

U.S House of Representatives

Committee on Energy and Commerce

Hearing Before the Subcommittee on Consumer Protection and Commerce

Safeguarding American Consumers: Fighting Frauds and Scams During the Pandemic

Testimony of William E. Kovacic¹

February 4, 2021

Introduction

I thank the Subcommittee and its leadership for the invitation to participate in these proceedings. The COVID Pandemic has provided a merciless stress test for all government agencies, including the consumer protection regulators. The Federal Trade Commission (FTC) and its partners at the state and local level have responded to this challenge with extraordinary dedication. The commitment, drive, and ingenuity of these institutions is inspiring to behold. With their offices shuttered and staff working remotely, our consumer protection agencies have devised creative methods to challenge fraudulent, oppressive commercial conduct that often follows in the wake of catastrophe.

The pandemic regulatory stress test has illuminated weaknesses in the framework through which the United States and other countries address supplier misconduct amid crisis conditions. My testimony derives lessons from this experience to suggest how Congress and the regulatory community at home and abroad might repair weaknesses in the existing consumer protection framework. I also identify how the regulators in the past year have improved operational techniques and devised new approaches for the exercise law enforcement and related policy duties. I recommend that agencies make recent, positive policymaking innovations lasting elements of

¹ Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London; Non-Executive Director, United Kingdom Competition and Markets Authority. I am indebted to Robert Anderson, Anna Caroline Müller, Will Hayter, Alison Jones, Antonella Salguiero, and Nadhya Sporysheva for many useful discussions about the subjects of my testimony. The views expressed here are the author's alone. Contact: wkovacic@law.gwu.edu.

agency practice. In preparing my testimony, I have been guided by recent experience in the US and by the work of the United Kingdom's Competition and Markets Authority (CMA), where I serve as a Non-Executive Director. In today's proceedings I do not speak on behalf of the CMA, but my comments are informed by the CMA's work over the past year.

Filling Gaps and Correcting Vulnerabilities: Priorities for New Legislation or Deliberations that Could Yield New Legislation

In the following areas, I believe new legislation is necessary to improve the effectiveness of the US consumer protection regime.

Federal Trade Commission Remedial Powers

The Supreme Court may be poised to rule that the FTC lacks authority under Section 13(b) of the Federal Trade Commission Act to obtain restitution and similar forms of equitable relief in a variety of consumer protection cases.² The Commission (and Congress) must be prepared for the possibility that the Court will issue a ruling adverse to the agency, a move that would hamper FTC consumer protection enforcement and cast doubt over the agency's ability to obtain disgorgement in antitrust cases. If the Court rules against the Commission, Congress should amend the FTC Act to make clear its intent to give the FTC power to obtain the full range of equitable remedies, including monetary recoveries as remedies for consumer protection violations. The ability to deprive wrongdoers of the financial gains from misconduct provides compensation for victims and increases deterrence by diminishing the returns to fraud and other forms of oppressive behavior.

Another enhancement of the FTC's remedial authority I recommend for the Committee's consideration would be to establish a US replica of the markets regime now implemented in the United Kingdom by the Competition and Markets Authority.³ Part 4 of the Enterprise Act 2002⁴ enables the CMA to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers in the market is harming competition and, where problems are

² On January 13, 2021, the Supreme Court heard oral argument in the appeal from *Federal Trade Commission v. AMG Capital Management, LLC*, 920 F.3d 417 (9th Cir. 2018). From my own viewing of the video of the argument, a majority of the Court's members seemed skeptical about the FTC's defense of its 13(b) remedial powers.

³ William E. Kovacic, *Market structure and market studies*, in *COMPETITION LAW AND ECONOMICS* 30 (Jay Pil Choi, Wonhyuk Lim & Sang-Hyop Lee eds., 2020).

