

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
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April 26, 2021

The Honorable Janice D. Schakowsky
Chair
Subcommittee on Consumer
Protection and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Gus M. Bilirakis
Ranking Member
Subcommittee on Consumer
Protection and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

We write concerning the Federal Trade Commission's ("FTC") statutory authority under Section 19 of the Federal Trade Commission Act of 1914 ("the Act") ahead of a subcommittee hearing entitled "The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers," to be held on April 27, 2021.

The Chamber has been in conversation with our members over proposed legislative text designed to address a core concern the FTC has over its ability to seek monetary relief in certain types of fraud cases. We believe that the ability for the FTC to seek and the courts to award monetary relief in such cases is consistent with long standing Congressional intent for such fraudulent activities. However, as the Supreme Court decided last week in a unanimous, 9-0 decision authored by Justice Breyer, the Federal Trade Commission has not followed the law.

Congressional intent and the FTC's statutory authority to seek monetary damages are found within Section 19 of the Act. However, the FTC has chosen not to use Section 19 as it requires the FTC to first use its administrative authorities to determine a violation before going to court and then to prove that a reasonable person should have known they were violating the law.

Instead, as the Supreme Court explained, the FTC has chosen to "circumvent" the "important limitations" in Section 19 by seeking injunctive relief under 13b, avoiding its own administrative process, as well as seeking unbounded monetary relief while avoiding Section 19's statute of limitations. *See AMG v. FTC* slip op. 9-10 (Apr. 22, 2021). As the Supreme Court makes clear, the text of the statutes only allows the FTC to seek, and the courts to grant, monetary relief under Section 19, not Section 13b.

The FTC is arguing for a legislative change under the guise that it needs the appropriate tools to combat "scams." However, instead of asking for a legislative solution that empowers the

agency to target such abhorrent practices, the agency is asking for a sweeping expansion of its authority that would allow the agency to universally seek monetary damages under Section 13b.

The Chamber supports a legislative solution that is narrowly crafted to address “scams,” however, we oppose H.R. 2668, the "Consumer Protection and Recovery Act" because it goes well-beyond the issues raised as part of last week’s Supreme Court decision or the FTC’s stated need to combat “scams”. Our concerns with H.R. 2668 are outlined below:

13b Monetary Relief

H.R. 2668 is seeking to extend 13b authority beyond injunctive relief to now include restitution and/or disgorgement remedies. It is important to recognize that 13b authority found within the Act applies universally to the laws the FTC enforces. As a result, attempts to import the monetary authority Congress gave the FTC in Section 19 into section 13b, expands monetary relief to many more consumer protection cases beyond the scope of Section 19, but also to antitrust cases. Such an expansion is deeply problematic without corresponding safeguards against misuse.

One of the most important safeguards is the “reasonable person standard” Congress wrote into the Section 19 statute. Monetary relief should not be available for every consumer protection violation but should be reserved for the most egregious types of cases. Section 19 recognizes this by inserting a “reasonable person test” for the courts to utilize, however, H.R. 2668 fails to include such a standard in its proposed text.

In addition, extending monetary relief as a statutory remedy for antitrust violations prosecuted by the FTC is similarly problematic. Antitrust violations are routinely subject to actions by private plaintiffs, where compensation and treble damages are awarded. Subjecting antitrust violations to restitution and/or disgorgement fails to recognize the role private litigation plays and the way those harmed by antitrust violations are already effectively compensated.

Further, the Chamber has concerns about establishing expanded statutory authority for the FTC to seek monetary relief in competition cases this new authority would not extend to the Department of Justice. While we have two agencies that enforce the antitrust laws, we have one law. The law does not distinguish which companies go before which agencies. It becomes a fundamental due process consideration if the FTC has a different remedy tool kit for civil enforcement.

“Has Violated”

H.R. 2668 creates the ability within 13b to go after conduct that is no longer occurring. Currently, 13b, which is focused on injunctive relief, is targeted at conduct that is occurring in the market or is about to occur in the market. It does not provide for the ability to seek injunctive relief for conduct that has occurred in the past. It is unnecessary to block conduct that is no longer occurring in the market, further, if the ceased conduct may occur again, the FTC can seek an injunction at that point. It can also under existing law seek an injunction if it believes it may or likely resume.

The ability to target past conduct is presumably important to the agency, not in the context of seeking an injunction to prohibit such conduct, but to go after monetary relief for conduct that has ceased. This is a result of the FTC seeking to make 13b no longer just about injunctive relief, but now to also include monetary relief. A major problem with the insertion of “has violated” into 13b is the draft language offers no clear statute of limitation for how far back the agency can go to address past conduct that is no longer occurring in the market. Such an open-ended authority is ripe for abuse.

All of these concerns, including potential solutions, were raised last week in the Senate Commerce hearing on 13b by Commissioner Wilson and Commissioner Phillips. The Chamber is willing to work with the sponsors of H.R. 2668 to address these concerns we agree the FTC need to be able to go to court and seek appropriate equitable monetary relief for clearly fraudulent cases that are found to be in violation of the law. However, the Chamber will continue to oppose changes to 13b that would dramatically expand FTC authority beyond the purported reason being given to justify the legislation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley", with a large, stylized flourish at the end.

Neil L. Bradley

cc: Members of the Committee on Energy and Commerce