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ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

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August 16, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Hon. Khan:

Thank you for appearing before the Subcommittee on Consumer Protection and Commerce on Wednesday, July 28, 2021, at the hearing entitled "Transforming the FTC: Legislation to Modernize Consumer Protection." I appreciate the time and effort you gave as a witness before the Committee on Energy and Commerce.

Pursuant to Rule 3 of the Committee on Energy and Commerce, members are permitted to submit additional questions to the witnesses for their responses, which will be included in the hearing record. Attached are questions directed to you from certain members of the Committee. In preparing your answers to these questions, please address your response to the member who has submitted the questions in the space provided.

To facilitate the printing of the hearing record, please submit your responses to these questions no later than the close of business on Friday, August 27, 2021. As previously noted, this transmittal letter and your responses, as well as the responses from the other witnesses appearing at the hearing, will all be included in the hearing record. Your written responses should be transmitted by e-mail in the Word document provided to Ed Kaczmarski, Policy Analyst, at ed.kaczmarski@mail.house.gov. To help in maintaining the proper format for hearing records, please use the document provided to complete your responses.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Ed Kaczmarski with the Committee staff at (202) 225-2927.

Sincerely,

Frank Pallone, Jr.

Chairman

Attachment

cc: The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce

The Honorable Jan Schakowsky
Chair
Subcommittee on Consumer Protection and Commerce

The Honorable Gus Bilirakis
Ranking Member
Subcommittee on Consumer Protection and Commerce

Attachment—Additional Questions for the Record

Subcommittee on Consumer Protection and Commerce
Hearing on
"Transforming the FTC: Legislation to Modernize Consumer Protection"
July 28, 2021

The Honorable Lina Khan, Chair, Federal Trade Commission

The Honorable Janice D. Schakowsky (D-IL)

1. **The Cambridge Analytica scandal was a major privacy violation and merited a strong response by the Federal Trade Commission (FTC). I've heard concerns that Facebook is using its consent order with the FTC as a sword to block researchers and competitors. Protecting consumer privacy is sometimes at odds with the need for meaningful transparency with respect to other consumer protection and competition interests. Going forward, how will the FTC balance consumer privacy concerns against transparency?**

   RESPONSE: I fully support good-faith research in the public interest, provided it is done in a privacy-protective manner. I also believe it is possible for data related to digital advertising to be made available to researchers in a way that protects users' privacy.

The Honorable Lori Trahan (D-MA)

1. **Facebook recently announced it had disabled accounts belonging to researchers at NYU, saying it took the step to "protect people's privacy" and comply with a settlement it struck with the FTC over allegations that NYU's Ad Observatory violated users' privacy.[1] The FTC clarified that their settlement agreement with Facebook did not necessitate that Facebook cease collaboration with researchers.[2] Do you believe data related to digital advertising can be made available to researchers in a way that preserves the privacy of internet users?**

   RESPONSE: I fully support good-faith research in the public interest, provided it is done in a privacy-protective manner. I also believe it is possible for data related to digital advertising to be made available to researchers in a way that protects users' privacy.

2. **As for other social media data such as those listed in (c)(4)(C)(i) of H.R. 3451, the "Social Media DATA Act",[3] has the FTC considered ways to protect academic independence while respecting the privacy of internet users? If the FTC had more resources, how would they tackle this issue?**

   RESPONSE: The FTC values academic independence and seeks to ensure its work is informed by rigorous research. In the past, the FTC has testified against provisions of legislation that would have restricted access to data for academic researchers, noting that prohibiting access to data for research purposes could be detrimental to privacy, security, and safety.

   With additional resources, the FTC would build on this approach by hiring individuals with knowledge and expertise to help the agency tackle these issues. The types of professional experience that could be useful include product development, supply chain management, data privacy and analytics, biometric privacy, information security, and other related fields as necessary.

[1] Facebook, *Research cannot be the Justification for Compromising People's Privacy* (August 2021) (about.fb.com/news/2021/08/research-cannot-be-the-justification-for-compromising-peoples-privacy/).

[2] Letter from Acting Director of the Bureau of Consumer Protection Samuel Levine to Facebook (Aug. 5, 2021) (www.ftc.gov/news-events/blogs/consumer-blog/2021/08/letter-acting-director-bureau-consumer-protection-samuel)

[3] H.R. 3451, the "Social Media DATA Act of 2021", 117th Cong., § 1 (2021).