⁴ Enterprise Act 200, c.40, Section 4 ("Market Investigations").

identified, to impose remedies (including price caps) and make proposals to legislators to correct observed problems. This would enable the FTC to study sectoral or economy-wide phenomena and to order remedies regardless of whether the conditions or practices in question violate existing consumer protection laws.

Federal Trade Commission Jurisdictional Limitations

Congress should eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not-for-profit institutions, the business of insurance, and banks.⁵ Most of these jurisdictional limitations date back to the agency's creation. Some exemptions may have made sense when established; the economy and the affected fields of activity were much different. Today, the exemptions are embarrassing anachronisms that diminish the FTC's capability to perform the competition policy role that Congress set out in 1914 and to carry out the consumer protection and privacy responsibilities that now are key elements of the agency's law enforcement portfolio. On many occasions over the past two decades, the FTC has pled with the Congress to revisit and eliminate – or at least curtail – the jurisdictional exemptions.

Federal Trade Commission Budget and Compensation Levels for Employees

There is a grave mismatch between the duties Congress has assigned the FTC and the resources it has given the agency to carry out its mandate. There is a serious need to raise the FTC's budget, but not simply to build a larger staff by hiring more people. Reforms to the federal compensation system are necessary to attract and retain a larger number of elite personnel. I do not see how the FTC or many other public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to managers and staff.

Consider two possibilities for compensation reform. The first is to align FTC salaries with the highest scale paid to the various US financial service regulators. One model would be the compensation scale used to pay employees of the banking regulatory agencies; the salary scale for these bodies exceeds the General Schedule (GS) federal civil service wage scale by roughly twenty percent.⁶ In adopting the Dodd-Frank

⁵ See David A Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1119, 1133 (2019).

⁶ See Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees* (American Enterprise Institute, April 2014), https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees_17170372690.pdf.

Wall Street Reform and Consumer Protection Act in 2010,⁷ Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency's personnel. If the higher salary scale made sense for the CFPB, I see no good reason why a more generous compensation schedule is not appropriate for what is the nation's leading consumer protection agency (and its leading federal data protection authority).⁸

A second, more ambitious alternative would be to triple the FTC's existing budget of about \$330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency's ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives.

A major increase in compensation, either by adopting the CFPB model or trying our more ambitious proposal, is a crucial test of our national commitment to improve the foundations for effective consumer protection enforcement. The nation should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in federal service in the expectation of receiving much higher compensation in the private sector at a later time.

Federal Trade Commission Administrative Process

I propose two legislative changes to the FTC's administrative framework to enable the Commission to carry out the full range of its duties, including consumer protection, more effectively. The first is to relax the limits that the Government in

⁷ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁸ As a member of the FTC, I observed firsthand how the disparity in salaries between the CFPB and the FTC resulted in a significant migration after 2010 of the Commission's elite consumer protection attorneys and economists to the CFPB. Many of these individuals were major contributors to the FTC's consumer protection programs because they combined outstanding intellectual skills with decades of experience (much of it in middle-level and senior management positions) at the Commission. It was impossible to replace them with individuals of comparable skill and experience, and the FTC's performance suffered as a consequence.

the Sunshine Act⁹ imposes on the ability of commissioners to deliberate together privately to discuss matters of strategy and tactics. Among other consequences, the Sunshine Act severely limits the ability of a quorum of commissioners to deliberate over matters of agency policy except in meetings open to the public.¹⁰ Policy planning, strategy-setting, and case selection functions cannot be executed at the highest level of effectiveness without this reform. A central reason to entrust governance to a multimember body, rather than to govern an agency with a single executive, is to gain the benefits of deliberation. Collective decisionmaking, and the informal collaborative discussions that surround it, are deemed useful to improve the agency's ability to make wise choices when setting priorities, formulate strategies for litigation and nonlitigation programs, and selecting projects. As now written and interpreted, the Sunshine Act severely reduces the FTC's ability to realize the theoretical advantages of collective governance. I know of no jurisdiction abroad that relies on an administrative commission to implement consumer protection law and encumbers the enforcement with so many restrictions on collegial decision making.¹¹ In numerous conversations, officials with consumer protection agencies in other jurisdictions with multi-member commissions express disbelief that the United States created an administrative mechanism with enormous potential and then chose to undermine its implementation so severely.

