

STATEMENT OF JESSICA L. RICH
Distinguished Fellow, Institute of Technology Law and Policy
Georgetown University Law Center

Before the

Subcommittee on Consumer Protection and Commerce

Committee on Energy and Commerce
United States House of Representatives

On

**SAFEGUARDING AMERICAN CONSUMERS:
FIGHTING FRAUD AND SCAMS DURING THE PANDEMIC**

February 4, 2021

I. INTRODUCTION

Chair Schakowsky, Ranking Member Bilirakis, and members of this Subcommittee, I am Jessica Rich, Distinguished Fellow at the Institute for Technology Law and Policy at Georgetown University Law Center. I am pleased to appear before you today to discuss the challenges of fighting fraud during the pandemic.

I joined Georgetown almost a year ago, and, before that, I was a Vice President at Consumer Reports and, briefly, an independent consumer protection consultant. But I spent most of my career (26 years) working at the Federal Trade Commission, the last four (2013-2017) as Director of the Bureau of Consumer Protection. I care deeply about consumer protection, and in ensuring a safe and fair marketplace for the American public.

One of the biggest challenges in consumer protection is fighting fraud, a pernicious problem that steals from consumers (often those least able to afford it), undermines their trust, and distorts the fair functioning of the marketplace. In “normal” times, fraud is a serious and widespread problem, ranging from telemarketing and get-rich-quick scams, to pyramid schemes and income frauds, to phishing and identity theft. In times of crisis, fraud can be relentless. Con artists seize the opportunity to prey on distressed consumers, offering bogus health cures, defective emergency supplies, non-existent financial aid, and many other scams – often posing as a government agency or official. This happened with Hurricane Katrina¹ and the Great Recession,² and it is happening again now with the COVID-19 pandemic.

The primary federal agency charged with fighting this type of fraud is the FTC. Since early last year, the FTC has received many consumer complaints related to COVID-19 – to date, 338,060 complaints reporting almost \$320 million in losses.³ Based on its prior experience with fraud related to crises and natural disasters, the FTC was able to respond quickly with consumer

¹See FTC Press Release, *FTC Testifies on Post-Katrina Help for Consumers* (September 22, 2005), <https://www.ftc.gov/news-events/press-releases/2005/09/ftc-testifies-post-katrina-help-consumers>.

²See FTC Press Release, *FTC Testifies About Crackdown on Scams Tied to the Economic Downturn*, <https://www.ftc.gov/news-events/press-releases/2009/07/ftc-testifies-about-crackdown-scams-tied-economic-downturn> (July 14, 2009).

³See FTC COVID-9 and Stimulus Reports: Consumer Sentinel Network Reports, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map> (last visited February 1, 2021).

alerts, warning letters to scammers, a dedicated website providing guidance to the public, and law enforcement.⁴ As of December, thanks to the leadership of Chair Schakowsky, the FTC will now be able to impose fines on the perpetrators of these frauds⁵ – legal authority that it lacked until Congress came to the rescue. This new authority will increase the FTC’s ability to deter and punish COVID-19-related fraud and deception for the duration of the public health crisis.

I plan to focus my testimony today on the some of the challenges that the FTC faces in fighting fraud as we enter 2021. Stopping consumer fraud – including the predacious type of fraud we are discussing today – is the “meat and potatoes” of what the FTC does. No other government agency has the broad mandate and jurisdiction to stop the range of frauds that consumers experience every day, let alone the surge that occurs during public emergencies. Although Congress provided the FTC with additional tools to fight COVID-19 until the pandemic is over, the FTC is facing increasing challenges as it seeks to protect consumers from fraud more broadly. My testimony will focus mainly on the FTC’s ability to provide consumers with restitution under Section 13(b) of the FTC Act. I also will briefly address issues related to platforms that enable fraud, underserved communities, and privacy.

