

Oral Statement of Commissioner Christine S. Wilson, FTC

Before the
U.S. Senate Committee on Commerce, Science and Transportation

April 20, 2021

Introduction

Chairman Cantwell, Ranking Member Wicker, and Members of the Committee, I am pleased to appear before you today (albeit remotely).

I would like to provide my perspective on three areas in which Congress could enhance the ability of the Federal Trade Commission to protect consumers and promote competition: first, by clarifying the FTC's authority under Section 13(b) of the FTC Act; second, by enacting federal privacy legislation; and third, by approaching the topic of antitrust reform judiciously.

Section 13(b)

A handful of recent court cases have challenged the FTC's ability to bring cases in federal court under Section 13(b) to obtain injunctive and equitable monetary relief. These decisions raise two sets of questions, the first of which pertains to the FTC's ability to bring actions when conduct is not "ongoing or imminent,"¹ and second of which pertains to the FTC's authority to obtain monetary relief.² Defendants use these adverse decisions to challenge the

¹ For example, targets of investigations often cease potentially illegal conduct when they learn they are being investigated. Even though nothing prevents those defendants from recommencing their unlawful conduct in the future, some courts have interpreted the language of Section 13(b) narrowly to require ongoing or imminent conduct. In one recent example, a court ruled against the FTC when it sought a temporary restraining order to halt allegedly fraudulent claims about COVID-19 stimulus benefits. *See* *FTC v. Traffic Jam Events, LLC*, No. 20-1740-WBV-DMD Section: D(3) (E.D. La. June 26, 2020) (denying the Commission's motion for a temporary restraining order seeking to enjoin defendant from deceptively promoting "official COVID-19 stimulus" relief citing the defendant's assertions that it was a one-time mailer and that future mailings were not conceived, attempted, or contemplated, despite previous state actions against the defendant for deceptive mailings), <https://casetext.com/case/fed-trade-commn-v-traffic-jam-events-llc>.

² Courts during the last several decades consistently have concluded that the authority in Section 13(b) to grant injunctive relief confers upon courts the full panoply of equitable remedies, including monetary remedies. *See* *FTC*

FTC's authority not only in ongoing court cases, but also in settlement negotiations. We now face significant difficulty both prosecuting and resolving cases. As this Committee is aware, the Supreme Court in January held oral arguments for the *AMG* case³ that expressly challenges the FTC's authority to obtain monetary relief; we expect a decision soon.

I recognize that stakeholders have expressed concerns regarding various aspects of Section 13(b). Some are concerned about the absence of a statute of limitations; I support including one in legislative revisions to 13(b). Others are concerned about the unbounded use of 13(b) to achieve disgorgement in antitrust cases. I agree that guiding principles on when the FTC will seek disgorgement, perhaps as detailed in the FTC's now-rescinded 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, would provide appropriate guardrails. And yet others have expressed concern about the application of Section 13(b) in consumer protection cases that involve not fraud but legitimate companies selling legitimate products, albeit with deceptive claims. Congress could set forth a framework in 13(b) under which courts must evaluate the value consumers may have retained from the product or service despite the deception. This approach has support in the case law⁴ and could assuage those concerns.

v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-572 (7th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). But the recent *AMG* case and others have ruled to the contrary. *See* *FTC v. Shire Viropharma Inc.*, No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018); *aff'd*, 917 F.3d 147 (3d Cir. 2019) (holding that the FTC did not meet its burden to show that the defendant was violating or was about to violate the FTC Act); *FTC v. AMG Capital Mgmt, LLC, et al.*, 910 F.3d 417 (9th Cir. 2018) (holding that the grant of authority to order an injunction does include authority to order equitable monetary relief); *But see* *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (concluding the grant of authority does not include ability to order equitable monetary relief).

³ *FTC v. AMG Capital Mgmt, LLC, et al.*, 910 F.3d 417 (9th Cir. 2018), *cert. granted sub nom*, *AMG Capital Mgmt, LLC, et al. v. FTC*, No. 19-508 (argued Jan. 13, 2021).

