

117TH CONGRESS }
1st Session } HOUSE OF REPRESENTATIVES { REPORT
117-

CONSUMER PROTECTION AND RECOVERY ACT

JUNE --, 2021.—Ordered to be printed

Mr. PALLONE, from the Committee on Energy and Commerce,
submitted the following

R E P O R T

together with

VIEWS

[To accompany H.R. 2668]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2668) to amend the Federal Trade Commission Act to affirmatively confirm the authority of the Federal Trade Commission to seek permanent injunctions and other equitable relief for violations of any provision of law enforced by the Commission, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Consumer Protection and Recovery Act”.

SEC. 2. FTC AUTHORITY TO SEEK PERMANENT INJUNCTIONS AND OTHER EQUITABLE RELIEF.

(a) PERMANENT INJUNCTIONS AND OTHER EQUITABLE RELIEF.—Section 13 of the Federal Trade Commission Act (15 U.S.C. 53) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by inserting “has violated,” after “corporation”;

(B) in paragraph (2)—

(i) by striking “that” and inserting “that either (A)”; and

(ii) by striking “final,” and inserting “final; or (B) the permanent enjoining thereof or the ordering of equitable relief under subsection (e),”; and

(C) in the matter following paragraph (2)—

(i) by striking “to enjoin any such act or practice”;

- (ii) by striking “Upon” and inserting “In a suit under paragraph (2)(A), upon”;
- (iii) by striking “without bond”;
- (iv) by striking “proper cases” and inserting “a suit under paragraph (2)(B)”;
- (v) by striking “injunction.” and inserting “injunction, equitable relief under subsection (e), or such other relief as the court determines to be just and proper, including temporary or preliminary equitable relief.”;
- (vi) by striking “Any suit” and inserting “Any suit under this subsection”;
- (vii) by striking “In any suit under this section” and inserting “In any such suit”;

(2) by adding at the end the following:

“(e) **EQUITABLE RELIEF.**—

“(1) **RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.**—In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, with respect to the violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.

“(2) **DISGORGEMENT.**—In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a person, partnership, or corporation obtained as a result of the violation that gives rise to the suit.

“(3) **CALCULATION.**—Any amount that a person, partnership, or corporation is ordered to pay under paragraph (2) with respect to a violation shall be offset by any amount such person, partnership, or corporation is ordered to pay, and the value of any property such person, partnership, or corporation is ordered to return, under paragraph (1) with respect to such violation.

“(4) **LIMITATIONS PERIOD.**—

“(A) **IN GENERAL.**—A court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought.

“(B) **CALCULATION.**—For purposes of calculating the beginning of the period described in subparagraph (A), any time during which an individual against which the equitable relief is sought is outside of the United States shall not be counted.”

(b) **CONFORMING AMENDMENT.**—Section 16(a)(2)(A) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)(A)) is amended by striking “(relating to injunctive relief)”.

(c) **APPLICABILITY.**—The amendments made by this section shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of the enactment of this Act.

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I. PURPOSE AND SUMMARY

H.R. 2668, the “Consumer Protection and Recovery Act”, amends section 13(b) of the Federal Trade Commission (FTC) Act to provide the FTC the ability to obtain both injunctive and monetary equitable relief, including restitution and disgorgement, for all violations of the laws it enforces. The bill also makes clear that under section 13(b) of the FTC Act the FTC may seek temporary restraining orders and preliminary injunctions without bond and that any relief sought under section 13(b) may be for past violations in addition to ongoing and imminent violations.

II. BACKGROUND AND NEED FOR LEGISLATION

The FTC is the premier federal consumer protection agency in the United States, directed to enforce numerous statutes. The heart of this enforcement regime is section 5 of the FTC Act, which mandates the agency prevent unfair or deceptive acts or practices and unfair methods of competition.¹ Section 13(b) of the FTC Act authorizes the Commission to bring suit in federal courts seeking relief for consumers and has long been a critical enforcement tool the FTC uses to combat fraud and scams under section 5.² The FTC refunded \$11.2 billion to consumers

¹ 15 U.S.C. § 45(a).