To serve the accountability and transparency aims that motivated the adoption of the Sunshine Act, Congress could press the FTC to use other disclosure techniques. Here, as well, experience in foreign jurisdiction suggests a superior alternative path. A number of jurisdictions achieve desired transparency through measures that require their competition authorities to publish an annual statement of priorities, to issue their prioritization criteria, to provide explanations of the decision to prosecute and not to prosecute in individual cases, and to issue annual reports that discuss the agency's progress in realizing its goals.¹² In many instances, documents that set out priorities, case selection criteria, and results achieved are issued first in draft form

⁹ P.L. 94-409, 90 Stat. 1241 (1976).

¹⁰ The Sunshine Act and its requirements are analyzed in Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* (Mar. 10, 2014) (report prepared for the Administrative Conference of the United States), <https://acus.gov/report/final-sunshine-act-report>.

¹¹ My experience as a non-executive director of the CMA has highlighted how the FTC is largely foreclosed from using policy planning and prioritization techniques that are commonly employed to great advantage in other jurisdictions.

¹² For example, it is sensible for the FTC to emulate the practice of many foreign authorities and more frequently issue closing statements when the agencies decide not to take action in a case. The triggering event in the United States might be matters in which the agency has used compulsory process to conduct an inquiry.

for public comment. In addition to these measures, agency officials make regular appearances before legislative committees and in public fora to discuss the work of their institutions. These techniques can be supplemented with a program of ex post evaluation that tests, through actual experience, the assumptions that guided agency decisions in specific cases and supplies an additional basis for public debate about the agency's policymaking. Experience with the disclosure mechanisms described here suggests that other jurisdictions achieve informative public disclosure, and rigorous agency accountability, without the limits imposed by the Sunshine Act.

A second legislative measure is to enable the FTC to recruit and hire competition and consumer protection specialists to serve as administrative law judges.¹³ The administrative adjudication of cases was a crucial basis for the establishment of the Commission in 1914. Several pillars of the institution were designed solely, or principally, to support administrative adjudication: the multi-member governance configuration (with the board performing the functions of deciding to prosecute and of hearing appeals from administrative cases), the broad, scalable mandate of Section 5 of the FTC Act,¹⁴ and special information gathering powers to inform the development of legal standards to meet evolving commercial conditions. All of these characteristics put administrative adjudication at the center of the agency's work. There was little point in Congress designing the agency as it did except to create a platform for administrative adjudication and norms creation.

The proceedings before the administrative law judge (ALJ) are the vital first step of the FTC's administrative process. The administrative hearing collects and analyzes evidence and applies the law. It is the foundation for subsequent deliberation by the Commission sitting as a plenum in appeals. At present, the Commission has no ability to insist that ALJ appointees have significant prior experience in competition law or consumer protection law. The ALJ selection process is controlled by government-wide processes that accord no weight to the FTC's institutional considerations. Congress can correct this deficiency by amending the government's ALJ selection process to use competition and consumer protection expertise as a key criterion in the choice of FTC ALJs.

¹³ See William E. Kovacic, Chairman, U.S. Federal Trade Commission, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY* 42-45 (2009)

¹⁴ As amended by the Wheeler-Lea Act, Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and proscribes "unfair or deceptive acts or practices." 15 U.S.C. §45.

Priorities for Future Legislative Oversight and Policy Discussion

In this section I identify possible focal points for congressional oversight and policy discussions.

