



**Testimony of Anna Laitin
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**Before the
United States House of Representatives Committee on Energy & Commerce
Subcommittee on Consumer Protection and Commerce**

**Hearing on
“The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers”**

April 27, 2021

Thank you Chair Schakowsky and Ranking Member Bilirakis for inviting Consumer Reports¹ to testify on this important legislation, and on the vital role of the Federal Trade Commission in protecting consumers in the marketplace.

The FTC is an essential consumer protection entity. It is charged with protecting consumers from unfair and deceptive acts and practices — both online and offline. This ranges from scammers peddling bogus coronavirus cures, fake online reviews, deceptive data collection practices, fraudulent lenders exploiting low-income consumers and small businesses with illegal fees, companies that misuse their customers' information, and more — in a marketplace that is growing larger, more complicated, and harder for consumers to navigate each year. And increasingly, it is having to do so with both hands tied behind its back.

The Commission is underfunded, operating with fewer staff than it had in the 1970s, when the marketplace was much smaller and simpler. It has had to operate for years with limits imposed on its rulemaking authority; and gaps in its enforcement authorities have become increasingly evident. And while, thanks to the work of the committee, the FTC has new authority to seek civil penalties for COVID-related scams, it generally cannot obtain civil penalties which are necessary to meaningfully deter illegal activity.² And now the Supreme Court has stripped it of the authority it has relied upon to recover ill-gotten profits from scam artists and fraudsters and return the money to the victims of those scams.

We thank Representative Cardenas for his timely introduction of the Consumer Protection and Recovery Act. This bill would make clear that the FTC can pursue meaningful restitution for victims, addressing the urgent problem that was created last week when the Supreme Court's narrow interpretation of § 13(b) of the Federal Trade Commission Act eliminated the Commission's most effective enforcement tools. We look forward to working with the Committee so that it can act quickly on this bill and restore effective enforcement authority to the Commission.

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising, CR strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

² *Pallone & Schakowsky Celebrate Consumer Protection and Commerce Bills Included in Omnibus*, House Committee on Energy & Commerce (Dec. 21, 2020), <https://energycommerce.house.gov/newsroom/press-releases/pallone-schakowsky-celebrate-consumer-protection-and-commerce-bills-included>.

The Role of the FTC's § 13(b) Enforcement Authority

For more than 40 years, the FTC has relied on § 13(b) of the FTC Act to stop unfairness and deception in the marketplace, prevent wrongdoers from benefiting from their behavior, and repay the victims of the fraud. The COVID-19 pandemic has made clear the FTC's essential role. As this Subcommittee discussed at a hearing earlier this year, scams and fraud were particularly pervasive during the pandemic, given that, as Ranking Member Bilirakis noted, nearly a year into the pandemic, "scammers are continuing to find new ways to exploit vulnerable Americans during COVID-19."³

Unless Congress acts to ensure that the FTC can appropriately address illegal behavior, scam artists and fraudsters will feel empowered to engage in more of it. Without the authority that the FTC previously enjoyed under § 13(b) — to prevent wrongdoers from profiting from their fraudulent acts and to repay the victims — the FTC won't be able to effectively strip the ill-gotten earnings from payday lenders that trick some of the most vulnerable consumers with hidden fees, or send adequate refunds to small business owners who had money illegally withdrawn from their accounts by lenders. Nor will it be able to rein in the big tech companies that have taken advantage of their market power to crowd out small businesses and exploit consumers' personal data.

The facts of the case decided by the Supreme Court last week highlight the urgent need for a legislative fix to the FTC Act. AMG Services was a fraudulent payday lending company. It bilked millions of struggling low-income Americans out of their hard-earned money, by imposing undisclosed charges and hidden fees on small-dollar loans — sometimes inflating the cost to more than three times the amount borrowed.⁴

The victims were people in financial need who went to a payday lender — a borrower of last resort. They were lied to, and due to those lies, lost more money. More than 5 million people who were looking for a lifeline instead got fleeced.

As a result of the FTC's enforcement action, AMG was required to pay disgorgement in the amount of \$1.3 billion — the amount the company was assessed to have scammed from these borrowers — to be returned to the individuals who were defrauded. Many of them already have

³ Statement of Ranking Member Bilirakis Subcommittee on Consumer Protection and Commerce, United State House of Representatives, Hearing on Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic at 5 (Feb. 4, 2021).