The Honorable Robin Kelly (D-IL)

1. **With regard to the FTC's Right to Repair work, have you, or do you plan to, solicited input from the EPA on the issue of engine emissions control tampering, and specifically, how it could be used to override emissions controls and impact air quality and public health?**

   RESPONSE: The FTC issued a call for empirical research and comments from any interested parties and stakeholders prior to the Nixing the Fix workshop held in July of 2019. Following the workshop, the Commission accepted comments into September 2019, and the FTC staff continues to meet with stakeholders and interested parties. The FTC has not solicited input specifically from the EPA outside of these general efforts.

   The Commission's right to repair work, including the Workshop and related report to Congress,[4] has focused on the various mechanisms that manufacturers use to limit consumers' repair options and the ways that these restrictions harm users. The FTC has not studied the prevalence or effects of restrictions that limit users' ability to modify their products.

   In instances where the Commission's work implicates laws and regulations outside of the agency's expertise, we will seek input from our government partners, including peer agencies like the EPA.

2. **Can you clarify whether the FTC is actively monitoring direct-to-consumer medical products from a consumer protection perspective and how the FTC is approaching this issue given the FTC's action filing amicus briefs from an antitrust perspective?**

   RESPONSE: The FTC receives millions of reports from consumers each year covering a range of products and marketing practices, including direct-to-consumer medical products. Staff mines such complaint data to identify law enforcement targets; we can also use the data to inform the agency's policy and advocacy work.

[4] Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

The Honorable Gus Bilirakis (R-FL)

1. **Chair Khan, can you confirm you endorsed the use of effective behavioral remedies to address competition concerns? For example, doesn't the 2020 House Judiciary Committee's Investigative Report promote government regulation of natural monopolies, and in cases where a dominant vertical merger partner controls "critical input," a requirement that the dominant partner provide competitors with "easy access" to the critical input on a non-discriminatory basis? What will your policy be on mergers moving forward and will it follow similarly?**

   RESPONSE: I believe that the Commission should have no tolerance for unlawful mergers, and I am skeptical about the efficacy of behavioral remedies. Research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction. While the antitrust agencies have at times relied on behavioral remedies, both the Commission and the Department of Justice have a stated preference for structural remedies, even for vertical mergers. I believe this preference is consistent with what Congress expects. Courts have also widely acknowledged that divestiture is the presumptive remedy for an acquisition found to be illegal under Section 7 of the Clayton Act.

   While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright.

2. **A Chinese company, BGI Group, is competing with American genetic sequencing companies like Illumina. Can you confirm the Chinese company is not behind efforts to block Illumina's merger with GRAIL, which would accelerate the early detection of cancer through a simple blood test? Can you explain how the FTC through its actions would not tie the hands of American companies and play into the hands of the Chinese Communist Party?**

   RESPONSE: Although I cannot comment on any pending adjudicative proceeding, the sole objective of Commission actions that seek to block mergers is to protect Americans from unlawful transactions, in accordance with our statutory obligations.

   a. **Can you explain how China would not gain most from the FTC blocking mergers such as the merger of Illumina and GRAIL?**

      RESPONSE: The Commission issued a complaint to cease the merger because it had reason to believe that the deal would substantially lessen competition, undermining innovation and raising prices. The case currently is pending before the ALJ and eventually could come before the Commission as

an adjudicative body. Accordingly, it would be inappropriate for me to comment on the matter further at this time.

3. **Preserving U.S. leadership in healthcare technology is critical, and the last thing we need is our own government acting as a headwind to innovation, especially when other countries like China are innovating at record speed with the full support of their government. I'm concerned that the FTC is using administrative hoops to slow down deals that could put American companies ahead of their Chinese competitors. Is it true that the FTC recently refused to even meet with healthcare company Illumina to discuss a merger that would advance cancer screening technology that has the potential to save millions of lives?**

   RESPONSE: Although I cannot comment on any pending adjudicative proceeding, I can assure you that as a general matter, the FTC provides target companies ample opportunities to convey their view. However, once litigation has begun and for as long as it is pending, Commission's ex-parte rules prevent communications with the Commission or its staff except as part of that litigation.

   a. **Can you explain why isn't the FTC doing everything in its power to facilitate innovation in a breakthrough area like this?**

      RESPONSE: The Commission prioritizes antitrust enforcement in health care markets precisely because competition can significantly drive innovation. Incumbent companies that do not face competition have few incentives to bring new products to market, depriving Americans of new advances.

