**Attachment—Additional Questions for the Record**

**Subcommittee on Consumer Protection and Commerce**
**Hearing on**
**"The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers."**
**April 27, 2021**

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**The Honorable Kelly Armstrong (R-ND)**

1. QUESTION: The courts have found the Commission need not prove actual knowledge: "Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective."[1] The dishonest or fraudulent standard was met in Figgie. That case may have taken an extended time to prosecute, but doesn't it serve as an example that the Commission is capable of proceeding, and succeeding, under the dishonest and fraudulent standard?

   RESPONSE: It may be that the FTC could bring some limited number of cases under the 'dishonest or fraudulent' standard – but how would the American public benefit from such a partial approach? Certain cases could still move forward under that constrained standard; but many others could not.

   Among the cases that couldn't be brought are those that involve significant harm to consumers, but not necessarily dishonesty or fraud by the business. These cases might include data breaches that lead to identity theft, apps that collect private personal information and sell it to the highest bidder, or harassment of consumers who allegedly owe a business money. Other cases that couldn't be brought include those where it is simply difficult to prove fraudulent intent. There is a reason that Section 5 and Section 13 of the FTC Act – not to mention other federal and state consumer protection statutes – contain no intent requirement: establishing a company's "state of mind" can be a very complicated and involved process. (*See* Prentiss Cox and Christopher Peterson, n.4 ("Scienter is not a consideration in liability for UDAP violations"), https://bit.ly/3ufuDDF.)

   In any case, if consumers were deceived, shouldn't they get their money back, whether or not the deception was intentional? If a business accidentally mislabeled a product, shouldn't consumers who would not have bought the product if it had been labeled accurately be entitled to a refund?

[1] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 603 (9th Cir. 1993).

As for the decision in *FTC v. Figgie Int'l*: The *Figgie* case was a long and difficult case for the FTC, precisely because it was brought under Section 19. Illustrating just how unwieldy and burdensome the case was to bring, the FTC stopped using Section 19 in administrative cases after *Figgie*. Part of the reason is the complexity and years of effort required by the Section 19 process, which involves litigating the case at least two and often three separate times: first an administrative proceeding, then either judicial review or a proceeding to enforce the FTC's order – and a third time if the FTC has needed to secure an asset freeze while the case is being litigated. But there is substantial additional difficulty in determining whether the conduct at issue is what a reasonable person would consider "dishonest" or "fraudulent" – especially when neither of those terms is defined in rule or statute.

Consider the following archetypical cases, in all of which the FTC has successfully obtained monetary relief for consumers who were harmed financially. *None* of these matters could have been brought under the "fraudulent or dishonest" standard.

1. Unfair Billing Cases

Example: FTC v. Amazon.com (2017)
The FTC brought suit against Amazon for billing consumers for unauthorized in-app charges incurred by children. The Commission sued under Section 13(b), alleging unfair practices in violation of Section 5 of the FTC Act. The settlement agreement provided refunds to consumers of more than $70 million.

2. Data Breach Cases

Example: FTC v. Equifax (2019)
The FTC brought suit under Section 13(b) against Equifax for lax security practices that led to a data breach affecting 147 million people. The breach exposed millions of names and dates of birth, Social Security numbers, physical addresses, and other detailed personal information whose misuse could readily lead to identity theft. In settling the case, Equifax agreed to pay at least $425 million in redress to consumers.

3. Debt Collection Practices Cases

Example: FTC v. Global Processing Solutions, LLC (2018)
The FTC sued under section 13(b) and settled with a debt collector that, among other things, illegally contacted consumers' employers and other third parties, and failed to provide written notices and disclaimers required by law. The settlement provided for equitable monetary relief of over $3 million.

*Note that common debt collection practices like calling in the middle of the night, talking to employers, and using abusive language do not amount to "fraudulent" or "dishonest" behavior. Note also that the Fair Debt Collection Practices Act (15 U.S.C. section 1692), which restricts these practices, does not provide remedies to the FTC beyond those available under the FTC Act, and in any case does not apply to*

*creditors collecting their own debts – so the remedies available under Section 13(b) remain critically relevant.*

4. Racial Discrimination Cases

Example: [FTC v. Bronx Honda] (2020)
The FTC sued car dealer Bronx Honda under Section 13(b) and obtained $1.5 million in equitable relief to consumers who had been charged higher financing markups and higher fees simply because they were African-American or Hispanic.

In sum, consumers were injured in each of these paradigm cases, sometimes seriously – and in each case the FTC was able to obtain substantial sums of money to provide relief to consumers. However, in each case the injured consumers could not have been provided economic relief if the "fraudulent or dishonest" standard had been in place.

2. QUESTION: FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), involved "websites [that] offered a 'free credit report and score' while obscuring a key detail in much smaller text: that applying for this 'free' information automatically enrolled customers in an unspecified $29.94 monthly 'membership' subscription."[2] "The subscription was for Brown's credit-monitoring service, but customers learned this information only when he sent them a letter after they were automatically enrolled."[3] Although the Commission proceeded under 13(b) and the "unfair or deceptive" standard in this case, the Seventh Circuit declared this a "fraudulent scheme."[4] Is there a reason the Commission could not have proven a case under the dishonest or fraudulent standard?

