

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**

Hon. Rebecca Kelly Slaughter, Acting Chairwoman, Federal Trade Commission

The Honorable Gus M. Bilirakis

1. Acting Chair Slaughter, during the hearing you expressed the need for the FTC to prioritize going after bad actors currently engaging in unfair or deceptive acts or practices. I want to reiterate, as I mentioned during the hearing, I am concerned that unintended consequences may be a result of granting FTC authority to retroactively go after bad actors.
 - a. Before the Supreme Court ruling, what was the percentage of cases brought forth against retroactive unfair or deceptive acts or practices versus cases against those actively engaging in unfair or deceptive acts or practices?

RESPONSE:

Although we do not have readily available data to calculate exact percentages, we conducted an informal review of the Commission’s consumer protection cases brought since 2018. That review showed that the majority of the Commission’s recent consumer protection enforcement actions involve ongoing unlawful conduct. Nonetheless, the Commission also brings enforcement actions involving past consumer protection violations when it can establish to a court that there is a likelihood that the unlawful conduct will recur, which is the well-established legal standard for obtaining an injunction in federal court.

Enforcement actions addressing ongoing unlawful conduct are important, but so too are actions addressing past misconduct that is no longer occurring. Even in past-conduct cases, injunctions remain critically important to prevent illegal conduct from recurring and protect consumers from future violations. When the Commission has reason to believe that defendants will re-engage in their unlawful conduct, it is important to obtain a federal court injunction that carries with it the threat of contempt sanctions, which serves as a strong deterrent to discourage defendants from violating the law again.

Moreover, limiting the Commission to only cases that involve ongoing violations would have wide ranging negative consequences. For example, the Commission would no longer be able to bring federal court actions to address many data breaches (such as the action it brought in

response to the Equifax breach¹) because companies typically take remedial steps as soon as they are discovered—long before the Commission can file suit. Furthermore, limiting Commission enforcement to those cases where lawbreakers are caught in the act would encourage would-be violators to break the law as long as they can avoid detection during the violation. Many defendants could easily escape a federal court injunction by stopping their unlawful conduct upon learning of the FTC’s investigation, forcing the Commission to wait until the unlawful conduct recurs before seeking a federal court order enjoining it. In that scenario, more consumers end up being harmed despite the fact that it was foreseeable that the defendant would resume its unlawful activities. By seeking federal court injunctions in cases in which there is a likelihood of recurrence, the Commission can effectively and efficiently protect consumers from future violations.

Commission actions involving past conduct are also necessary to make whole consumers who lost money as a result of defendants’ unlawful conduct. Take for example a defendant who sold a supplement falsely advertised to cure cancer but stopped selling it before the Commission was able to file suit. Although the conduct would not be ongoing, Commission action would still be needed to provide refunds to consumers who lost money to the scam and to prevent the defendant from retaining the unjust gains earned from the scheme. Below are some recent Commission actions that involved allegations of past conduct and resulted in settlements that returned billions of dollars to harmed consumers:

- Volkswagen: From 2008 to 2015, VW sold “clean” diesel vehicles that the company claimed had been shown in government tests to have reduced emissions. In reality, the vehicles did not have lower emissions because they were equipped with a defeat device that could detect government testing and artificially lower emissions in response. VW stopped using defeat devices in 2015 in response to an investigation by EPA and California. The FTC brought suit in 2016, securing nearly \$10 billion in compensation in the form of vehicle buy-backs or repairs for consumers who purchased “clean” diesel vehicles that had lost significant value due to the defeat devices.² Neither the EPA, the Department of Justice, nor the states had statutory authority to provide nationwide redress to these purchasers—that authority came solely from the Commission’s pre-AMG ability to obtain equitable monetary relief under Section 13(b) of the FTC Act.
- Office Depot: From 2009 to 2016, Office Depot offered consumers a “free PC check-up” that utilized a scanning program that falsely claimed that every computer had malware or viruses, which the company then used to sell consumers millions of dollars of computer repair services that they did not need. Tech support scams like

¹ Press Release, FTC, *Equifax to Pay \$575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach* (July 22, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related>.

² Press Release, FTC, *In Final Court Summary, FTC Reports Volkswagen Repaid More Than \$9.5 Billion to Car Buyers Who Were Deceived by “Clean Diesel” Ad Campaign* (July 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/final-court-summary-ftc-reports-volkswagen-repaid-more-than-9-billion>.

this disproportionately impact seniors.³ Office Depot stopped using the scanning program in 2016 after news reports exposed the practice. The FTC reached a settlement with Office Depot and the company that created the software in 2019. The settlements required the companies to pay \$35 million in refunds to consumers who paid for unnecessary computer repairs.⁴

- DeVry University: From 2008 to 2015, DeVry University ran advertisements that falsely claimed that 90% of its graduates obtained a job in their field within 6 months of graduation and that its graduates had 15% higher incomes than graduates of other colleges and universities. These false advertisements targeted, among others, former members of the military. DeVry stopped making these claims in 2015 when the FTC began investigating. DeVry ultimately agreed to a \$100 million settlement in 2016, which included payments and debt forgiveness for students who were deceived by DeVry's false claims.⁵
- T-Mobile / AT&T: T-Mobile and AT&T earned millions in fees when consumers paid unauthorized third-party charges that were discretely placed on their phone bills, a practice known as mobile cramming. The carriers continued to allow these charges to be placed on their bills despite numerous consumer complaints, news reports, high refund rates, and other obvious signs that the third-party charges were fraudulent. The carriers also buried these unauthorized charges on their bills making it difficult for consumers to detect them. By early 2014, both carriers had stopped allowing third-parties to place charges on their bills. The FTC subsequently brought suit against the carriers and obtained nearly \$180 million that was returned to consumers who paid these bogus hidden charges.⁶
 - b. Before the Supreme Court ruling, how far back, in time, did the FTC go to pursue bad actors who engaged in unfair or deceptive acts or practices?

RESPONSE:

³ Emma Fletcher, FTC, *Older Adults Hardest Hit by Tech Support Scams* (Mar. 7, 2019), <https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams>.

⁴ Press Release, FTC, *Office Depot and Tech Support Firm Will Pay \$35 Million to Settle FTC Allegations That They Tricked Consumers into Buying Costly Computer Repair Services* (Mar. 27, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/office-depot-tech-support-firm-will-pay-35-million-settle-ftc>.

⁵ Press Release, FTC, *DeVry University Agrees to \$100 Million Settlement with FTC* (Dec. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/devry-university-agrees-100-million-settlement-ftc>.

⁶ Press Release, FTC, *T-Mobile to Pay At Least \$90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case* (Dec. 19, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>; Press Release, FTC, *FTC Providing Over \$88 Million in Refunds to AT&T Customers Who Were Subjected to Mobile Cramming* (Dec. 8, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-providing-over-88-million-refunds-att-customers-who-were>.

Based on an informal review of consumer protection cases that we have brought since 2014, we were unable to identify any FTC case in which a court awarded monetary relief for violations that occurred more than ten years prior to the filing of our complaint. Most of our recent cases have been limited to unlawful conduct that began no more than five to seven years prior to filing.

- c. When would it be appropriate to redirect efforts to retroactively go after bad actors when there are bad actors currently taking advantage of Americans?

RESPONSE:

Please see response to Question 1.a.