4. **Where a merger is being reviewed in multiple jurisdictions, is it the FTC's policy to defer to the process in the other jurisdiction, rather than litigating the merger in the United States?**

   RESPONSE: The Commission makes its own law enforcement decisions based on its analysis of U.S. laws. In order to take advantage of the benefits of premerger review, the Commission must evaluate when closing is likely to occur. If the merger is still subject to other closing conditions, such as regulatory approval or review by a foreign enforcer, the Commission may take such delay into account in deciding when to initiate an enforcement action.

5. **Does the FTC prefer to litigate mergers in its own administrative tribunal rather than allowing federal courts to address merger issues?**

   RESPONSE: The Commission's primary forum for determining violations of Section 7 of the Clayton Act is its administrative proceedings. The Commission also has the authority to ask a federal court to issue a preliminary injunction preventing the consummation of a proposed transaction pending an administrative trial on the merits.

The agency's approach is guided not by the preferences of the Commission, but instead by the statutory text and institutional design crafted by Congress.

6. **If H.R. 4447 were enacted into the law, could we have a problem where the rules constantly change based on the whims of each administration's FTC? How could this impact the small businesses who are affected by these constantly changing rules?**

RESPONSE: Currently, the FTC is required to use the more cumbersome procedures in Section 18 of the FTC Act to promulgate trade regulation rules relating to unfair or deceptive acts or practices. H.R. 4447 would allow the FTC to use the same notice-and-comment procedures used by most other agencies under the Administrative Procedure Act (APA), enabling the Commission to promulgate rules in a timely and efficient manner. Under the APA, agencies are required to provide notice of the proposed changes in the Federal Register, provide a reasoned explanation for the proposed changes, receive comments from the public, and respond to significant issues raised in the public comments before making any decision. These requirements apply to proposals to issue new rules, as well as to proposals to substantively amend existing rules or repeal them.

With respect to small businesses specifically, I understand H.R. 4447 does not affect the existing requirements in the Regulatory Flexibility Act or the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[5]

7. **With the notice-and-comment rulemaking proposed by H.R. 4447, if one administration's FTC wants to change or repeal the rules of a previous administration's FTC, do those changes face any sort of heightened judicial review?**

RESPONSE: Rule promulgations as well as amendments or repeals are all subject to the same standard of review. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[6] At a minimum, the agency must "display awareness that it is changing position."[7] In providing the required reasoned explanation for an amendment or repeal of a rule, the agency may have to address any reliance interests that the existing rule has engendered, as failing to do so could be arbitrary and capricious.[8]

   a. **What standard of review would apply to Section 18 rulemaking?**

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[5] *See* 5 U.S.C. § 603. The Regulatory Flexibility Act requires that agencies consider ways to minimize potential impacts on small businesses when engaging in rulemaking. Among other things, SBREFA requires that agencies publish a final regulatory flexibility analysis with each rule describing the steps the agency has taken to minimize the significant economic impact on small entities, publish a compliance guide to assist small entities in complying with the rule, and provide informal guidance to small entities where appropriate.
[6] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).
[7] FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).
[8] *See id.*

RESPONSE: Under H.R. 4447, a reviewing court could set aside a Section 18 rule on any of the grounds in 5 U.S.C. § 706(2)(A)-(D) – e.g., if the rule was arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, or without observance of procedure required by law – or if the court found that the Commission's action was not supported by substantial evidence in the rulemaking record taken as a whole.

b. Can the FTC ignore public comment or results of any review and enact their own agenda into a new rule?

RESPONSE: No. To avoid being arbitrary or capricious under the APA, the agency must adequately explain its result and respond to relevant and significant public comments.[9]

8. For the FTC Improvements Act of 1980, S. Rpt. 96-500 states with respect to the presiding officer, "This section is intended to ensure that the independence of presiding officers is maintained. Presiding officers were originally a part of the Bureau of Consumer Protection, the FTC organization responsible for the development of rules. In response to the concern that this structure created an appearance of impropriety, the Commission last year moved the presiding officers to the Office of the General Counsel, which has no program responsibilities in rulemaking. The Committee believes, however, that the independent role of presiding officers can best be maintained if they are organizationally independent, reporting solely to a chief presiding officer, who in turn will not report to any other staff member."

a. Is it true that during the July 1 FTC meeting the FTC voted to install the FTC Chair as the chief presiding officer?