² 15 U.S.C. § 53(b).

targeted by illegal activities over the past five years,³ including \$482 million to more than 1.6 million consumers in 2020 alone.⁴

The FTC's authority under section 13(b) to obtain equitable monetary relief for consumers as well as to disgorge unjust profits from bad actors was settled law for over 40 years.⁵

In 2019, the Seventh Circuit Court of Appeals reversed its own precedent to hold that the FTC does not have authority under section 13(b) to obtain monetary relief.⁶ The Court further held that recent Supreme Court decisions require adherence to the strict text of the statute instead of decades of precedent.⁷ The Third Circuit followed, rendering close to 48 million Americans in six states unable to obtain monetary redress under 13(b).⁸ That decision also hampered the FTC's "ability to protect consumers by enjoining defendants from resuming their unlawful activities in cases where the conduct has stopped but there is a reasonable likelihood that the defendants will resume their unlawful activities in the future."⁹

On April 22, 2021, the United States Supreme Court held that section 13(b) is limited to stopping or mandating certain conduct and does not allow the FTC to seek equitable monetary relief or require bad actors to return money earned through illegal activity.¹⁰ The Supreme Court has not yet addressed the question of whether section 13(b) of the FTC Act as written allows the FTC to obtain relief for past conduct. To date, no other circuit court has followed the approach of the Third Circuit.

With the appellate court cases pending, the Commissioners raised the issue and requested Congressional action before the Committee on Energy and Commerce in May 2019.¹¹ In 2020, all five FTC Commissioners reiterated the need for Congress to take quick action to pass legislation reaffirming the FTC's authority under section 13(b) to recover ill-gotten gains from bad actors and provide equitable monetary relief to consumers.¹²

³ House Committee on Energy and Commerce, Testimony of the Federal Trade Commission, *Hearing on The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers*, 117th Cong. (Apr. 27, 2021).

⁴ Federal Trade Commission, *FTC Returns More Than \$482 Million to Consumers in 2020* (Jan. 27, 2021) (press release).

⁵ See House Committee on Energy and Commerce, Testimony of Jessica Rich, Distinguished Fellow, Institute of Technology Law and Policy, Georgetown Law Center, *Hearing on Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic*, 117th Cong. (Feb. 4, 2021).

⁶ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

⁷ *Id.*

⁸ *FTC v. AbbVie, Inc.*, No. 18-2621 (3rd Cir. 2020).

⁹ Senate Committee on Commerce, Science, and Transportation, Prepared Statement of the Federal Trade Commission, *Hearing on Strengthening the Federal Trade Commission's Authority to Protect Consumers*, 117th Cong. (Apr. 20, 2021).

¹⁰ *AMG Capital Management, LLC et al. v. FTC*, 593 U.S. ____ (2021).

¹¹ House Committee on Energy and Commerce, *Hearing on Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security*, 116th Cong. (May 8, 2019).

¹² National Law Review, *FTC Commissioners Urge Congress to Pass Legislation to Restore Section 13(b) of the FTC Act* (Nov. 3, 2020) (www.natlawreview.com/article/ftc-commissioners-urge-congress-to-pass-legislation-to-restore-section-13b-ftc-act).

No alternative authorities under existing law can replace what the FTC lost when section 13(b) was narrowed by the Supreme Court. With section 13(b) limited solely to injunctive relief, the FTC may only recover monetary relief for consumers for a violation of a specific FTC rule (as opposed to the much more frequent section 5 violation) or following lengthy administrative and court proceedings.¹³ Moreover, the FTC lacks any clear authority to freeze assets or seek other preliminary injunctive relief when bringing an enforcement action in court. In practice, the absence of that authority means that money is often long gone by the time the FTC negotiates a settlement or wins a favorable court decision for consumers, precluding any practical monetary relief for those victims.

H.R. 2668 restores the FTC's essential authorities under section 13(b) to be able to bring enforcement actions in court to seek and for courts to order equitable monetary relief for consumer victims, including the disgorgement of ill-gotten profits from bad actors. Consumers are not sufficiently protected when the primary federal consumer protection agency is allowed to bring suit to require bad actors stop illegal behavior but lacks the authority to seek court orders for those bad actors to disgorge illegal profits or require defendants return to consumers what was taken from them. H.R. 2668 restores the monetary equitable relief authority previously available to the FTC for over four decades that had become a core component of the FTC's overall enforcement regime to protect consumers. H.R. 2668 also removes any potential ambiguity over whether the FTC may bring enforcement actions under section 13(b) for past conduct even for consumers who were harmed before the illegal action stopped. Without H.R. 2668, the FTC will be far less effective in fulfilling its mission to protect consumers and execute its law enforcement responsibilities.

