

## Attachment—Additional Questions for the Record

**Subcommittee on Consumer Protection and Commerce**  
**Hearing on**  
**“The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers.”**  
**April 27, 2021**

Anna Laitin, Director, Financial Fairness and Legislative Strategy, Consumer Reports

### The Honorable Kelly Armstrong (R-ND)

- 1. The courts have found the Commission need not prove actual knowledge: “Congress unambiguously referred the district court to the state of mind of a hypothetical reasonable person, not the knowledge of the defendant. The standard is objective, not subjective.”<sup>1</sup> The dishonest or fraudulent standard was met in Figgie. That case may have taken an extended time to prosecute, but doesn’t it serve as an example that the Commission is capable of proceeding, and succeeding, under the dishonest and fraudulent standard?**

RESPONSE: While the Commission is capable of proceeding and succeeding under the dishonest and fraudulent standard, holding all equitable relief cases to that standard will limit the Commission’s ability to stop wrongdoing, disgorge ill-gotten gains, and secure relief for consumers. In order to protect consumers and small businesses - including our most vulnerable citizens - the FTC needs a standard broad enough to ensure that liars, cheats, scammers and dishonest business alike are not able to benefit from their efforts. The “unfair or deceptive” standard worked for many years and enabled the FTC to prevent bad actors from benefiting from their illegal behavior.

It isn’t entirely clear how courts may define “fraudulent and dishonest,” but the standard would certainly be narrower than the “unfair or deceptive” standard, and will create new hurdles for the FTC. No longer would the FTC simply need to show deception to a court in order to proceed; now they need to meet a new, less established standard. The FTC should be able to bring cases for equitable remedies under unfairness and deception, and should not be legislatively prohibited from doing so. It is up to the courts to determine what equitable relief is appropriate given the facts of the case.

The purpose of any 13(b) authority would be to provide the FTC with the ability to take action to stop illegal activity, disgorge ill-gotten gains, and to seek restitution for

---

<sup>1</sup> FTC v. Figgie Int’l, Inc., 994 F.2d 595, 603 (9th Cir. 1993).

consumers. With unfair and deceptive practices rampant in the economy, the FTC needs flexibility to pursue cases in which consumers are being harmed without being held to a standard that remains undefined and would limit the FTC's ability to seek equitable remedies.

2. **FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), involved “websites [that] offered a ‘free credit report and score’ while obscuring a key detail in much smaller text: that applying for this ‘free’ information automatically enrolled customers in an unspecified \$29.94 monthly ‘membership’ subscription.”<sup>2</sup> “The subscription was for Brown’s credit-monitoring service, but customers learned this information only when he sent them a letter after they were automatically enrolled.”<sup>3</sup> Although the Commission proceeded under 13(b) and the “unfair or deceptive” standard in this case, the Seventh Circuit declared this a “fraudulent scheme.”<sup>4</sup> Is there a reason the Commission could not have proven a case under the dishonest or fraudulent standard?**

RESPONSE: When the FTC brings a case, it does so before discovery. While it may be able to make a case for deception at the outset, it may not be able to plead fraud with the specificity until it has actually received documents and taken depositions. This makes it difficult to look at cases in hindsight and determine a standard based on those cases that seem most clearly fraudulent. While the court declared that this case involved a “fraudulent” scheme, there may be cases that are clearly fraudulent in retrospect, but take longer to build. The “unfair or deceptive” standard works well.

3. **The Commission obtained \$14.7 billion, by far its largest ever monetary remedy, from Volkswagen in a 2016 settlement. The Commission alleged the company had intentionally installed, in millions of vehicles sold in the U.S., “illegal software designed to enable the vehicle to cheat emissions tests” to allow “emissions at as much as 4,000 percent above the legal limit.” If intentional falsification of a product quality, which is both required by law and also valued by environmentally sensitive consumers, does not qualify as dishonest or fraudulent conduct, what type of conduct would meet this standard?**

RESPONSE: This case clearly met the “dishonest and fraudulent” standard. In fact, before the FTC filed its complaint against Volkswagen, the company admitted publicly that it had installed devices to defeat the emissions tests and had “broken the trust of our customers and the public.”

The question arises however, whether the FTC could bring a similar case in which the company had not admitted to the fraud, under the “fraudulent and dishonest”

---

<sup>2</sup> FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

standard. To bring its case under Section 13(b), the FTC only had to show that the company made claims about clean fuel and that those claims were not true. It did not have to show how the company intentionally defeated the emissions tests.

It is rare for a company to admit that it deceived its customers. In order to stop bad actors from taking advantage of consumers and small businesses, bilking them out of their hard earned money, the FTC needs to be able to counter illegal activity, particularly when companies conceal that activity.

**4. H.R. 2668 contains a provision that “a court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought.”**

**a. Is 10 years an appropriate period? Please explain.**

RESPONSE: Yes, ten years is an appropriate period. Some FTC cases deal with illegal behavior that took place over the course of years. The FTC should be able to seek equitable relief for consumers who lost money in the early years of the illegal behavior. A ten year look back may also provide a useful deterrent to businesses that consider engaging in deceptive practices.