UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Commissioner
Noah Joshua Phillips

Prepared Oral Statement of
FTC Commissioner Noah Joshua Phillips
Before the
U.S. Senate Committee on Commerce, Science, and Transportation

Hearing on "Strengthening the Federal Trade Commission's Authority to Protect Consumers"

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Chairwoman Cantwell, Ranking Member Wicker, Members of the Committee, thank you for the opportunity to appear before you. I'm honored to testify with my fellow Commissioners about the important work we do at the FTC.[1]

Thanks to you, our legal and financial wherewithal to fight the wave of scams the epidemic brought with it is substantially stronger. Fighting bad actions like these are the bread and butter of the FTC's consumer protection program, and deserve to remain a focus.

I want to spend the few minutes I have on Section 13(b), in particular as it applies to consumer protection. Should the court rule against us in *AMG*,[2] we will need a fix. Without one, in too many cases where money should be on the table, it will not be. As you consider a fix, I believe the focus should be on helping consumers, not on inappropriately punishing businesses.

[1] My comments today are my own and do not necessarily reflect the views of the Commission or my fellow Commissioners.
[2] *AMG Capital Mgmt. LLC v. FTC*, No. 19-508 – Argued before the U.S. Supreme Court on January 13, 2021. *AMG* is an appeal by defendants from a 2018 Ninth Circuit ruling in which the court re-affirmed its prior precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief. *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

In the last few years, some have pushed for more money across the board, frequently citing deterrence as the goal. Courts have been pretty clear that deterrence is penal in nature;[3] and I am concerned that disgorgement in particular will be used as a penalty, especially in cases where consumer harm is low.

Penalties makes sense when you have clear rules. Where rules aren't clear, penalties don't work well. It makes sense to post the speed limit and fine you if you exceed it. It doesn't make sense to announce that you can drive at a "fair speed" and fine you when you drive over 65.

This concept is central to the design of the FTC. The agency was created to examine business practices (first regarding competition, later consumer protection); and, where we deemed them violative of broad terms like "unfair" and "deceptive," condemn them. This broad authority enables us to be nimble, to address new issues like privacy, and to help develop the law. We can advise Congress, as we did censuring non-disparagement clauses in cases that provided a basis for the Consumer Review Fairness Act. We can also send a message to courts, as we did with pay-for-delay agreements, on which we made important progress last week in the U.S. Court of Appeals for the Fifth Circuit.[4] But, because we are enforcing broad terms that give businesses less notice, we do not have general penalty authority. On the flip side, where a company is subject to an order; or we have adopted a rule; or Congress has passed a statute; or we send a notice under 5(m)(1)(B) – in all these circumstances, where rules are clear, penalties apply.

[3] *See, e.g.*, *Liu v. SEC*, 140 S.Ct. 1936 (2020); *Kokesh v. SEC*, 137 S.Ct. 1635 (2017).
[4] *Impax Labs., Inc. v. FTC*, No. 19-60394, 2021 U.S. App. LEXIS 10555 (5th Cir. 2021).

Section 19, another one of our tools, provides a contrast. Where conduct is fraudulent or dishonest but may not be as clearly defined, equitable money is available. There is less of a notice issue, because businesses know that fraud can get them into trouble.

We use Section 13(b) to stop harmful conduct in a wide swath of areas: fraud, pharmaceutical antitrust cases, privacy and data security, mergers, and deceptive advertising. The powers that you give us can and will be applied broadly, but the appropriate remedies should not be the same in every case. We *should* have a different result for fraud, for example, than we do for a data breach caused by unreasonable data security practices.

The equitable remedies traditionally available to us under 13(b) are largely developed in cases involving, and perfectly suited to, outright fraud. For example, courts developed a framework for monetary relief in which the agency starts with the defendant's gross receipts as a proxy for consumers' losses.[5] Courts have also held that the agency is not required to offset the value of products.[6] For pure fraud, it makes sense to ensure that consumers get all their money back.

In other cases, the equitable result might not be to return every penny paid. Maybe consumers received some—or even most—of the value from the product or service (they ate the cereal, or stayed in a hotel room), and equity should reflect that fact. My concern is that, without additional clarification in a 13(b) fix, you will increasingly see the FTC seek to punish companies under the guise of "disgorgement." For me, the most important and pressing concern is the ability not only to stop the ongoing fraud, but to get consumers back the money they have lost.

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[5] *FTC v. Blue Hippo*, 762 F.3d 238, 243-44 (2d Cir. 2014). *See also*, *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *FTC. V. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005).
[6] *See, e.g., FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993).

Thank you, and I look forward to addressing your questions.