III. COMMITTEE HEARINGS

For the purposes of section 3(c) of rule XIII of the Rules of the House of Representatives, the following hearing was used to develop or consider H.R. 2668:

The Subcommittee on Consumer Protection and Commerce held a hearing on May 8, 2019. The hearing was entitled, "Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security." The Subcommittee received testimony from:

- **The Honorable Joseph J. Simons**, Chairman, Federal Trade Commission
- **The Honorable Noah Joshua Phillips**, Commissioner, Federal Trade Commission
- **The Honorable Rohit Chopra**, Commissioner, Federal Trade Commission
- **The Honorable Rebecca Kelly Slaughter**, Commissioner, Federal Trade Commission.
- **The Honorable Christine S. Wilson**, Commissioner, Federal Trade Commission.

The Subcommittee on Consumer Protection and Commerce held a hearing on February 4, 2021. The hearing was entitled, "Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic." The Subcommittee received testimony from:

- **Bonnie Patten, Esq.**, Executive Director, TruthInAdvertising.org
- **Jessica Rich**, Distinguished Fellow, Institute for Technology Law & Policy, Georgetown Law School

¹³ 15 U.S.C. § 57b.

- **The Honorable William E. Kovacic**, Global Competition Professor of Law and Policy, Professor of Law, Director, Competition Law Center, George Washington University Law School
- **Traci Ponto**, Spokane COPS Crime Victim Advocate, Spokane Community Oriented Policy Services.

The Subcommittee on Consumer Protection and Commerce held a legislative hearing on April 27, 2021. The hearing was entitled, “The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers.” The Subcommittee received testimony from:

- **The Honorable Rebecca K. Slaughter**, then-Acting Chairwoman, Federal Trade Commission
- **Anna Laitin**, Director, Financial Fairness and Legislative Strategy
- Consumer Reports
- **Ted Mermin**, Executive Director, Center for Consumer Law and Economic Justice, University of California, Berkeley School of Law
- **Dr. J. Howard Beales**, Professor Emeritus of Strategic Management and Public Policy, George Washington University.

IV. COMMITTEE CONSIDERATION

H.R. 2668, the “Consumer Protection and Recovery Act”, was introduced on April 20, 2021, by Representative Cárdenas (D-CA) and 13 other original cosponsors, and was referred to the Committee on Energy and Commerce. It was then referred to the Subcommittee on Consumer Protection and Commerce on April 21, 2021. A hearing on the bill was held on April 27, 2021.

The Subcommittee on Consumer Protection and Commerce met in virtual open markup session, pursuant to notice, to consider H.R. 2668 on May 27, 2021. During consideration of the bill, Representative Rodgers (R-WA) offered a motion to postpone consideration of H.R. 2668 until June 16, 2021. A motion to table the Rodgers’s motion to postpone consideration until June 16, 2021, offered by Representative Pallone (D-NJ), was agreed to by a roll call vote: 14 yeas to 9 nays (*CPC Roll call no. 01*). Subsequently, Representative Bilirakis (R-FL) offered a motion to postpone consideration of H.R. 2688 indefinitely. A motion to table the Bilirakis motion to postpone indefinitely, offered by Representative Pallone, was agreed to by a roll call vote: 13 yeas to 7 nays (*CPC Roll call no. 02*).

After deliberation of the motions offered to postpone consideration of H.R. 2668, an amendment in the nature of a substitute (AINS) offered by Representative Cárdenas was agreed to by a voice vote. An amendment to the Cárdenas AINS, offered by Representative Armstrong (R-ND), was defeated by a roll call vote: 7 yeas to 14 nays (*CPC Roll call no. 03*). An amendment to the Cárdenas AINS, offered by Representative Latta (R-OH), was defeated by a roll call vote: 8 yeas to 14 nays (*CPC Roll call no. 04*). Five amendments to the Cárdenas AINS, offered by Representative Bilirakis, were withdrawn. Representatives Armstrong, Guthrie (R-KY), and Dunn (R-FL) each offered an amendment to the Cárdenas AINS, but withdrew the amendments. Upon conclusion of consideration of the bill, the Subcommittee ordered H.R. 2668 reported favorably to the full Committee, amended, by a voice vote.

On June 10, 2021, the full Committee met in virtual open markup session to consider H.R. 2668. During consideration of the bill, an AINS offered by Representative Cárdenas was agreed to by a voice vote. An amendment to the Cárdenas AINS, offered by Representative Bilirakis,

was defeated by a roll call vote: 25 yeas to 28 nays (*Roll call no. 27*). Two amendments, offered by Representative Duncan and Representative Rodgers, were ruled out of order by the Chairman because the amendments violate House Rule XVI, clause 7. Representative Pallone, Chairman of the committee, offered a motion to order H.R. 2668 reported favorably to the House, amended. The motion on final passage was agreed to by a roll call vote of 30 yeas to 22 nays (*Roll call no. 28*), a quorum being present.

V. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list each record vote on the motion to report legislation and amendments thereto. The Committee advises that there were six record votes taken on H.R. 2668, including a motion by Mr. Pallone ordering H.R. 2668 favorably reported to the House, amended. The motion on final passage of the bill was approved by a record vote of 30 yeas to 22 nays. The following are the record votes taken during Committee consideration, including the names of those members voting for and against:

[CAMERA COPY - GPO – See attached after this page]

Committee on Energy and Commerce
117th Congress

Subcommittee on Consumer Protection and Commerce
(ratio: 14-10)

ROLL CALL VOTE #1

Bill: **H.R. 2668**, the “Consumer Protection and Recovery Act”

Motion: A motion to table the motion to postpone consideration of H.R. 2668 until June 16, 2021, offered by Mr. Pallone of New Jersey.

Disposition: **AGREED TO** by a roll call vote of 14 yeas to 9 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Ms. Schakowsky		x		Mr. Bilirakis	x		
Mr. Rush		x		Mr. Upton	x		
Ms. Castor		x		Mr. Latta	x		
Ms. Trahan		x		Mr. Guthrie	x		
Mr. McNerney		x		Mr. Bucshon			
Ms. Clarke		x		Mr. Dunn	x		
Mr. Cárdenas		x		Ms. Lesko	x		
Mrs. Dingell		x		Mr. Pence	x		
Ms. Kelly		x		Mr. Armstrong	x		
Mr. Soto		x		Mrs. Rodgers	x		
Ms. Rice		x					
Ms. Craig		x					
Ms. Fletcher		x					
Mr. Pallone		x					

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Committee on Energy and Commerce
117th Congress

Subcommittee on Consumer Protection and Commerce
(ratio: 14-10)

ROLL CALL VOTE #2

Bill: **H.R. 2668**, the “Consumer Protection and Recovery Act”

Motion: A motion to table the motion to postpone consideration of H.R. 2668 indefinitely, offered by Mr. Pallone of New Jersey.

Disposition: **AGREED TO** by a roll call vote of 13 yeas to 7 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Ms. Schakowsky		x		Mr. Bilirakis	x		
Mr. Rush		x		Mr. Upton	x		
Ms. Castor		x		Mr. Latta	x		
Ms. Trahan		x		Mr. Guthrie	x		
Mr. McNerney		x		Mr. Bucshon			
Ms. Clarke		x		Mr. Dunn			
Mr. Cárdenas		x		Ms. Lesko			
Mrs. Dingell				Mr. Pence	x		
Ms. Kelly		x		Mr. Armstrong	x		
Mr. Soto		x		Mrs. Rodgers	x		
Ms. Rice		x					
Ms. Craig		x					
Ms. Fletcher		x					
Mr. Pallone		x					

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Committee on Energy and Commerce
117th Congress

Subcommittee on Consumer Protection and Commerce
(ratio: 14-10)

ROLL CALL VOTE #3

Bill: **H.R. 2668**, the “Consumer Protection and Recovery Act”

Amendment: An amendment to the amendment in the nature of a substitute, offered By Mr. Armstrong of North Dakota, No. 1b.

Disposition: **NOT AGREED TO** by a roll call vote of 7 yeas to 14 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Ms. Schakowsky		x		Mr. Bilirakis	x		
Mr. Rush		x		Mr. Upton	x		
Ms. Castor		x		Mr. Latta	x		
Ms. Trahan		x		Mr. Guthrie	x		
Mr. McNerney		x		Mr. Bucshon			
Ms. Clarke		x		Mr. Dunn			
Mr. Cárdenas		x		Ms. Lesko			
Mrs. Dingell		x		Mr. Pence	x		
Ms. Kelly		x		Mr. Armstrong	x		
Mr. Soto		x		Mrs. Rodgers	x		
Ms. Rice		x					
Ms. Craig		x					
Ms. Fletcher		x					
Mr. Pallone		x					

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Committee on Energy and Commerce
117th Congress

Subcommittee on Consumer Protection and Commerce
(ratio: 14-10)

ROLL CALL VOTE #4

Bill: **H.R. 2668**, the “Consumer Protection and Recovery Act”

Amendment: An amendment to the amendment in the nature of a substitute, offered By Mr. Latta of Ohio, No. 1c.