Preserving and Extending Recent Operational Innovation and Identifying Other Areas to Improve FTC Capacity

I suggest that the Subcommittee convene formal proceedings or conduct informal discussions with the FTC to ask the agency to describe what new measures it devised to deal with the COVID crisis and how it adapted existing procedures and policy tools to detect and attack fraudulent schemes and to provide information to consumers. It appears that the Commission used a number of innovative methods to provide additional information to consumers and to expedite, as much as possible, the investigations and cases involving fraud. The Subcommittee might engage with the Commission in an ongoing conversation about what worked well and ought to be continued in more normal times.

The COVID stress test undoubtedly identified for the Commission areas in which greater expenditures and changes to operations are necessary for the future. This might be an ideal moment for the Subcommittee and the Commission to consider what type of capital investment might be needed to upgrade the agency's Consumer Sentinel system or the create net information networks to join up the FTC more closely with other public agencies with consumer protection duties and with civic bodies that monitor problems affecting consumers.

This would also be an appropriate time for a stocktaking exercise in which the Subcommittee and Commission reflect upon ways that, based on the experience of the past year, the pandemic has changed the commercial environment for the longer term – in some instances, creating conditions that pose greater hazards for consumers but in other cases inspiring commercial innovations that benefit consumers. In short, the Subcommittee might use its policy making deliberations to assess, with the FTC and other consumer protection bodies, how COVID has altered the commercial landscape in ways that dictate adjustments in consumer protection policy.

One of the most important policy innovations undertaken by the CMA in recent years has been the creation of a Data, Technology and Analytics (DaTA) unit.

Formed in 2018, the group now numbers forty professionals, many with professional training and experience in fields such as computer science and engineering. The CMA formed the DaTA group out of recognition that a major enhancement of its scientific capabilities was necessary to enable the agency to meet the challenges, in its capacity as a competition agency and a consumer protection body, presented by developments in highly dynamic, high technology commercial sectors. It would no longer be possible to rely chiefly, or exclusively, on attorneys and economists to staff relevant projects.

The CMA DaTA team has proved to be an extremely valuable asset during the pandemic. Among other contributions, the DaTA unit played a vital role in the analysis of consumer complaints related to COVID. The unit's analytics group enabled the CMA to identify trends almost in real time and to publish weekly updates about trends in complaints. The results of the data analysis, in turn, enabled the CMA to focus its law enforcement efforts and related publicity work immediately upon areas of greatest urgency and to give valuable guidance (informed by reliable data) to other government bodies. I urge the Subcommittee to encourage the FTC to develop a comparable capability and to press ahead with efforts in Congress to fund its development.

Larger questions about configuration of US Consumer Protection System

The remedies issues mentioned at the beginning of my testimony are only one set of developments that, I expect, will force a reconsideration of the institutional arrangements through which the federal government and its state and local partners implement consumer protection policy. We may see in the next year the adoption of long-awaited national privacy legislation. Should this come to pass, Congress must choose a mechanism for its enforcement. Should it give the new mandate to the FTC, create a standalone federal privacy agency, or devise other enforcement and policymaking frameworks? Whatever choice is made will have a major impact on the future operations of the FTC.

We also may see the courts revisit the basic question of whether the president may remove the members of the independent federal regulatory agencies without cause. My own interpretation of recent cases, such as the Supreme Court's decision in 2020 in *Seila Law LLC v. Consumer Financial Protection Bureau*, is that the Court may be minded to come back on the issue of the removal power in future cases and, perhaps, to alter fundamentally a key pillar of the modern regulatory state. There have been rumblings in the lower courts, as well, in the form of opinions that openly

express doubts about the soundness of the FTC's administrative adjudication system.¹⁵

All of these developments suggest that we may be on the threshold of a basic reassessment, driven by the rulings of the federal courts, about the proper structure and allocation of authority to the regulatory bodies on which Congress has relied heavily for over a century to regulate commerce and protect consumers. This seems an increasingly urgent topic for consideration by the Subcommittee and agencies, such as the FTC, subject to its oversight.