RESPONSE: Section 18(c)(1) of the FTC Act, 15 U.S.C. § 57a(c)(1), provides for two different roles: (1) the presiding officer, who conducts any informal hearings, makes a recommended decision based upon his or her findings and conclusions, must not engage in ex parte communications except as authorized by law, and "shall be responsible to a chief presiding officer"; and (2) the chief presiding officer, "who shall not be responsible to any other officer or employee of the Commission." The statute does not specify any other organizational requirements for the presiding officer, nor does it prescribe any other responsibilities for the chief presiding officer.

The rule amendments approved by the Commission on July 1, published at 86 Fed. Reg. 38542, are consistent with these statutory requirements. The powers of the presiding officers are described in revised 16 C.F.R. § 1.13(a), including the requirement that the presiding officers be "responsible to the chief presiding officer who must not be responsible to any other officer or employee of the Commission." The Chair of the FTC meets the statutory

[9] *See, e.g.*, Pub. Citizen, Inc. v. FAA, 988 F.2d 186 (D.C Cir. 1993).

requirement, so revised 16 C.F.R. § 0.8 provides that the Chair may serve as the chief presiding officer or "may appoint another person to serve as Chief Presiding Officer who is not responsible to any other official or employee of the Commission."

Whoever is serving as the chief presiding officer will appoint the presiding officer for each rulemaking, and presiding officers are responsible to the chief presiding officer in the performance of their rulemaking functions.[10] Otherwise, the statute and rules do not prescribe any specific responsibilities for the chief presiding officer.

b. Previously, the Chief Administrative Law Judge—who is generally perceived as independent—was the chief presiding officer. Even if this move is technically legal, can you explain how this move does not clearly violate congressional intent of the FTC Improvements Act of 1980 and compromise the independence of presiding officers?

RESPONSE: As noted above, the FTC Improvements Act of 1980 provided for the independence of presiding officers by specifying that they "shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission."[11] The revised rules mirror this requirement.[12]

As explained in the Commission's statement accompanying the rule revisions, having the Chief ALJ serve as the chief presiding officer reinforced the myth that Section 18 rulemakings require elaborate, interminable judicial processes instead of straightforward public participation.[13] The streamlined procedural rules implement the statutory requirements for presiding officers and also provide significant transparency, process, and opportunity to be heard.

9. There are eighteen mentions of "copyright" in the FTC's "Nixing the Fix" report. Yet during the commission's open meeting discussion of Repair Restrictions Imposed by Manufacturers and Sellers, none of the Commissioners referenced copyright protection. Only one Commissioner (Wilson) mentioned intellectual property (IP) protection. How will the FTC's new initiatives on Repair Restrictions comply with and defer to federal laws protecting intellectual property and copyrights?

RESPONSE: While patents can play a key role in promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect monopoly positions. For instance, in the recent Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may

[10] 16 C.F.R. § 1.13(a)(1), (4).
[11] 15 U.S.C. § 57a(c)(1)(A).
[12] *See* 16 C.F.R. §§ 0.8, 1.13(a)(4).
[13] *See* 86 Fed. Reg. 38542, 38551 (2021).

be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner.[14]

While efforts by dominant firms to restrict repair markets are not new, changes in technology and more prevalent use of software has created fresh opportunities for companies to limit independent repair. As both the FTC's work and public reporting have documented, companies routinely use a whole set of practices, including limiting the availability of parts and tools, using exclusionary designs and product decisions that make independent repairs less safe, and making assertions of patent and trademark rights that are unlawfully over-broad. These types of restrictions can significantly raise costs for consumers, stifle innovation, close off business opportunity for independent repair shops, create unnecessary electronic waste, delay timely repairs, and undermine resiliency.