Disposition: **NOT AGREED TO** by a roll call vote of 8 yeas to 14 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Ms. Schakowsky		x		Mr. Bilirakis	x		
Mr. Rush		x		Mr. Upton	x		
Ms. Castor		x		Mr. Latta	x		
Ms. Trahan		x		Mr. Guthrie	x		
Mr. McNerney		x		Mr. Bucshon			
Ms. Clarke		x		Mr. Dunn			
Mr. Cárdenas		x		Ms. Lesko	x		
Mrs. Dingell		x		Mr. Pence	x		
Ms. Kelly		x		Mr. Armstrong	x		
Mr. Soto		x		Mrs. Rodgers	x		
Ms. Rice		x					
Ms. Craig		x					
Ms. Fletcher		x					
Mr. Pallone		x					

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Committee on Energy and Commerce
117th Congress

Full Committee

(ratio: 32-26)

ROLL CALL VOTE #27

Bill: H.R. 2668, the “Consumer Protection and Recovery Act”

Amendment: An amendment to the amendment in the nature of a substitute, offered by Mr. Bilirakis of Florida, No. 1a

Disposition: **NOT AGREED TO** by a roll call vote of 25 yeas to 28 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Pallone		X		Mrs. Rodgers	X		
Mr. Rush		X		Mr. Upton	X		
Ms. Eshoo		X		Mr. Burgess	X		
Ms. DeGette		X		Mr. Scalise	X		
Mr. Doyle		X		Mr. Latta	X		
Ms. Schakowsky		X		Mr. Guthrie	X		
Mr. Butterfield		X		Mr. McKinley			
Ms. Matsui				Mr. Kinzinger	X		
Ms. Castor		X		Mr. Griffith	X		
Mr. Sarbanes		X		Mr. Bilirakis	X		
Mr. McNerney		X		Mr. Johnson	X		
Mr. Welch		X		Mr. Long			
Mr. Tonko		X		Mr. Bucshon	X		
Ms. Clarke		X		Mr. Mullin	X		
Mr. Schrader	X			Mr. Hudson	X		
Mr. Cárdenas		X		Mr. Walberg	X		
Mr. Ruiz		X		Mr. Carter	X		
Mr. Peters				Mr. Duncan	X		
Mrs. Dingell		X		Mr. Palmer	X		
Mr. Veasey		X		Mr. Dunn	X		
Ms. Kuster		X		Mr. Curtis	X		
Ms. Kelly		X		Ms. Lesko	X		
Ms. Barragán		X		Mr. Pence	X		
Mr. McEachin				Mr. Crenshaw	X		
Ms. Blunt Rochester		X		Mr. Joyce	X		
Mr. Soto		X		Mr. Armstrong	X		
Mr. O’Halleran		X					
Ms. Rice		X					
Ms. Craig		X					
Ms. Schrier		X					
Ms. Trahan		X					
Ms. Fletcher		X					

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Committee on Energy and Commerce
117th Congress

Full Committee
(ratio: 32-26)

ROLL CALL VOTE #28

Bill: H.R. 2668, the “Consumer Protection and Recovery Act”

Motion: A motion by Mr. Pallone of New Jersey to order **H.R. 2668** transmitted favorably to the House, amended (Final Passage)

Disposition: **AGREED TO** by a roll call vote of 30 yeas to 22 nays

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Pallone	X			Mrs. Rodgers		X	
Mr. Rush	X			Mr. Upton		X	
Ms. Eshoo	X			Mr. Burgess		X	
Ms. DeGette	X			Mr. Scalise		X	
Mr. Doyle	X			Mr. Latta		X	
Ms. Schakowsky	X			Mr. Guthrie		X	
Mr. Butterfield	X			Mr. McKinley			
Ms. Matsui				Mr. Kinzinger			
Ms. Castor	X			Mr. Griffith		X	
Mr. Sarbanes	X			Mr. Bilirakis		X	
Mr. McNerney	X			Mr. Johnson		X	
Mr. Welch	X			Mr. Long			
Mr. Tonko	X			Mr. Bucshon		X	
Ms. Clarke	X			Mr. Mullin		X	
Mr. Schrader	X			Mr. Hudson		X	
Mr. Cárdenas	X			Mr. Walberg		X	
Mr. Ruiz	X			Mr. Carter		X	
Mr. Peters	X			Mr. Duncan		X	
Mrs. Dingell	X			Mr. Palmer		X	
Mr. Veasey	X			Mr. Dunn			
Ms. Kuster	X			Mr. Curtis		X	
Ms. Kelly	X			Ms. Lesko		X	
Ms. Barragán	X			Mr. Pence		X	
Mr. McEachin				Mr. Crenshaw		X	
Ms. Blunt Rochester	X			Mr. Joyce		X	
Mr. Soto	X			Mr. Armstrong		X	
Mr. O’Halleran	X						
Ms. Rice	X						
Ms. Craig	X						
Ms. Schrier	X						
Ms. Trahan	X						
Ms. Fletcher	X						

VI. OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the oversight findings and recommendations of the Committee are reflected in the descriptive portion of the report.

