably work very well in conjunction with each other, with Section 13(b) enjoining the harmful conduct while the Commission litigates a final cease and desist order, which they can then extend to the market via notices of penalty offense.

b) Compared to the Pattern of Novel Interpretation

I would contend that enforcement through Penalty Offense Authority, in addition to having advantages over the Section 13(b) Fraud Program, is also a significantly better system than the pattern of novel interpretation described earlier. First, parties are provided with more notice in a system of Penalty Offense Authority than one of constantly evolving and expanding interpretations of rules and statutes. Second, similar to the comparison with the Section 13(b) Fraud Program, there is less potential litigation risk

149 Chopra & Levine, *supra* note 132, at 102.
150 *Id.*
151 15 U.S.C. § 13(b).

and greater market-wide impact with Penalty Offense Authority compared with the pattern of novel enforcement.

While Chopra advocates Penalty Offense Authority as a powerful tool for "showing the marketplace that the FTC has more than one trick up its sleeve, regardless of AMG," he also notes its substantial due process protections.[152] Under Section 5, together with the knowledge requirement, "issues of fact in such action against such defendant shall be tried de novo."[153] This means that, though the FTC can use notices of penalty offenses to put alleged fraudsters on notice, those enforcement targets are still entitled to a non-deferential review of whether their conduct was in fact a violation. Furthermore, "the court shall also review the determination of law made by the Commission in the proceeding . . . [regarding the] act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice . . . ."[154] This contrasts the pattern of novel enforcement described above for two reasons. As seen in the Walmart case, it is entirely possible that the company did not know it was violating the TSR until the FTC adopted a novel and expansive interpretation of that Rule. But with Penalty Offense Authority, notice is a required and vigorously protected component of the process. This step alleviates to some degree the concerns about regulation through enforcement. In other words, because of substantial due process protections embedded in penalty offense authority, there is not much concern about retroactive rulemaking.

Just as in the comparison with the Section 13(b) Fraud Program, Penalty Offense Authority also leads to less litigation risk and more market-wide impact when compared to the pattern of novel enforcement. For instance, as previously noted, in the Walmart case, Walmart is not only attacking the novel interpretation of the telemarketing sales rule, but the very constitutionality of the current FTC structure. If a court agrees with Walmart, the Commission will face substantial barriers to future enforcement actions. So the pattern of novel interpretation has resulted in significant litigation risk. That said, a litigated final order showing a practice to be unfair or deceptive under Section 5 and enforced through Penalty Offense Authority has much more force than a dubious novel argument. Similarly, the FTC can reach more of the market by first determining something is unfair and deceptive, obtaining a cease and desist, and subsequently

[152] Chopra & Levine, *supra* note 125, at 121.
[153] FTC Act, 15 U.S.C. § 45(m).
[154] 15 U.S.C. § 45.

sending notices of penalty offenses than it can use to persuade courts to adopt novel interpretations at trial.

3. Addressing Potential Drawbacks of Penalty Offense Authority

Though the prospect of increased FTC enforcement power with healthy protections for due process embodied in the revival of Penalty Offense Authority seems appealing, it comes with some hinderances. Notices of penalty offenses can only proscribe a similar course of malfeasance to one that the FTC has litigated before. However, all that is necessary to send out a new batch of notices of penalty offenses is a final litigated order concerning the conduct the Commission wishes to proscribe. This would appear no harder than the pattern of novel interpretation described above, with the added benefit of notice that comes with Penalty Offense Authority.

Another drawback is that notices of penalty offenses can only trigger civil penalty liability to those who have received them. Therefore, "it may be difficult to put every potential malefactor on notice, particularly for newly founded firms and the types of misconduct prevalent among them."[155] But all that is necessary to put a new party on notice is to mail a letter. So while this gap exists, it is easily remediable once the Commission discovers a party engaged in this conduct. And in instances of conduct that the FTC has not issued a notice on, the commission can still seek an injunction under Section 13(b). So while ever-evolving methods of fraud may evade policing via penalty offense authority, the FTC is not powerless.

Lastly, penalties "are the only allowable monetary remedy for this provision. Redress, disgorgement and damages are not authorized as forms of relief for violations of this provision, although there may be some other violation charged that allows for other monetary relief."[156] So while penalty offense authority is a powerful tool for policing certain conduct, it is not unrestrained.

While the novel interpretations of rules and statutes mentioned in the cases above raise concerns about notice and regulation through enforcement, Penalty Offense Authority does not. The mechanism by which the authority operates ensures that the

[155] Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519, 527 (2022).