10. **Intellectual property protection has fueled American innovation. IP has led to countless technologies and manufacturing advancements that have made the United States the most prosperous nation in the world. What assurances can you provide that the FTC respects IP protection and will not pursue actions that would undermine IP protection laws?**

RESPONSE: In general, patents can play a key role in promoting innovation. However, misuses of intellectual property rights may create barriers to entry for other innovative firms, thereby depriving Americans of critical advances. Moreover, claims that anticompetitive conduct is justified to protect intellectual property rights will be closely scrutinized and should be rejected if found to be a mere pretext for anticompetitive conduct.

[14] Federal Trade Commission. Nixing the Fix: An FTC Report to Congress on Repair Restrictions at 8 (May 2021) https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repairrestrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

The Honorable Michael C. Burgess, M.D. (R-TX)

1. **Chairwoman Khan, in the Federal Trade Commission's (FTC) testimony, you state that global mergers and acquisitions are putting stress on the FTC's ability to effectively investigate and challenge unlawful transactions.**

   As you are aware, Illumina, Inc. has filed to reacquire GRAIL, Inc., a company it founded before becoming a minority shareholder. Illumina and GRAIL's products and services work together to provide and analyze a blood test that can screen for more than 50 types of cancer, 45 of which currently have no screening test available.

   Unfortunately, the FTC pursued a preliminary injunction and then withdrew its motion upon the initiation of a European Commission investigation.

   a. **Can you explain what anticompetitive concerns the FTC has for Illumina's reacquisition of GRAIL?**

      RESPONSE: Although I cannot comment on any pending administrative proceeding, I have attached the public redacted version of the administrative complaint and related Commission press releases about this matter that explain the Commission's allegations about the likely competitive harm from this proposed acquisition.

   b. **Do you believe the limited resources you highlight in your testimony will result in the FTC seeking to block mergers more often than conducting a full investigation?**

      RESPONSE: I believe the Commission must carefully marshal its limited resources to achieve the best outcomes for consumers, workers, and entrepreneurs who would otherwise bear the cost of illegal mergers.

The Honorable Neal Dunn (R-FL)

1. **I represent a large, rural district in North Florida & many of my constituents shop at independent or small chain grocery stores. I'm concerned by reports that large superstores are unfairly leveraging their buying power and overbuying many products in an effort to keep them out of the hands of their smaller competitors.**

    a. **Is the FTC aware of these allegations, and if so, what are they doing to facilitate better competition in the grocery market?**

    RESPONSE: I share your concern that decades of consolidation may have enabled large grocery store chains and superstores to squeeze their suppliers for greater margins, harming independent grocery chains. I have asked Commission staff to look into conduct by large food retailers that may unlawfully harm market participants.

The Honorable Debbie Lesko (R-AZ)

1. **What legal basis does the FTC have for rulemaking authority when it comes to Section 5 of its statute? Do you agree the agency does not possess legislative style or Administrative Procedure Act rulemaking authority under Section 5, but instead it only has congressionally granted Magnusson-Moss rulemaking for unfair and deceptive practices and can only issue guidance under its unfair methods of competition authority?**

   RESPONSE: Section 6(g) of the FTC Act provides that the Commission may issue rules "for the purpose of carrying out this Act."[15] As a result, the plain text of Section 6(g) makes clear that the FTC can issue rules to carry out its powers under the FTC Act as a whole. In 1975, Section 18 of the FTC Act became the Commission's exclusive authority for issuing rules with respect to unfair or deceptive acts or practices under the FTC Act.[16] However, the text of Section 18 expressly preserved the "authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."[17] In 1973, the D.C. Circuit concluded that Section 6(g) provides the Commission authority to issue legislative, not just procedural, rules.[18] *Petroleum Refiners* remains operative precedent and has been cited multiple times by courts in finding legislative rulemaking authority when evaluating similar grants of rulemaking authority to other federal agencies.

2. **One of the significant changes made to Section 18 rulemaking in the July 1st order was to replace the authority of administrative law judges with the Chair in terms of who is acting as Chief Presiding Officer over rulemakings. The Chief Presiding Officer has responsibility for fairly determining which issues are in dispute and what can be addressed in Magnusson-Moss hearings. Can you explain why you have made this change? For an agency which already has prosecutorial powers, isn't it better to have an independent arbiter in rulemakings?**

   RESPONSE: Section 18(c) of the FTC Act specifies that the Commission will determine whether there are disputed issues to be resolved at an informal hearing.[19] However, Section 18(d)(2)(A) recognizes that the Commission may need to delegate its responsibilities.[20] For many years, the Commission's rules allowed either the Commission or the presiding officer to designate disputed issues.[21] Under the revised