VII. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Pursuant to 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

VIII. FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

IX. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII, the general performance goal or objective of this legislation is to enhance the ability of the FTC to protect consumers from and provide relief to consumers victimized by unlawful behavior by restoring authority to the FTC under section 13(b) of the FTC Act to seek and for federal courts to order equitable monetary relief for any provision of law enforced by the Commission as well as to clarify that such relief may be sought for illegal conduct that is ongoing, imminent, or has already occurred.

X. DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII, no provision of H.R. 2668 is known to be duplicative of another Federal program, including any program that was included in a report to Congress pursuant to section 21 of Public Law 111–139 or the most recent Catalog of Federal Domestic Assistance.

XI. COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(1) of rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

XII. EARMARKS, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

Pursuant to clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R. 2668 contains no earmarks, limited tax benefits, or limited tariff benefits.

XIII. ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

XIV. APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

XV. SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

SECTION 1. Short title.

Section 1 designates that the short title may be cited as the “The Consumer Protection and Recovery Act”.

SEC. 2. FTC Authority to Seek Permanent Injunctions and Other Equitable Relief.

Section 2 amends section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to provide the FTC the ability to obtain both injunctive and monetary equitable relief for all violations of the laws it enforces.

Paragraph (1) of subsection (a) of this section amends section 13(b) of the FTC Act to make clear that the FTC may seek temporary restraining orders and preliminary injunctions without bond and specifies that the FTC may seek any relief under section 13(b) of the FTC Act for past violations in addition to ongoing and imminent violations.

Paragraph (2) of subsection (a) of this section adds a new subsection (e) to section 13 of the FTC Act that specifies types of equitable relief the FTC may pursue: restitution for losses, contract reformation and rescission, money refunds, and the return of property. The new subsection (e) also provides the FTC with disgorgement authority to seek court orders requiring

bad actors to repay unjust gains acquired in violation of the law. Any amount of restitution for losses, contract reformation and rescission, money refunds, or the return of property a court orders to be returned must be offset by any amount the court orders be paid in disgorgement. Such relief is allowed for violations occurring up to the 10 years before the date a suit is filed, including any violations that occur after the suit is filed.

Subsection (b) of this section makes a technical conforming amendment to section 16(a)(2) of the FTC Act, 15 U.S.C. § 56(a)(2), to conform to the changes made to section 13 of the FTC Act.

Subsection (c) of this section specifies that the law would apply to any currently pending FTC action or proceeding in addition to those commenced on or after the date of enactment.

XVI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

[INSERT RAMSEYER HERE]

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

FEDERAL TRADE COMMISSION ACT

* * * * *

SEC. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation *has violated*, is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) **that** *that either (A) the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become [final,] final; or (B) the permanent enjoining thereof or the ordering of equitable relief under subsection (e), would be in the interest of the public—*

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States [to enjoin any such act or practice]. [Upon] *In a suit under paragraph (2)(A), upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted [without bond]: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in [proper cases] a suit under paragraph (2)(B) the Commission may seek, and after proper proof, the court may issue, a permanent [injunction.] injunction, equitable relief under subsection (e), or such other relief as the court determines to be just and proper, including temporary or preliminary equitable relief. [Any suit] Any suit under this subsection may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. [In any suit under this section] In any such suit, process may be served on any person, partnership, or corporation wherever it may be found.*

(c) Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for

the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction.

(e) *EQUITABLE RELIEF.*—

(1) *RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.*—*In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, with respect to the violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.*

(2) *DISGORGEMENT.*—*In a suit brought under subsection (b)(2)(B), the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a person, partnership, or corporation obtained as a result of the violation that gives rise to the suit.*

(3) *CALCULATION.*—*Any amount that a person, partnership, or corporation is ordered to pay under paragraph (2) with respect to a violation shall be offset by any amount such person, partnership, or corporation is ordered to pay, and the value of any property such person, partnership, or corporation is ordered to return, under paragraph (1) with respect to such violation.*

(4) *LIMITATIONS PERIOD.*—

(A) *IN GENERAL.*—*A court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought.*

(B) *CALCULATION.*—*For purposes of calculating the beginning of the period described in subparagraph (A), any time during which an individual against which the equitable relief is sought is outside of the United States shall not be counted.*