II. THE FTC’S ABILITY TO PROVIDE CONSUMER RESTITUTION UNDER SECTION 13(b)

A. Background

As this Committee is aware, the authority of the FTC to obtain restitution under the FTC Act is currently being considered at the Supreme Court, following two adverse rulings by the Third and Seventh Circuits.⁶ Without repeating the extensive arguments and record of the Supreme Court proceeding, I am providing a very brief summary of the issue here:

For four decades, the main tool that the FTC has used to return money to consumers (and small businesses) victimized by fraud is Section 13(b) of the FTC Act. This provision states that in “proper cases,” the FTC may go directly to federal court to obtain a permanent injunction. Since

⁴ See *Coronavirus (COVID-19) Pandemic: The FTC in Action*, <https://www.ftc.gov/coronavirus>.

⁵ See Press Release, *Cantwell-Schakowsky Legislation Cracking Down on COVID-19 Scams Passes Senate and House*, <https://www.commerce.senate.gov/2020/12/cantwell-schakowsky-legislation-cracking-down-on-covid-19-scams-passes-senate-and-house> (December 22, 2020).

⁶ See Supreme Court Docket, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html> (last visited February 1, 2021).

this provision was added to the FTC Act in 1973, every circuit court to consider the issue (until recently) held that when issuing a permanent injunction, a court can invoke its equitable authority to provide ancillary equitable relief, including restitution for consumer victims. Notably, Section 13(b) is the *only* provision of the FTC Act that has enabled the FTC to seek, in the same federal action, both an injunction against law violations and restitution for injured consumers.

Using this authority, the FTC has been able to return many billions of dollars wrongly taken from consumers – over \$11 billion in just the last five years.⁷ The vast majority of the FTC’s 13(b) cases have involved hardcore fraud. However, some have involved clearly deceptive claims by “legitimate” companies, as was the case in the FTC’s action against Volkswagen for its deceptive emissions claims. In fact, while the FTC developed its case with multiple other government agencies, it was the *FTC’s 13(b) authority* that allowed the agencies to obtain up to \$11 billion dollars for consumer restitution.⁸ Importantly, under the statutory interpretation recognized in these cases, the FTC can *seek* restitution under Section 13(b), but the power to *grant* such relief derives from the court’s equitable authority, and it is the court that orders and/or approves this relief.⁹

B. Consequences for Consumers

The adverse rulings in the Third and Seventh Circuits have already undermined the FTC’s ability to obtain restitution for consumers in those circuits.¹⁰ An adverse ruling by the Supreme Court would be devastating.¹¹ Section 13(b) is simply the most efficient and effective tool that the

⁷ See *FTC Refunds to Consumers*, https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase (last visited February 1, 2021).

⁸ See Press Release, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁹ See, e.g., *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982). Even when the FTC settles a federal district court action with a defendant, the court must approve it.

¹⁰ See *Letter from FTC Commissioners to House and Senate Commerce Committees*, <https://www.hinchnewman.com/wp-content/uploads/2020/11/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act-1.pdf> (October 22, 2020).

¹¹ Other rulings also limit the FTC’s ability to enjoin and remedy misconduct. See *FTC v. Shire ViroPharma Inc.*, 917 F.3d 147 (3d Cir. 2019 (13(b) relief only available when there are ongoing violations); *Liu v. SEC*, 140 S. Ct. 1936 (2020) (limits amount that can be obtained as equitable restitution). The FTC also lacks authority to impose civil penalties for first-time violations, a problem that is particularly acute in areas where harm can be difficult to prove, such as privacy.

FTC has to stop illegal conduct, prevent defendants from profiting from such conduct, and return money to injured consumers. It contains appropriate safeguards, including evidentiary standards for proving the violations and seeking the requested relief, as well as the requirement that a court must determine whether to grant or deny such relief. The legal arguments about the FTC's authority have mostly focused on the wording of Section 13(b) and its legislative history, not on a judgment that defendants should be able to keep money obtained through wrongdoing, or that consumers should not get their money back. Whatever Congress intended when it wrote Section 13(b), Congress in 2021 can fix this problem.