[156] Daniel Kaufman, *The FTC's Fall 2021 Letter-Writing Campaign-Section 5(m)(1)(b) of the FTC Act and the Focus on Civil Penalties*, APR. ANTITRUST MAG. ONLINE 1, 2–3 (2022).

parties are fully aware of past FTC actions, thereby satisfying the actual knowledge requirement. Nor does the Commission have to expend resources making potentially frivolous novel arguments in order to get monetary redress. They can simply prove that one instance of a practice is unfair and deceptive and put the rest of the industry on notice. For this reason, too, Penalty Offense Authority is preferable to novel interpretations of rules and statutes as an avenue for FTC enforcement.

B. Cooperating with States

Beyond novel interpretations and penalty offense authority, another way that the FTC can seek monetary relief is through cooperation with the states. Several of the post-*AMG* cases seeking monetary remedies involve state partnerships. For instance, in *FTC v. Zurixx*,[157] the Commission partnered with the Utah Attorney General's Office to go after a real estate flipping business.[158] In *FTC v. GDP Network*, the FTC and Florida Attorney General's office sought damages and an injunction against a credit card interest reduction service.[159] Finally, in *FTC v. Frontier Communications Corporation*,[160] the FTC, along with six other states, sued an internet provider alleging insufficient internet speeds, eventually obtaining a monetary judgement.[161] These three cases show an alternative way for the FTC to pursue monetary redress—partnering with state attorneys general. Without Section 13(b), "a path for the commission to have obtained civil penalties absent the state is not obvious" in these cases. [162] Therefore, it is "likely that state involvement was key in this case to obtaining the amount of monetary remedy."[163] This practice benefits both parties in that the states get to draw upon the resources of the FTC, and the FTC gets to assist states in prosecutions under state laws that do allow for monetary redress.

However, there are some significant drawbacks to this approach. For example, there are coordination problems when the FTC works with states that the FTC would not face if it was

157 Complaint, FTC v. Zurixx, LLC, No. 2:19-CV-00713-DAK (D. Utah Feb. 16, 2022), https://perma.cc/D4XZ-MZH7.

158 *Id.*

159 FTC v. GDP Network LLC (YF Solution), No. 6:20-cv-1192-Orl-78DCI (M.D. Fla. Feb. 28, 2022), https://perma.cc/SSL3-2HRE.

160 FTC v. Frontier Communications Corporation, No. 2:21-cv-04155 (C.D. Cal. May 19, 2021).

161 *Id.*

162 Stivers, *supra* note 32.

163 *Id.*

acting alone under federal law. Second, as opposed to FTC rulemaking, the FTC has to operate within the regulatory framework of the states, mostly serving in an advisory capacity. While state partnerships are not a substitute for monetary redress under Section 13(b), they do allow the FTC an additional path towards such redress while policing fraud.

V. CONCLUSION

While many saw the loss of the Section 13(b) Fraud Program as crippling the FTC's enforcement power, if the frequency with which they initiate enforcement actions is anything to go on, they are still walking tall. In recent months, the FTC has supported its enforcement efforts with novel and often expansive interpretations of the laws it is enforcing. In many of these cases, the FTC's proposed interpretation could greatly expand the scope of the rules the agency is enforcing. This raises concerns about regulation through enforcement rather than rulemaking and giving the parties proper notice.

For the FTC, this pattern of novel interpretations seems to have little downside . If they win, they win. If they lose, they are in no worse of a place than where they started. They maintain the more conventional interpretation of the statute, and they have yet more reasons to support their request that Congress amend the FTC Act to bring back the Section 13(b) Fraud Program. However, rulings like the one recently handed down in the Walmart case, dismissing claims predicated on novel interpretations make the strategy significantly less successful. But such rulings are specific to a single interpretation of a single act, and do not prevent further use of an enforcement strategy focused on novel interpretations.

The FTC has increasingly used Penalty Offense Authority following *AMG*. This practice avoids some of the unpredictability in the FTC's current strategy of pushing novel interpretations. It also has the added benefit of reducing litigation risk, as the agency does not have to attempt to fit certain unfair and deceptive acts into statutes not designed to proscribe them. Furthermore, notices of penalty offenses can work in conjunction with the current state of Section 13(b) to ensure that unfair and deceptive practices are held at bay through injunction while the FTC litigates a final cease and desist order. This practice also has the drawback of requiring a final litigated order proscribing a specific type of conduct. But, especially if companies like Walmart put up a fight, such litigation is no more difficult than that predicated on novel and potentially overbroad statutory interpretations.

In sum, *AMG* did not make the FTC toothless, but the strategy of advocating novel and broad interpretation of statutes to pursue would-be 13(b) claims for monetary redress comes with many problems. Penalty Offense Authority is a much more manageable way to seek monetary redress. Though the FTC has numerous means to seek monetary redress, they are not unlimited, and the pattern of novel interpretation is difficult to square with principles of notice and due process when used as a one stop shop for all enforcement needs.