[15] *See* 15 U.S.C. § 46(g).
[16] *See* 15 U.S.C. § 57a(a)(2).
[17] *Id.*
[18] *See* Nat'l Petroleum Refiners Ass'n, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).
[19] *See* 15 U.S.C. § 57a(c)(2)(B) (creating rights of cross-examination and rebuttal "if the Commission determines that there are disputed issue of material fact it is necessary to resolve").
[20] *See* 15 U.S.C. § 57(d)(2)(A) ("The term 'Commission' as used in this subsection and subsections (b) and (c) of this section includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.").
[21] *See* 16 C.F.R. § 1.13(b)(2)(ii), (d)(1)-(2) (2020).

rules, the Commission will invite public input on potential disputed issues and then publish a final list of disputed issues to be resolved during the informal hearing; the presiding officer can also add or modify disputed issues.[22]

Section 18(c)(1)(B) specifies that the presiding officer will make a recommended decision based upon the presiding officer's findings and conclusions.[23] However, the decision about whether to promulgate a final rule belongs to the Commission, not the presiding officer.[24] The Commission is required to consider the entire rulemaking record when deciding whether to issue, modify, or decline to issue the rule.[25]

3. **Recently the Supreme Court unanimously held that the FTC has been operating beyond its authority for more than 50 years – and that it used that authority to collect billions of dollars from private companies. Given this long, and just recently acknowledged overstep of authority, if the Senate doesn't pass H.R. 2668, what guidelines should be in place to make sure this situation doesn't occur again?**

RESPONSE: For four decades prior to the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*,[26] courts routinely awarded the Commission equitable monetary relief pursuant to Section 13(b) of the FTC Act. The Commission used these monetary relief awards to provide billions of dollars of refunds to consumers who lost money due to anticompetitive, unfair, deceptive, and fraudulent practices in a wide variety of cases. Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money. For decades, no court held to the contrary. In 1994, Congress directly ratified the FTC's reliance on Section 13(b) by expanding its venue and service of process provisions without placing any limitations on the types of relief to which Section 13(b) applies. It did so knowing that the Commission had relied on Section 13(b) to obtain monetary remedies, as the legislative history of the 1994 amendments make clear.[27]

The Commission is committed to enforcing the law consistent with its statutory mandates and legal authorities, and clear statutory directives can assist in furthering that goal. To that end, the enactment of H.R. 2668 would restore one of the FTC's critical law enforcement tools.

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[22] *See* 16 C.F.R. §§ 1.11(e)(3), 1.12(a)(3), 1.13(b)(1)(ii).
[23] *See* 15 U.S.C. § 57a(c)(1)(B).
[24] *See* 15 U.S.C. § 57a(b)(1)(D); 16 C.F.R. § 1.14(a).
[25] *See* 15 U.S.C. § 57a(b)(1)(D), (e)(1)(B); 16 C.F.R. §§ 1.14(a), 1.18(a).
[26] *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).
[27] *See* S. Rep. No. 103-130, at 15-16 (1993) (noting under Section 13(b), the Commission could "go into court ex parte to obtain an order freezing assets, and . . . obtain consumer redress" and that the amendments would "assist the FTC in its overall efforts" at enforcement).

4. **It is my understanding that proposed legislation (H.R. 2668) does not define when the FTC may seek restitution. Will you agree to adding a requirement that the FTC may seek restitution when it can prove the specific amount that individual customers were allegedly harmed? Or when it can prove that individual customers were harmed?**

   RESPONSE: H.R. 2668 provides that the FTC may seek restitution for losses that arise from "the violation that gives rise to the suit." Thus, the language already requires that restitution awards be based on proof that the defendant's violation of the law caused consumer losses.

5. **It is my understanding that the FTC can currently seek monetary relief under Section 19 of the FTC Act. It requires the FTC to do more work and it ensures defendants receive clear notice of what exactly the FTC believes is illegal.**

   a. **Why is Section 19 not enough to ensure that the FTC can police bad actors?**

      RESPONSE: Section 19 of the FTC Act allows the FTC to initiate federal court actions in certain circumstances to obtain monetary judgments, including monetary redress to compensate harmed consumers. Section 19 has several limitations.