As recognized throughout the case proceedings, the FTC *does* have alternative ways to obtain restitution for consumers. However, these options are not nearly as effective as Section 13(b). As one option, the FTC can engage in a two-step legal process, first by obtaining an order through administrative adjudication under Section 5 of the FTC Act, and then by seeking restitution in federal district court under Section 19.¹² This approach raises the risk that the money wrongly taken will be long gone, or the victims impossible to locate, by the time redress is distributed, especially since cases that have used this approach have taken many years to resolve. For example, in the FTC's case against Figgie International, the FTC could not distribute redress to consumers until a full *twelve* years after it filed its administrative complaint (eight years after it issued its administrative order) due to the many steps involved.¹³ In the FTC's case against the Telebrands Corporation, the FTC could not distribute redress to consumers until *eight* years after the FTC filed its administrative case (five years after it issued its administrative order), a "shorter" wait only because the parties reached a settlement resolving the Section 19 litigation.¹⁴

As another option, if a defendant has violated a rule enforced by the FTC, the FTC may be able to seek injunctive relief and restitution in one proceeding, just as it has done under Section 13(b). However, not all of the FTC's fraud and deception cases involve rule violations. In fact, many of them – including, for example, the FTC's cases against Volkswagen, for-profit school

¹² 15 U.S. Code Section 57b.

¹³ See Press Release, *Figgie International, Inc.*, <https://www.ftc.gov/news-events/press-releases/1995/06/figgie-international-inc> (June 9, 1995).

¹⁴ See Press Release, *FTC to Send Refund Checks to Consumers Who Bought Bogus "Ab Force" Weight Loss Devices*, <https://www.ftc.gov/news-events/press-releases/2010/11/ftc-send-refund-checks-consumers-who-bought-bogus-ab-force-weight> (November 18, 2010).

DeVry University,¹⁵ and numerous cases involving phony income schemes, financial aid scams, and bogus disease cures – rely solely on Section 5’s prohibition against “unfair or deceptive” practices. Even in cases involving rule violations, there may be parts of the case that rest only on Section 5, resulting in only partial restitution.

In addition, the FTC could use its inherent rulemaking authority under Section 19 to issue *more* rules covering *more* conduct, thus laying a broader foundation for restitution in future cases. While this remains an option for the FTC, it has serious limitations. For one thing, the rulemaking process set forth in Section 19 is highly complex and elongated¹⁶ – deliberately so, since it was enacted as part of a series of reforms designed to stem perceived regulatory overreach by the FTC in the 1970s.¹⁷ As a result, most rulemakings under these procedures have taken many years – nine in the case of both the Credit Practices and Used Car Rules, for example.¹⁸ For another thing, a rules-focused approach would require the FTC to anticipate and regulate multiple forms of deception and unfairness in advance, an outcome that would be highly regulatory and could be viewed as a reprise of the FTC’s 1970s “overreach.” Nevertheless, in the absence of Congressional action regarding Section 13(b), the FTC should consider undertaking rulemakings in appropriate circumstances – to prohibit clear, discrete, and recurring forms of deception, such as misrepresenting affiliation with the government.

Each of these options provides a path for the FTC to seek consumer restitution but none comes close to compensating for the loss of the FTC’s restitution authority under Section 13(b). And it will be consumers that pay the price. The FTC, already squeezed for resources given its vast mission and relatively small size, will spend more time on each case, bring fewer cases, and find less of consumers’ money at the end of the process. Scammers will keep more of their unjust

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

¹⁶ 15 U.S. Code Section 57a.

¹⁷ Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection> (May 30, 2003).

¹⁸ *Credit Practices Rule*, 40 Fed. Reg. 16,347 (proposed Apr. 11, 1975); 49 Fed. Reg. 7740 (issued Mar. 1, 1984; codified at 16 C.F.R. pt. 444); *Sale of Used Motor Vehicles*, 41 Fed. Reg. 1089 (proposed Jan. 6, 1976); 49 Fed. Reg. 45,692 (issued Nov. 19, 1984, codified at 16 C.F.R. pt. 455).

gains, and consumers will be stuck with their losses. I urge Congress to restore the authority that the FTC's has used to fight fraud for the past forty years.

