

May 18, 2021

The Honorable Maria Cantwell
Chair
Committee on Commerce, Science, and
Transportation
United States Senate
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Committee on Commerce, Science, and
Transportation
United States Senate
Washington, DC 20510

Dear Chair Cantwell and Ranking Member Wicker:

On April 20, 2021, my fellow Commissioners and I testified at a full Committee hearing entitled “Strengthening the Federal Trade Commission’s Authority to Protect Consumers,” where we urged Congress to act swiftly to restore the Federal Trade Commission’s (“FTC” or “Commission”) statutory authority to obtain monetary relief under Section 13(b) of the Federal Trade Commission Act (the “FTC Act”).¹ During the hearing, I saw for the first time a letter that the Chamber of Commerce of the United States of America (“Chamber”) sent to you the day before that raised numerous concerns with legislation that would restore the Commission’s ability to obtain monetary relief under Section 13(b) of the FTC Act. Now having had time to review the letter carefully, it is my view that the Chamber’s position is based on a fundamental misunderstanding of the history and function of Section 13(b). Congress’s adoption of such an approach would be a boon to those who engage in unfair, deceptive, or anticompetitive business practices, at the expense of harmed consumers and honest competitors.

Two days after my colleagues and I testified, the Supreme Court issued its opinion in *AMG Capital Management, LLC v. FTC* (“*AMG*”).² In *AMG*, the Court did what we feared—it overruled four decades of consistent judicial decisions holding that Section 13(b) authorizes courts to require law violators to return illegal gains to harmed consumers. The *AMG* decision deprived the FTC of its strongest tool to help consumers. It is critically important that Congress promptly restore the Commission’s ability to secure refunds of money unlawfully taken from consumers and deprive wrongdoers of the fruits of their unlawful conduct.

Days before the *AMG* ruling, a bill was introduced in the House that would do just that by codifying the traditional understanding of Section 13(b).³ I support this bill, which would restore Section 13(b) to the way that it operated for over 40 years. The Chamber, however, does not.

¹ 15 U.S.C. § 53(b)

² See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

³ Consumer Protection and Recovery Act, H.R. 2668, 117th Cong. (2021).

As I explain below, the Chamber’s opposition is based on numerous misstatements and faulty premises that I wish to correct.

Congress Never Intended to Limit 13(b) to Consumer Protection Cases Involving Egregious Frauds, and Adding New Limits Now Would Hurt Consumers

First, the Chamber is wrong that Congress always intended Section 13(b) to be used only in so-called “fraud cases.” As an initial matter, the Chamber’s reading has no basis in the text of the statute, which contains no such limitation. Indeed, the Commission relied on Section 13(b) for four decades to obtain billions of dollars of monetary relief for consumers in a wide variety of cases, including numerous non-fraud consumer protection cases and competition cases. Congress never objected. To the contrary, in 1994 Congress directly ratified the FTC’s reliance on Section 13(b) in all manner of cases by expanding its venue and service of process provisions without placing any limitations on the types of cases to which Section 13(b) applies. It did so knowing that the Commission had relied on Section 13(b) to obtain monetary remedies, as the legislative history of the 1994 amendments make clear.⁴

Next, the Chamber claims that the Department of Justice cannot secure monetary remedies in antitrust cases, so neither should the Commission. In fact, the DOJ’s Antitrust Division has obtained over \$26 million in disgorgement in competition cases.⁵ Depriving the Commission of the same remedy would put the agencies on unequal footing, contrary to the Chamber’s assertion. Moreover, the ability to obtain disgorgement of unjust gains in competition cases is important—companies who violate antitrust laws take money from consumers and workers, just like other law breakers.

The Chamber also contends that private plaintiffs’ ability to get compensation and treble damages in antitrust cases obviates the need for the Commission to get monetary relief under Section 13(b). Not so. As an initial matter, the Chamber’s concern misapprehends the legal standard for disgorgement. Disgorgement is an equitable remedy imposed by a court to ensure that a wrongdoer does not keep its ill-gotten gains. It would be inconsistent with principles of equity for the FTC to seek, or a court to order, duplicative recovery in cases in which plaintiffs are fully compensated, which explains why I am aware of no antitrust case in which this has occurred. Indeed, in the Cephalon case, the Commission asked the court to place the judgment in escrow so it could be used to satisfy judgments and settlements in the related private lawsuits.⁶ Moreover, most of the Commission’s antitrust cases brought under Section 13(b) have involved pharmaceuticals. Private antitrust plaintiffs in such cases face significant hurdles that the

⁴ See S. Rep. No. 103-130, at 15-16 (1993) (noting under Section 13(b), the Commission could “go into court ex parte to obtain an order freezing assets, and . . . obtain consumer redress” and that the amendments would “assist the FTC in its overall efforts” at enforcement).

⁵ See U.S. Dep’t of Justice, Antitrust Division Workload Statistics, 2010-2019, at 12 available at <https://www.justice.gov/atr/file/788426/download> (last accessed Apr. 30, 2021).

⁶ See *FTC v. Cephalon*, 2:08-cv-2141, Dkt. No. 405 (E.D. Pa. June 17, 2015) (Stipulated Order for Permanent Injunction and Equitable Monetary Relief Settlement Fund Disbursement Agreement).