      First, in cases that do not involve alleged violations of certain FTC rules, Section 19 allows federal court lawsuits only after the Commission has completed an entire administrative proceeding, including through all levels of appeal. That process involves multiple steps; in past cases in which the Commission has utilized this pathway, the process has taken many years.

      Second, the inefficiencies of Section 19 are even worse in cases involving hardcore frauds and scams. Defendants in such cases are highly likely to dissipate assets[28] or destroy evidence[29] once they learn that the Commission has undertaken an enforcement action against them, and the process for imposing a receivership and asset freeze can be lengthy and complex.

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[28] *See, e.g., FTC v. Am. Fin. Benefits Ctr.,* No. 4:18-cv-00806-SBA (N.D. Cal. 2018) (within hours of receiving notice of the FTC's action, individual defendant transferred $400,000 from corporate bank accounts to himself, his family, and one of his attorneys); *FTC v. E.M.A. Nationwide, Inc.*, No. 1:12-CV-2394 (N.D. Ohio 2012) (after FTC request for an asset freeze was denied and individual defendants received notice of the FTC's complaint, they withdrew more than $152,000 from a corporate bank account); *FTC v. Lakhany*, No. 8:12-337-CJC (C.D. Cal. 2012) (individual defendant withdrew $204,000 from corporate bank accounts in violation of the asset freeze).

[29] *See, e.g.*, *FTC v. Elite IT Partners, Inc.*, No. 2:19-cv-125-RJS (D. Utah 2019) (after receiving notice of the FTC's action, defendant secretly removed a hard drive from the premises that contained evidence inculpating the defendant and his companies in scam); *FTC v. Dayton Family Productions, Inc.*, No. 2:97-cv-00750 (D. Nev. 2013) (within hours of receiving notice of FTC action, employee permanently erased a computer hard drive); *FTC v. Asia Pacific Telecom, Inc.*, No. 10-cv-3168 (N.D. Ill. 2010) (after receiving notice of the FTC's action, defendant deleted an email account used to conduct many of the illegal practices at issue in the FTC's complaint).

Third, Section 19 is not available for every case that the Commission can bring under Section 13(b). Significantly, Section 19 does not apply to antitrust violations and therefore cannot be used to provide redress to consumers that have been harmed solely by unfair methods of competition. Prior to *AMG*, the Commission had obtained monetary relief awards under Section 13(b) in several cases involving anticompetitive practices in the pharmaceutical industry that led to higher drug prices for consumers.[30]

Fourth, even in certain consumer protection cases under Section 19, a court can award monetary relief only if the Commission establishes that the unfair or deceptive conduct at issue is conduct that a "reasonable man would have known under the circumstances was dishonest or fraudulent."[31] The Commission cannot meet this heightened requirement in every case. As a result, there will be cases in which the Commission has proven that the defendant violated the law by engaging in an unfair or deceptive act or practice, but the Commission will not be able to provide refunds to consumers who lost money as a result of those violations because the Commission could not satisfy the heightened requirement. In those cases, the defendant who violated the law keeps the money earned from breaking the law.

Finally, Section 19 has a three-year statute of limitations. In many cases, however, the FTC does not learn about the unlawful conduct until more than three years have passed, suggesting that a three-year statute of limitation period is far too short.

6. **Why is it necessary for the FTC to be able to go back and prosecute advertisements and business practices that ended ten years earlier?**

RESPONSE: I am unaware of any FTC enforcement action that addressed conduct that was more than ten years old and was no longer causing harm. Under well-established legal principles, the FTC cannot obtain an injunction under Section 13(b) unless it can prove that the unlawful conduct at issue is likely to recur. If unlawful

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[30] *See, e.g.*, Press Release, Federal Trade Commission, *Reckitt Benckiser Group plc to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc; Press Release, Federal Trade Commission, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it; Press Release, Federal Trade Commission, *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics* (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill; Press Release, Federal Trade Commission, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), https://www.ftc.gov/news-events/press-releases/2004/08/generic-drug-marketers-settle-ftc-charges (generic manufacturers agreed to disgorge $6.25M in illegal profits).

[31] 15 U.S.C. § 57b(a)(2).

conduct occurred ten years prior to suit and is no longer causing harm, the FTC will have a difficult time convincing a court that the unlawful conduct is likely to recur. Accordingly, it is highly unlikely that the FTC would seek a federal court injunction to address conduct that has not caused harm in the past ten or more years.