   RESPONSE: *FTC v. Credit Bureau Center* was a massive fraud, causing a half-billion dollars in consumer loss. Although the FTC did essentially prove that this was a fraudulent scheme, there was no Section 19 claim asserted and there was no basis to do so since there was no rule violation and no prior administrative proceeding.

   Therefore, to the extent the question is asking whether the FTC could have litigated *Credit Bureau* in a way that allowed the Commission to use Section 19, the realistic answer is no. The FTC would have to have filed an action for an asset freeze in federal court, which would have required the FTC to give the company a real preview of its case in order to meet the likely-to-succeed requirement. The Commission would then have to go back and litigate the case administratively, which takes longer then federal court proceedings; then wait until judicial review of the FTC's order was complete; and only *then* bring a Section 19 case. That process would have taken years. Doing so in *FTC v. POM Wonderful*, for example, took more than five years.

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[2] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

[3] *Id.*

[4] *Id.*

(*See* David Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 Mont. L. Rev. 159, 188-90 (2021).) Could the FTC find victims after so long? Could it maintain an asset freeze for so long?

To the extent that the question asks instead whether the "dishonest or fraudulent" standard could have been met in that case, the answer is "perhaps." It would have depended on the definitions of "dishonest" and "fraudulent" that the court chose to apply – and which could well have varied from the common meanings of the words employed in the existing opinion.

But again, the crucial issue in deciding on a legislative fix to the *AMG v. FTC* case is not the cases that *could* still have been brought, but rather those that could *not* have been.

Conduct that violates users' privacy, that involves abusive or even unconscionable behavior, that preys on children or seniors or the disabled – but that is not dishonest or fraudulent – is conduct that we want the FTC to be able to stop. And we want the Commission to be able to obtain redress for consumers who are injured. That can only be accomplished if Congress provides the FTC with full authority to provide equitable relief to consumers. That is the same authority that the FTC has been exercising under an interpretation of Section 13(b) that went unchallenged by appellate judges for four decades. It is the same authority that is exercised by other federal agencies and by state attorneys general. It is neither novel nor exceptional. It is, rather, precisely what is needed by every consumer – every senior, every servicemember, every veteran, every small business – in this country.

3. QUESTION: The Commission obtained $14.7 billion, by far its largest ever monetary remedy, from Volkswagen in a 2016 settlement. The Commission alleged the company had intentionally installed, in millions of vehicles sold in the U.S., "illegal software designed to enable the vehicle to cheat emissions tests" to allow "emissions at as much as 4,000 percent above the legal limit." If intentional falsification of a product quality, which is both required by law and also valued by environmentally sensitive consumers, does not qualify as dishonest or fraudulent conduct, what type of conduct would meet this standard?

   RESPONSE: Given the intentional conduct on the part of Volkswagen, it does seem that this behavior could readily be characterized as both dishonest and fraudulent. But rarely do public prosecutors encounter a case in which the conduct is admitted and the intent is so readily established. Much more common are the cases in which intent (including, perhaps, dishonesty and fraud) is difficult to prove. After all, "unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery" (*People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 772 (1962)) and those who perpetrate them are often "wily or obstinate enough to hide the truth." (*U.S. Dept. of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc.,* 64 F.3d 920, 927 (4th Cir. 1995).) In the great majority of cases brought by public prosecutors, including the FTC, the defendant denies all

wrongdoing – even in the consent decree or stipulated judgment settling the case. It is for this reason that public consumer protection statutes generally do not contain a "scienter" or intent requirement. (*See* Cox & Peterson, *supra*, at p. 37.)

4. QUESTION: H.R. 2668 contains a provision that "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."

    a. Is 10 years an appropriate period? Please explain.

The current FTC Act does not contain a statute of limitations for 13(b) relief. Imposing one now is not necessary – the FTC has operated for the past four decades and more without great consternation over the lack of a limitations period. And the consensus among public prosecutors is that there is no need for such a limitation. Nevertheless, in the interest of finality, a carefully crafted statute of limitations of some kind should not overly burden the Commission's work. Given the months or often years it can take for misconduct to reach the attention of the FTC, a finite but not overly constricted statute of limitations would make sense. A 10-year timeframe could provide the balance of returning money to as many consumers as possible on the one hand, and providing finality while allaying concerns about evidence that has gone stale or disappeared on the other. It is, however, necessary to add to any statute of limitations the caveat that the statute does not begin to run until the FTC has discovered or should have discovered the wrongdoing. That is, so long as the wrongdoing conceals the fraud, the statute of limitations should not be running. Otherwise, we run the risk that bad actors will retain money that they unlawfully took from consumers more than a few years ago.

This last observation serves as a useful summation to the entire question of placing limitations on the FTC's ability to return stolen money to consumers: Why would we want to let wrongdoers keep the money they took illegally?

The time has come for Congress – including every member who cares about fairness in the marketplace and safeguarding their constituents – to act swiftly to restore the FTC's full capacity to protect all Americans.

Respectfully submitted,

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