Commission does not, including strict requirements for class certification and federal law restrictions of recoveries to direct purchasers only, which exclude the individual consumers who actually take the drugs. The Commission, however, can return money to consumers overcharged by anticompetitive prices without such constraints.⁷ Without Commission enforcement, drug companies will only infrequently face financial consequences for anticompetitive conduct, making such behavior immensely profitable, all at the expense of consumers to the tune of hundreds of millions of dollars each year.

The Chamber says it wants only to restore limitations on Section 13(b) that previously existed. In reality, it advances new restrictions that never existed and would hurt consumers and honest competitors. Eliminating the Commission's ability to get monetary relief in competition cases, or limiting monetary relief to cases involving "egregious" frauds, would serve only to allow defendants adjudicated to have engaged in unfair, deceptive, or anticompetitive practices to keep money reaped from their unlawful conduct at the expense of consumers harmed by such conduct. To protect consumers, Congress should amend Section 13(b) to restore the Commission's ability to secure monetary relief for consumers harmed by any violations of the FTC Act, irrespective of whether such violations are "egregious."

Limiting Section 13(b) to Only Ongoing or Imminent Conduct Makes No Sense

The Chamber believes it is unnecessary to make clear that Section 13(b) applies to past conduct that is no longer occurring. Prior to 2019, no court had ever limited Section 13(b)'s scope in that way, and Congress has never objected to the Commission's historical use of Section 13(b) to address law violations that occurred wholly in the past so long as there is a reasonable likelihood that the unlawful conduct will recur. Two recent court decisions,⁸ however, ruled that the Commission can use Section 13(b) only in cases where the alleged unlawful conduct is ongoing or imminent. These rulings have unnecessarily restricted the Commission's ability to address past violations and may allow violators to avoid FTC enforcement by simply stopping their unlawful conduct once they get wind of an FTC investigation. Such a gaping loophole allows violators to easily escape consequences for their illegal conduct and hurts consumers.

The Chamber position that Section 13(b) should be limited to ongoing or imminent conduct rests on nonsensical arguments. The Chamber claims that if conduct has stopped, there is no need for an injunction because the Commission can seek an injunction if the conduct recurs. But forcing the Commission to wait until violations recur effectively gives the violator a free bite at the apple, creates weak incentives for compliance, and is an inefficient enforcement mechanism that will result only in more consumer harm. Federal court injunctions are critically important deterrents to repeating illegal conduct and a far more effective tool to protect consumers from future law violations.

⁷ For example, the Commission recently distributed more than \$59 million to more than 50,000 consumers who purchased the opioid addiction treatment drug Suboxone at prices that were highly inflated due to the pharmaceutical company's "product hopping" scheme that delayed entry of lower-priced generic competitors. Press Release, Federal Trade Commission, *FTC Returns Nearly \$60 Million to Those Suffering from Opioid Addiction Who Were Allegedly Overcharged in Suboxone Film Scheme* (May 10, 2021) (<https://www.ftc.gov/news-events/press-releases/2021/05/ftc-returns-nearly-60-million-those-suffering-opioid-addiction>).

⁸ See *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020); *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

The Chamber's approach would needlessly deny refunds to consumers harmed by past violations of the FTC Act, even in cases that involve "egregious" frauds. Take for example a defendant who sold snake oil falsely advertised to cure cancer. As the Chamber would have it, the Commission should be powerless to do anything if the defendant stopped making sales before the Commission sued. Defrauded consumers would get no relief and the defendant could not only keep the money, but would also avoid being subject to a federal court injunction. That result defies common sense. Section 13(b) should be amended to make clear that the Commission is authorized to seek monetary and injunctive relief for all violations, whether past, ongoing, or imminent.

Statute of Limitation for Monetary Relief

In its letter, the Chamber claims that statutory fix proposals lack a statute of limitation on monetary relief under Section 13(b). The recently introduced House bill, however, places a ten-year limit on monetary relief under Section 13(b). This would introduce a statute of limitations into 13(b) authority for the first time, representing the only significant change the bill imposes on the law as it had been understood for decades. Although this is a new limitation, I believe it strikes an appropriate balance between the Chamber's concerns of "unbounded" liability and the need to provide refunds to consumers harmed by unlawful conduct.⁹

* * *

The recently introduced House bill and other proposals to amend Section 13(b) do not "dramatically extend FTC authority in unbounded ways" or lack "safeguards against misuse" as the Chamber wrongly asserts. Rather, these proposals simply codify the way the Commission used Section 13(b) on a bipartisan basis for four decades, but with an additional ten-year statute of limitation on the Commission's ability to obtain monetary relief. This approach makes sense and is good for consumers and honest businesses. Accordingly, I reiterate the Commission's request that Congress act quickly to restore Section 13(b) of the FTC Act and preserve the FTC's ability to enjoin illegal conduct, disgorge ill-gotten gains, and return to consumers money they have lost. I look forward to continuing to work with the Committee and Congress on this critically important issue.

Very truly yours,



Rebecca Kelly Slaughter
Acting Chairwoman
Federal Trade Commission

Cc: Neil L. Bradley, U.S. Chamber of Commerce

⁹ Consumer Protection and Recovery Act, H.R. 2668, Sec. 2(e)(4), 117th Cong. (2021).