* * * * *

SEC. 16. (a)(1) Except as otherwise provided in paragraph (2) or (3), if—

(A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

(2) Except as otherwise provided in paragraph (3), in any civil action—

(A) under section 13 of this Act [(relating to injunctive relief)];

(B) under section 19 of this Act (relating to consumer redress);

(C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 5 of this Act;

(D) under the second paragraph of section 9 of this Act (relating to enforcement of a subpoena) and under the fourth paragraph of such section (relating to compliance with section 6 of this Act); or

(E) under section 21A of this Act;

the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

(3)(A) If the Commission makes a written request to the Attorney General, within the 10-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if—

(i) the Attorney General concurs with such request; or

(ii) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment—

(a) refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period; or

(b) the Attorney General fails to take any action with respect to the Commission's request.

(B) In any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

(C) For purposes of this paragraph (with respect to representation before the Supreme Court), the term "Attorney General" includes the Solicitor General.

(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to

any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action pursuant to paragraph 3(A)(ii).

(5) The provisions of this subsection shall apply notwithstanding chapter 31 of title 28, United States Code, or any other provision of law.

(b) Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this Act, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought.

(c) FOREIGN LITIGATION.—

(1) COMMISSION ATTORNEYS.—With the concurrence of the Attorney General, the Commission may designate Commission attorneys to assist the Attorney General in connection with litigation in foreign courts on particular matters in which the Commission has an interest.

(2) REIMBURSEMENT FOR FOREIGN COUNSEL.—The Commission is authorized to expend appropriated funds, upon agreement with the Attorney General, to reimburse the Attorney General for the retention of foreign counsel for litigation in foreign courts and for expenses related to litigation in foreign courts in which the Commission has an interest.

(3) LIMITATION ON USE OF FUNDS.—Nothing in this subsection authorizes the payment of claims or judgments from any source other than the permanent and indefinite appropriation authorized by section 1304 of title 31, United States Code.

(4) OTHER AUTHORITY.—The authority provided by this subsection is in addition to any other authority of the Commission or the Attorney General.

* * * * *

XVII. DISSENTING VIEWS

[Dissenting Views (original) attached to this page]

Dissenting Views to H.R. 2668

For the second full Energy and Commerce Committee markup of the 117th Congress, the Energy and Commerce Democrats pursued a partisan process strewn with process fouls that produced defective legislation that reflected a lack of expert witnesses and input from both sides of the aisle in the committee. Both Republicans and Democrats want the Federal Trade Commission (FTC) to have the tools necessary to protect consumers, especially given the goal to provide increased authorities and resources necessary to enforce a national privacy standard. This legislation became a missed opportunity to protect consumers on many fronts. Republicans are hopeful the Majority will review the hearing record and the rebuke they received, even by their own side of the aisle, on this legislation and consider working with Republicans on important business, like modernizing and empowering the FTC to take on enforcing data protections for American consumers..

Since the creation of the FTC in the Federal Trade Commission Act in 1914, Congress has deliberated on delegated powers and specified additional authorities over the years to level the playing field to combat unfair or deceptive acts or practices including scams, misleading consumers about the costs of products or services, whether such products or services are in fact available, or companies selling a misleading product or service.¹ In the 1970s, Congress authorized additional FTC authorities, including Section 13(b), to seek remedies in court.²

The FTC has often invoked Section 13(b) to seek monetary relief in addition to injunctive relief. However, the Supreme Court recently ruled, in a rare 9-0 decision, that Section 13(b) does not authorize the Commission to seek, or the court to award, monetary relief including disgorgement or restitution.³

Ensuring the FTC has the necessary tools to protect consumers from bad actors is a shared goal by both Republicans and Democrats. This has particularly been the case during the COVID-19 pandemic when the Committee on Energy and Commerce led the way on several bipartisan measures to increase protections for Americans, especially seniors and those with disabilities. This also included providing the FTC with first time civil penalty authorities in cases relating to COVID-19 scams.

Unfortunately, H.R. 2668, the “Consumer Protection and Recovery Act” is not one of those measures. From the time of introduction, the legislation has been rushed through an entirely partisan process without addressing significant concerns from Republicans to protect due process and prevent the FTC from operating unchecked as it did in the 1970’s.

¹ See Federal Trade Commission Act, Section 5 Unfair or Deceptive Acts or Practices at <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf>

² See Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/dec-2020/v20_i3_dec2020_beales.pdf

³ See the Opinion of Justice Breyer in AMG Capital Management, LLC et al. v. Federal Trade Commission at https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf

Representative Cardenas introduced H.R. 2668 on Tuesday, April 20, 2021, which would grant the FTC with new authorities and retroactive standing to seek, including cases up to 10 years, monetary relief such as disgorgement and restitution in cases of unfair competition and unfair or deceptive acts or practices.