⁴ *FTC Charges Payday Lending Scheme with Piling Inflated Fees on Borrowers and Making Unlawful Threats when Collecting*, Fed. Trade Comm'n (April 2, 2012), <https://www.ftc.gov/news-events/press-releases/2012/04/ftc-charges-payday-lending-scheme-piling-inflated-fees-borrowers>.

received checks. Nearly 1.2 million people have received checks from the FTC, averaging \$235 each.⁵

As this case worked its way through the courts, nobody argued that AMG Services was a model company, or that it did anything other than scam and defraud its customers. What AMG Services has argued, instead, and what the Supreme Court decided last week, is that the FTC can stop the fraud, but it does not have authority to take any further steps. It cannot recover those fraudulently scammed dollars from AMG Services and return them to the consumers who were defrauded.

This is clearly an unjust outcome that Congress cannot let stand. No company should be able to hold on to money that it obtained illegally. And people who were lied to and defrauded should be able to get their money back. They should never be left holding the bag.

Unless Congress acts, this decision will make it harder for individuals and small businesses across the country who are victims of scams or other illegal acts to get back the money that was unlawfully taken from them. Last week, on the same day that the Supreme Court issued its ruling, the Commission announced a \$9.8 million settlement with Yellowstone Capital, a provider of merchant cash advances — short-term, high-cost financing products marketed to small business owners in immediate need of funds. According to the complaint, Yellowstone Capital engaged “in a pattern of deceptive and unfair conduct in connection with the marketing, advertising, and offering of their MCAs.... Additionally, the Defendants have made excess, unauthorized withdrawals from consumers’ accounts after consumers already repaid the full amount that they owed.”⁶ The settlement was filed before the Supreme Court issued its decision. If the case had taken any longer, the FTC would likely not have been able to secure the settlement, and small business owners would not be looking forward to receiving refunds in the mail.

Again, these small business owners are a year into a pandemic that has shut down companies across the country. It cannot be the proper policy answer for the FTC to be denied this enforcement authority to strip the ill-gotten earnings from this company or for it to be able to send refunds to small business owners.

Further, critics — including my own organization and observers across the political spectrum — have argued that the FTC has not been aggressive enough in reining in big tech companies, including the largest platforms that dominate so much of our economy, for abusing monopoly power, enabling fraud, using consumers’ personal data inappropriately, and other misbehavior.

⁵ *Tableau Public Refunds By Case*, Fed. Trade Comm’n, (last visited April 25, 2021) https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.

⁶ *Fed. Trade Comm’n vs. Yellowstone Capital*, Case No. 20-cv-6023, (Aug. 3, 2020), <https://www.ftc.gov/system/files/documents/cases/1823202yellowstonecomplaint.pdf>.

When the FTC has gone after major tech companies like Facebook and Uber, it has often relied on its § 13(b) authority.⁷ This decision will make it even harder for the Commission to take on these giant companies. An after-the-fact injunction to cease and desist unfair and deceptive acts and practices, without more, is just a slap on the wrist

The FTC's other options for obtaining restitution are nowhere near as effective as § 13(b) has been, or as effective as the FTC, and the Americans that it serves, need it to be. In his Opinion, Justice Breyer stated that nothing “prohibits that Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers.” But as Jessica Rich, the former Director of Consumer Protection at the FTC, noted in testimony before this committee earlier this year, that approach “raises the risk that the money wrongly taken will be long gone, or the victims impossible to locate, by the time redress is distributed, especially since cases that have used this approach have taken many years to resolve.”⁸ This is a slow and multi-pronged approach that requires the FTC to first obtain an order through administrative adjudication under § 5 of the FTC Act (a particularly slow process given that the FTC has only one Administrative Law Judge to hear all its cases⁹), and only then can it seek restitution in federal district court under § 19.

Similarly, while the Commission can seek civil penalties in some cases, that authority is not broad enough to be an effective deterrent in the marketplace — it is limited to violations of an FTC rule, a consent decree, or, as in the case of the recent COVID legislation, a specific grant of civil penalty authority from Congress.