Based on an informal review of consumer protection cases that the FTC has brought since 2014, FTC staff were unable to identify any FTC case in which a court awarded monetary relief for violations that occurred ten or more years prior to the filing of the FTC's complaint. Some of our recent cases involved compensation for consumer losses suffered eight years prior to the filing of the FTC complaint; most sought monetary relief going back five years.

a. Is there a legitimate scenario where it would take the FTC ten years after the practice has ceased to bring a complaint?

RESPONSE: See prior response.

b. Why is the three-year limitations period for Section 19 not a better guide here?

RESPONSE: A three-year statute of limitation period is far too short to effectively protect Americans. Many Commission actions involve schemes that have been operating undetected for many years, and it often takes several years for such schemes to come to the Commission's attention. In such cases, by the time the Commission commences and completes its investigation and files suit, more than three years have elapsed from the time the unlawful conduct first began. A three-year limitation period for monetary relief leads to inequitable outcomes because it prevents consumers who lost money in the early days of a scheme from recovering anything at all, even though they suffered the same harm as consumers who lost money more recently.

One example of the shortcomings of a three-year statute of limitation for monetary relief is the Commission's 2016 case against Volkswagen (VW). The FTC alleged that, 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 after the EPA and California began investigating. The FTC brought suit shortly thereafter 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. If a three-year statute of limitation applied, however, the FTC only would have been able to secure a fraction of this relief.

c. Would a ten-year statute of limitations incentivize the Commission to go back and pick on big targets when the political composition of the Commission or public opinion shifts?

RESPONSE: No. For conduct that has not occurred for the past ten or more years and is no longer causing harm, it is unlikely that the Commission could prove the legally required likelihood of recurrence necessary to obtain a federal court injunction. Historically there has been no statute of limitation applicable to claims under Section 13(b). Despite the absence of a statute of limitation, FTC staff has been unable to identify any case that the Commission has brought since Section 13(b) was enacted in 1973 that challenged conduct that was more than ten years old and was no longer causing harm.

7. The proposed legislation (H.R. 2668) applies retroactively to "any action or proceeding that is pending on, or commenced on or after, the date of the enactment of this Act" (Section 2(c)).

a. Can you point me to any other similar statute allowing a federal agency to seek monetary penalties in actions already pending in federal court?

RESPONSE: H.R. 2668 addresses only equitable remedies, not penalties. The language in Section 2(c) of the bill is nearly identical to a statutory provision in a federal statute enacted in January 2021 concerning the remedial authority of the Securities & Exchange Commission. That statute, which amends the Securities Exchange Act of 1934 to expressly authorize the SEC to seek disgorgement in federal court, provides that the amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act."

The Honorable Kelly Armstrong (R-ND)

1. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", the Commission mentions stakeholder concerns regarding modifications to remove, impair, or disable federally-required emissions control equipment. Putting aside considerations of whether such activity would be classified as a modification or repair in specific circumstances, does the Commission plan to consult with the Environmental Protection Agency to fully understand whether providing access to embedded software would affect the regulation of federally-required emissions control equipment?**

   RESPONSE: We recognize that the right to repair may overlap with a number of different policy and legal issues. In the right to repair arena, as in other areas where the Commission's work implicates laws and regulations outside of the agency's expertise, we will seek input from the relevant stakeholders, including agencies like the EPA.

2. **In "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", footnote 18 states that "Commissioner Wilson and Commissioner Phillips note that the report excludes from the scope of its coverage an analysis of manufacturers' intellectual property rights, which may provide legitimate justification for some repair restrictions." How will the Commission address such legitimate assertions of intellectual property rights?**

   RESPONSE: We recognize that the right to repair issue may overlap with a number of different policy and legal issues, including intellectual property. As we noted in the Report, actions to enable independent repair should seek input from relevant stakeholders, including government partners, in order to be mindful of existing law and policy.[32]

   Market participants must also abide by antitrust laws, including in the way that they assert IP rights. While patents can play a critical role in promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development to protect and defend monopoly positions. For instance, in the Commission report on repair restrictions, Commission staff uncovered evidence that manufacturers and sellers may be restricting competition for repair services in a number of ways, including by asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner.

[32] *Id.* at 53-54.