



MEMORANDUM

April 23, 2021

To: Subcommittee on Consumer Protection and Commerce Members and Staff

Fr: Committee on Energy and Commerce Staff

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

On Tuesday, April 27, 2021, at 1 p.m., via Cisco WebEx online video conferencing, the Subcommittee on Consumer Protection and Commerce will hold a legislative hearing entitled, “**The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers.**”

I. BACKGROUND

As the nation’s premier consumer protection agency, the Federal Trade Commission (FTC) is directed to enforce numerous statutes: the core of which is section 5 of the Federal Trade Commission Act (FTC Act) mandating the agency to prevent unfair or deceptive acts or practices and unfair methods of competition.¹ Section 13(b) of the FTC Act, which authorizes the FTC to bring suit in federal courts seeking relief for consumers, is a critical enforcement tool the FTC uses to combat fraud and scams under section 5.² In 2020 alone, the FTC returned more than \$482 million to over 1.6 million consumer victims of fraud or illegal business practices.³

The FTC’s restitution authority under section 13(b) was settled law for over 40 years.⁴ In 2017, the FTC obtained an injunction and restitution against a company that offered supposedly free credit scores and reports, but automatically enrolled customers in a recurring subscription

¹ 15 U.S.C. § 45(a).

² 15 U.S.C. § 53(b).

³ Federal Trade Commission, *FTC Returns More Than \$482 Million to Consumers in 2020* (Jan. 27, 2021) (www.ftc.gov/news-events/press-releases/2021/01/ftc-returns-more-482-million-consumers-2020).

⁴ 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).

plan charging \$30 per month.⁵ On appeal, the Seventh Circuit Court of Appeals reversed its own precedent to overturn FTC authority under section 13(b) to obtain monetary relief holding that recent Supreme Court decisions require adherence to the strict text of the statute instead of decades of precedent.⁶ The Third Circuit followed, rendering close to 48 million Americans in six states unable to obtain monetary redress under 13(b).⁷ The Third Circuit Court decision also hampered the FTC’s “ability to protect consumer 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.”⁸ In 2020, with this legal ambiguity over section 13(b) already impeding the FTC, all five FTC Commissioners repeatedly urged Congress to take quick action to pass legislation reaffirming FTC authority under section 13(b).⁹

On April 22, 2021, the Supreme Court held that section 13(b) does not allow the FTC to seek monetary relief or require bad actors to return money earned through illegal activity.¹⁰ According to Acting Chairwoman Slaughter, the decision “deprived the FTC of the strongest tool [the FTC] had to help consumers.”¹¹

II. H.R. 2668, THE CONSUMER PROTECTION AND RECOVERY ACT

On April 20, 2021, Rep. Cárdenas (D-CA), along with Chairman Pallone (D-NJ), Subcommittee on Consumer Protection and Commerce Chair Schakowsky (D-IL) and Reps. Rush (D-IL), Castor (D-FL), Trahan (D-MA), McNERNEY (D-CA), Clarke (D-NY), Dingell (D-MI), Kelly (D-IL), Soto (D-FL), Rice (D-NY), Craig (D-MN), and Fletcher (D-TX), introduced H.R. 2668, the Consumer Protection and Recovery Act.

H.R. 2668 amends section 13(b) of the FTC Act to explicitly provide the FTC the ability to obtain both injunctive and monetary equitable relief for all violations of the laws it enforces. It adds a new subsection (e) to section 13 of the FTC Act that specifies types of equitable relief

⁵ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

⁶ *Id.*

⁷ *FTC v. AbbVie, Inc.*, No. 18-2621 (3rd Cir. 2020).

⁸ *Prepared Statement of the Federal Trade Commission*, Senate Committee on Commerce, Science, and Transportation (Apr. 20, 2021).

⁹ 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); 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).

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

¹¹ Federal Trade Commission, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021).

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 disgorgement authority to seek court orders requiring bad actors repay unjust gains acquired in violation of the law. Any amount a court orders to be returned in equitable relief must be offset by any amount the court orders be paid in disgorgement. Such relief is allowed for violations occurring up to the ten years prior to the date a suit is filed, including any violations that occur after the suit is filed. This ten-year period is extended when relief is sought for individuals who are outside of the United States during this period.

H.R. 2668 also makes clear that 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. The bill applies to any currently pending FTC action or proceeding in addition to those commenced on or after, the date of enactment.

III. WITNESSES

The following witnesses have been invited to testify:

Panel 1

The Honorable Rebecca K. Slaughter

Acting Chairwoman
Federal Trade Commission

Panel 2

Anna Laitin

Director, Financial Fairness and Legislative Strategy
Consumer Reports

Ted Mermin

Executive Director
Center for Consumer Law and Economic Justice
Lecturer
University of California, Berkeley School of Law

Dr. J. Howard Beales

Professor Emeritus of Strategic Management and Public Policy
George Washington University