This is a problem that Congress can fix. There is no reason for the FTC to twist itself in knots and use unwieldy authorities to achieve justice when a simple change to the FTC Act can restore the FTC's authority.

The Consumer Protection and Recovery Act

Rep. Cardenas' Consumer Protection and Recovery Act would amend the FTC Act to restore the authorities that the Commission has successfully operated under for more than 40 years. It would enable the Commission to pursue fraudulent and deceptive actors and to return money to the people they harmed. And it would end any debate about the proper role for the FTC in achieving relief for consumers.

⁷ See, for example, *Fed. Trade Comm'n v. Facebook, Inc.*, Case No.: 1:20-cv-03590 (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf; *Fed. Trade Comm'n v. Uber Technologies*, Case 3:17-cv-00261 (Jan. 19, 2017), <https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf>.

⁸ Statement of Jessica Rich, Distinguished Fellow, Institute of Technology Law and Policy, Georgetown University Law Center, before the Subcommittee on Consumer Protection and Commerce, United State House of Representatives, on Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic at 5 (Feb. 4, 2021), <https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-RichJ-20210204.pdf>.

⁹ See <https://www.ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges>.

Importantly, this bill extends the § 13(b) authorities for equitable remedies to all violations of the FTC Act, and does not create artificial delineations of the types of illegal acts that should qualify. The FTC has authority to enforce against unfair and deceptive acts and practices, as well as unfair methods of competition. It should have authority to seek equitable remedies in all cases under its jurisdiction — disgorgement of ill-gotten gains, and restitution for consumer losses. It is a simple matter: if a business makes money from violating the FTC Act, it should not be able to keep that money.

Consider the following example: a large tech company collects a lot of your personal data, and *explicitly promises* that they will never sell or share that data with anyone. One day, they decide to sell everyone's records — their personal information, their messages, their purchase history — to a data broker for \$10 million in cash. This isn't really a case of "pure fraud." These consumers didn't lose any money. And we don't really know what the data broker is going to do with that information, so it's hard to calculate the harm to consumers in advance. But as a matter of fairness, if the FTC brings a case and the court deems the action to be illegal, it's simply wrong to let the company keep that money. Making them give up the proceeds of this sale is not punitive — the company is just back to the same place they were before making that illegal sale. But it would be immoral and outrageous to say that a large tech company is entitled to retain the proceeds of that illegal sale.

By quickly enacting the Consumer Protection and Recovery Act, Congress can ensure that companies that violate the law will not be able to hold onto their ill-gotten gains.

Additional Needs of the FTC

Enacting the Consumer Protection and Recovery Act is essential. But it will not be enough to ensure that the Federal Trade Commission can fully achieve its mission. After all, even if a company is forced to give up its illegally obtained profits, it's no worse off than it was before it started its illegal activities. If a thief gets caught, it's hardly sufficient punishment or deterrent to simply make them give up what they stole. As noted above, even before these cases were brought to challenge the Commission's 13(b) authority, it has long been clear that the Commission needs more resources as well as more enforcement and rulemaking authority. Most pertinent to today's hearing are the resource limitations, the restrictions on seeking civil penalties, and the limitations on rulemaking.

Resources and Staffing

For years, Congress has failed to provide the FTC with the funding it needs to do the massive job with which it is tasked. The agency is overdue for an influx of resources to help it play catch-up

to the modern economy. Currently, the FTC only has 1,100 staff positions total to pursue both its competition and consumer protection missions.¹⁰ This number has been roughly flat over the past twelve years, and actually represents a significant *decrease* from 1,746 positions in 1979.

Given the size and complexity of the modern marketplace — and the calls from all sides for the FTC to be more active — the Commission is operating with almost 40% fewer staff than it had before home computers, before cordless phones, and even before the fax machine was a common item in offices.

Giant, vertically-integrated technology companies increasingly dominate the marketplace, and the FTC is expected to have the technical expertise and sophistication to meaningfully check abuses by these companies. In 2015, the Commission established the Office of Technology Research and Investigation as a way of levelling the playing field and empowering the FTC to better tackle abuses from technology companies.¹¹ The stated purpose of OTECH was to:

provide expert research, investigative technique and further insights to the agency on technology issues involving all facets of the FTC’s consumer protection mission, including privacy, data security, connected cars, smart homes, algorithmic transparency, emerging payment methods, big data, and the Internet of Things.