The authorities, which the FTC historically never had, do not include guardrails to ensure the FTC has a sound basis for seeking monetary relief nor to incentivize the FTC to pursue current bad actors in violation of law. Instead, the legislation establishes a 10-year statute of limitations going forward and neutralizes the unanimous Supreme Court decision to allow the FTC to seek relief retroactively. Such a long statute of limitations allows the assertion of claims long after the conduct at issue, when evidence may be stale or no longer available.⁴

Seven days after introduction, H.R. 2668 was the sole piece of legislation considered at a hearing before the Subcommittee on Consumer Protection and Commerce, even when Republicans introduced FTC reform bills to move in tandem with H.R. 2668. At the Subcommittee hearing, the Majority invited Acting Chairwoman Rebecca K. Slaughter to testify without her fellow FTC Commissioners, despite our request that all of the current Commissioners testify as they did in the Senate one week prior. If that discourse were allowed, the committee would have heard expert testimony from Republican FTC Commissioners who justified the appropriate guardrails needed in any legislation addressing Section 13(b).

The Committee would have benefited from hearing the viewpoints of all current FTC Commissioners, some of which raised several factors Congress should consider while drafting a legislative fix during the Senate hearing. Such factors included, ensuring there are guardrails that set boundaries on when the FTC may seek disgorgement and restitution, similar to the 2003 FTC Policy Statement on Monetary Equitable Remedies in Competition Cases,⁵ and how Congress can examine the authorities granted under Section 19 of the FTC Act as a possible solution to allow the Commission to seek monetary relief in cases of fraudulent or dishonest behavior.⁶ None of these considerations were included in the legislation moving forward.

After holding a hearing without the input from pertinent experts, the Majority continued a partisan process to markup H.R. 2668 in both the subcommittee and the full committee.

During the subcommittee markup, Republicans offered amendments to address potential unintended consequences of granting the FTC new authority. Republican's proposed ensuring the FTC conducts an economic analysis before seeking disgorgement or restitution, increasing transparency, and eliminating duplicative efforts including the recently announced centralized rulemaking office.⁷ In addition to pointing out the impact on the seventy plus consumer

⁴ See Professor Howard Beales responses to Additional Questions for the Record at <https://docs.house.gov/meetings/IF/IF17/20210427/112501/HHRG-117-IF17-Wstate-BealesJ-20210427-SD001.pdf>

⁵ See the FTC Policy Statement on Monetary Equitable Remedies in Competition Cases at <https://www.govinfo.gov/content/pkg/FR-2003-08-04/pdf/03-19722.pdf>

⁶ The Senate Committee on Commerce, Science, and Transportation held an information hearing with the FTC at <https://www.commerce.senate.gov/2021/4/strengthening-the-federal-trade-commission-s-authority-to-protect-consumers>

⁷ See FTC Acting Chairwoman Slaughter Announces New Rulemaking Group at <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>

protection laws the FTC is charged with enforcing, Republicans also highlighted for the need – and the opportunity H.R. 2668 presented – to establish a national privacy framework.

Prior to the full committee markup, and in keeping within the jurisdiction of the committee, Republicans proposed a compromise amendment to clarify the FTC may only seek restitution and disgorgement in cases involving unfair or deceptive acts or practices in which a reasonable person would have known the potential violation under consideration was unfair or deceptive. This compromise would have also reduced the statute of limitations from 10 years to 5 years, but included an avenue to allow the FTC to seek (under the approval from the courts) equitable relief with respect to violations where a corporation engaged in intentionally deceptive or fraudulent conduct that prevented the Commission from bringing the suit within the 5 year statute of limitations – a sincere offer to address Democratic desires for longer statutes of limitations.

Even after the Republican compromise garnered bipartisan support, Democrats rejected the commonsense approach and moved forward with their partisan legislation with no consideration for its consequences.

The Committee should have received input from all of the FTC Commissioners and worked in a bipartisan manner to reach common ground to provide the FTC the tools to protect consumers, rather than providing the FTC with new, blanket authorities without guardrails and insurances.

We are disappointed that the Democrats failed to manage a bipartisan process on H.R. 2668. However, when Democrats wish to engage in bipartisan solutions for the American people, the Energy and Commerce Republicans will still be there, ready to work.



Cathy McMorris Rodgers
Republican Leader



Gus Bilirakis
Republican Leader
Subcommittee on Consumer Protection
and Commerce