FTC Rulemaking Authority

This is an ideal time for the Subcommittee to reflect upon what adjustments it might wish to make, beyond measures already adopted recently in COVID-related legislation, to clarify and augment the FTC's powers to issue trade regulation rules governing consumer protection and competition matters. In hearings and other policy deliberations, the Subcommittee might consider what mix of instruments it wishes the Commission to exercise (and what remedies to apply) in the future: the Magnuson-Moss rulemaking process, more generic Administrative Procedure Act rulemaking authority, or sector-specific grants of rulemaking powers. In doing so, I think it is sensible for the Subcommittee to be guided by the awareness that the federal judiciary today is unlikely to embrace statutory interpretation approaches that courts have used in the past to infer broad grants of rulemaking authority to the Commission for various purposes.¹⁶

Interagency Cooperation

The US consumer protection regime is a decentralized system that distributes policymaking and law enforcement power across numerous agencies at the federal, state, and local levels. Federal statutes coexist with myriad state laws mandates, some with powerful enforcement mechanisms.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is disabled (*e.g.*, due to capture, resource austerity, or

¹⁵ *Axon Enterprise v. Federal Trade Commission*, 2021 U.S. App. LEXIS 2374 (9th Cir., Jan. 28, 2021).

¹⁶ One case whose analytical foundations might be seen by some judges as worthy of a rethink is *National Petroleum Refiners Ass'n v. Federal Trade Commission*, 482 F.2d 632 (D.C. Cir. 1973).

corruption).¹⁷ Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. Congress should use its oversight powers to encourage the FTC and the states to adopt collaborative approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

For models of successful interagency cooperation, one might study the successful policy integration that has taken place through the work of the United Kingdom Competition Network and the European Competition Network. In both examples one can see the mix of organizational structures and personal leadership that enabled agencies collectively to accomplish policy results that would have been unattainable through the work of single agencies operating in isolation. The United States has no equivalent to these institutions, which have served valuable policy formation and coordination functions abroad. The development by US consumer protection bodies of such networks could provide a useful way to replicate the success achieved in other jurisdictions. Other useful measures would include the creation of a regular program of secondments in which the leading agencies in the United States – federal and state bodies, alike – would swap personnel to build familiarity with the partner institutions and help create the trust and understanding that improve cooperation.

The Subcommittee’s oversight activities can be a valuable means for guiding the FTC and other consumer protection bodies agencies to cooperate more extensively in ways that pool experience and knowledge and enable federal and state officials to get the greatest value from their consumer protection expenditures and respond more quickly and effectively to fraud and patterns of misconduct. The Subcommittee might help foster the expansion and formalization of interagency contacts through secondments, the formation of working groups, and the creation of U.S. equivalents of the ECN and the UKCN.

Promoting agency efforts to expand their existing impact evaluation programs – especially common evaluation exercises performed by federal, state, and local

¹⁷ David A. Hyman and William E. Kovacic, *State Enforcement in a Polycentric World*, 2019 B.Y.U. L REV. 1447.

agencies, could be one part of a broader effort by Congress to support efforts to evaluate the effects of past antitrust cases – especially those with significance for the digital marketplace. Committee hearings could provide a regular forum in which agency officials, practitioners, and academics examine the effects of completed matters. Committees could cooperate with universities and think tanks to hold programs that study past experience. One step in this direction might be for consumer protection agencies to convene an event that focuses on lessons learned for consumer protection policy from the pandemic experience.

FTC Risk Preferences

Congress should engage the agencies in a regular conversation about how risky a program of litigation and rulemaking it wants the agencies to undertake – and what expectations Congress brings to the assessment of a litigation program. Does Congress have in mind a specific rate of success? By what measure will an agency's litigation effectiveness be evaluated? How does Congress believe agencies should account for the risk of political backlash – from either end of Pennsylvania Avenue – once the agencies have launched matters that attack powerful economic interests? How can Congress today credibly commit itself not to attack agencies tomorrow for bringing cases that incumbent legislators wish the agencies to pursue?