III. PLATFORMS THAT ENABLE FRAUD

Fraud does not happen in a bubble. It relies on other entities, individuals, and systems to function, including the platforms and conduits through which scam artists disseminate fraudulent information. Among the warning letters that the FTC sent regarding COVID-19 scams were letters to Voice over Internet Protocol (VoIP) providers and other companies warning them that routing and transmitting illegal robocalls related to COVID-19 is against the law.¹⁹ As the Chair of this Subcommittee has recognized, these platforms and conduits (not just VoIP providers but the tech companies and social networks through which people communicate and sell products and services) play an enormous role in enabling fraud and should bear some responsibility for stopping it too.

Like many enforcement agencies and private litigants, the FTC faces obstacles in holding these entities liable for assisting and facilitating fraud. Among other things, defendants of all stripes argue that they are immune from liability under Section 230 of the Telecommunications Act.²⁰ Although Section 230 reform is a complex undertaking that is well beyond the scope of this hearing, the Chair's bill from last year – the Inform Consumers Act – is a great step forward (short of wholesale 230 reform) in ensuring platform accountability.

IV. REACHING DIVERSE COMMUNITIES

Fraud can have a disproportionate effect on certain communities, such as seniors, veterans, African-Americans, and Latinos. As a result, during my tenure as FTC Bureau Director, the FTC created and scaled up an ambitious project called *Every Community*, the goal of which was to

¹⁹ See Press Release, *FTC and FCC Send Joint Letters to Additional VoIP Providers Warning against 'Routing and Transmitting' Illegal Coronavirus-related Robocalls*, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-fcc-send-joint-letters-additional-voip-providers-warning> (May 20, 2020).

²⁰ See Press Release, *U.S. Circuit Court Finds Operator of Affiliate Marketing Network Responsible for Deceptive Third-Party Claims Made for LeanSpa Weight-loss Supplement*, <https://www.ftc.gov/news-events/press-releases/2016/10/us-circuit-court-finds-operator-affiliate-marketing-network> (October 4, 2016) (FTC prevailed against defendant's 230 defenses but only after extensive litigation).

ensure that the agency was reaching and protecting the diverse communities victimized by fraud.²¹ The project included consumer surveys, outreach to African American and Latino organizations, engagement with a range of community groups, and data analysis by the FTC's Bureau of Economics. Among the project's findings was that African American and Latino communities experienced fraud at *higher* rates than white communities but reported fraud to the FTC at *lower* rates – in other words, they were underreporting fraud, highlighting a key challenge for the FTC in reaching and protecting these communities. In making these findings, FTC staff had to perform a detailed analysis of fraud and census data, since the Commission's complaint database contained very limited demographic information.

In 2021, the FTC should expand the *Every Community* program, including by collecting more data (with appropriate safeguards) to enable the type of analysis discussed above, and tasking the Bureau of Economics with additional studies of the FTC's reach and effect on different communities. The FTC also should consider hiring experts on racial equity and representation to assist with this important work. Such efforts would be consistent with last week's Executive Order on racial equity and underserved communities.²²

V. DATA PRIVACY AND SECURITY

Many issues, including data privacy and security legislation, have necessarily taken a backseat to the exigencies of the pandemic. However, as I discussed in a recent blog posted on the Brookings website,²³ available data suggests that our outdated privacy laws undermined our ability to respond to the pandemic. Indeed, surveys show that American consumers refused to use contact-tracing apps – which could have been helpful in tracking the disease – largely due to privacy concerns. A baseline privacy law placing limits on how these types of apps can collect, use, and share personal data could have bolstered consumer trust and increased consumer use of these apps.

²¹ See FTC Report, *Combating Fraud in Latino and African American Communities*, <https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf> (June 15, 2016).

²² *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/> (January 20, 2021).

²³ *How Our Outdated Privacy Laws Doomed Contact-Tracing Apps*, <https://www.brookings.edu/blog/techtank/2021/01/28/how-our-outdated-privacy-laws-doomed-contact-tracing-apps/> (January 28, 2021).

This Subcommittee has provided strong leadership on data privacy and security, including by circulating draft legislation and holding hearings on the issue. I hope you will continue to support federal legislation that both establishes a baseline level of protection and strengthens the FTC's ability to deter misconduct and protect consumers.

VI. CONCLUSION

Thank you for the opportunity to provide my views on fighting COVID-19 scams and other fraud. I stand ready to assist this Subcommittee as it pursues its important work to protect consumers.