Despite this wide-ranging mission, no additional staff were appropriated to fund this office, so it was largely staffed by shifting personnel from other parts of the agency. Even today, OTECH only has a handful of employees to support all five Departments in the Bureau of Consumer Protection (and there is no analogous Office within the Bureau of Competition at all).

Similarly, acting Chairwoman Rebecca Slaughter recently announced the creation of an Office of Rulemaking to take advantage of dormant and unused authorities to issue more clear and substantive guidance to companies on what behaviors violate the law.¹² We welcome the creation of this group, which signals that the FTC will make rulemaking a priority and, we hope, lead to greater consumer protections and corporate accountability. But the FTC has not received additional funding to do this work, so again it will have to shift resources from other priorities.

¹⁰ *FTC Appropriation and Full-Time Equivalent (FTC) History*, Fed. Trade Comm’n (last visited Apr. 22, 2021), <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

¹¹ *FTC Seeks Technologists for New Research, Investigations Office*, Fed. Trade Comm’n (Mar. 23, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-seeks-technologists-new-research-investigations-office>.

¹² *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group*, Fed. Trade Comm’n (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

Civil Penalties

The disgorgement and restitution that were previously allowed for under § 13(b) and that are provided for in the Consumer Protection and Recovery Act are vital tools for the FTC's law enforcement work. But to truly be able to deter bad behavior, and keep industry honest, the Commission needs the authority to assess civil penalties against the worst actors. Under current law, the Commission can generally assess penalties against companies that violate an FTC Rule or a consent decree, but cannot do so in the first instance.

The FTC is stretched thin and its enforcement resources are limited. Sufficiently large civil penalties provide real teeth to the Commission's enforcement, and create a necessary deterrent effect for the rest of the industry. It's also appropriate that companies face meaningful consequences for breaking the law. Allowing companies to engage in and profit from egregious behaviors without a threat of penalty will not prevent fraud from happening. Given the Commission's limited staff and capacity to police an \$18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do get caught shouldn't get off easy.

Rulemaking Authority

The FTC can more effectively enforce the law and stop bad actors when it has established rules regarding certain practices. While Congress has occasionally granted the FTC the authority to issue rules under the standard Administrative Procedures Act processes available to other federal agencies, the FTC's core rulemaking process — known as Magnuson-Moss — has seriously hindered FTC trade regulation, as its procedures are notoriously onerous and can take years to pursue.¹³ Since 1975, the Commission has finalized only a small number of rulemakings under this process.¹⁴

Under Acting Chair Slaughter, the FTC has sent a clear message that it seeks to make more active use of its existing rulemaking authority, which includes its authority under Magnuson-Moss, and the specific APA rulemaking authorities Congress has granted it. But it should have that authority afforded to it for all rulemaking. If we are to expect the FTC to effectively protect consumers in the marketplace, it needs the full range of authorities and remedies at its disposal in order to protect consumers.

¹³ Statement of Jessica Rich, *supra* note 5, at 6; Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, *The George Washington Law Review* (Nov. 2015), Vol. 83 No. 6, p. 1982-1985, <http://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1979.pdf>.

¹⁴ *Id.* at 1985.

Conclusion

This hearing raises a simple question: should companies be able to profit from lies and deception in the marketplace? The answer is as simple as the question: no.

While the Supreme Court decided last week that the current text of §13(b) is so narrow that the Commission can no longer use its most effective tool to take away ill-gotten gains and return them to the consumers who were defrauded, it in no way ruled on this common-sense question.

This leaves the question in your hands. In order to continue to effectively monitor the marketplace and stop fraudulent and illegal activity, the FTC needs this authority restored. The Consumer Protection and Recovery Act would do just that, and we urge you to act quickly to enact it into law.

We urge the Committee to go further as well, and to recognize that the FTC is being asked to do far more than it realistically can with its existing staff and authority. In order to build a marketplace that works for consumers, for small businesses, and for legitimate businesses that can't compete against companies that are willing to break the law, we need an FTC with sufficient capacity and penalty authority to provide truly effective deterrence, so that others will think twice before violating the law. We look forward to working with this committee to further strengthen this important consumer protection authority.