⁴ *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 1048 (C.D. Cal. 2012), *aff'd*, 815 F.3d 593, 603 (9th Cir. 2016) (affirming the district court decision that "relied on the testimony in question to *reduce* the award from \$36.4 million to \$18.2 million"); *FTC v. Lane Labs-USA, Inc.*, 2014 WL 268642, *2 (D.N.J. 2014) (explaining that the

The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers. The FTC would be pleased to provide technical assistance with draft language.

Privacy Legislation

The second topic I'd like to cover is federal privacy legislation. As members of this Committee know, FTC Commissioners on a bipartisan basis have urged Congress to pass federal privacy legislation for years. And the FTC is not alone in this request – consumer groups and industry groups agree on the need for federal privacy legislation.⁵

The first and best option would be for *this* Congress to enact privacy legislation. Congress is comprised of elected representatives empowered to represent the will of the American people. Consequently, it is this body that is uniquely situated to weigh and balance the important value judgments inherent in privacy legislation. And the FTC stands ready to assist

court has discretion in determining how to compensate consumers for the violations, was not constrained to total revenues, and could consider an award of the premium Defendants charged for the product over comparable products during the relevant period as well as Defendants' profits traced to only the offending advertisements); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 384 (D. Conn. 2009) (explaining that "[t]he formula for calculating redress for consumer injury is straightforward: "(1) calculate the gross receipts received from all consumers subjected to the contumacious acts of the defendants, (2) offset gross receipts to the extent the defendants prove that consumers either received refunds or were satisfied with their purchases, [and] (3) order the liable defendants to pay the resulting amount. . . ." (citation omitted); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir 2004) (describing the calculation of consumer loss and explaining that "defendants might be able to show that some customers received full refunds of their payments or that others were wholly satisfied with their purchases and thus suffered no damages.")

⁵ Businesses need certainty in the form of guardrails governing information collection, use, and dissemination. Consumers need transparency regarding how their data is collected, used, and shared so they can make informed decisions about which goods and services to use. Gaps in sectoral laws like HIPAA are growing, a fact underscored by COVID-19. And the use of commercial data to police stay-at-home orders and track protestors across the political spectrum reminds us of the connection between consumer privacy and our civil liberties. For a longer discussion of these issues, see: Christine Wilson, "Covid-19 Underscores Need for Comprehensive Privacy Legislation" MLEX (May 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576490/wilson_-_mlex_op-ed_5-18-20.pdf; Christine Wilson, "Coronavirus Demands a Privacy Law," WSJ (May 13, 2020), <https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Keynote Remarks at Privacy + Security Academy: Privacy and Public/Private Partnerships in a Pandemic (May 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson_-_remarks_at_privacy_security_academy_5-7-20.pdf.

with the implementation of that legislation through narrowly tailored rulemaking processes and vigorous enforcement of that new authority. But what if Congress has other legislative priorities?

Critics – including some members of this Committee – have lambasted the FTC for not doing enough to protect consumer privacy. But as other Commissioners and I have repeatedly noted, our jurisdiction and tools are limited.⁶ I respect the boundaries of the law, and FTC cannot act beyond its existing authority. That said, rulemaking under Section 18 of the FTC Act – known colloquially as Magnuson-Moss rulemaking⁷ – *is* within our authority. Granted, a Mag-Moss rulemaking is not the first-best solution to address the myriad privacy issues confronting Americans today – federal privacy legislation is the optimal solution. But in the absence of Congressional action and in the face of continuing harm – including infringements of civil liberties that once differentiated this great nation – I support Acting Chairwoman Slaughter in considering this path.

Mag-Moss rulemaking is a significant and lengthy undertaking. If Congress moves ahead with federal privacy legislation, input obtained from stakeholders during the Mag-Moss process would still have value. That input could inform our enforcement work, facilitate our comments on draft legislation, and identify areas of needed empirical research on complex privacy questions. I would be thrilled to undertake the Mag-Moss process, only to have it preempted by Congressional action on this front. But in the absence of federal privacy legislation, a Mag-Moss process would move the country toward providing transparency for consumers, establishing guardrails for businesses, and erecting safeguards for our civil liberties. Inaction is not an option.

⁶ Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Prepared Remarks of Commissioner Christine S. Wilson, Facebook., Inc. Press Event (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1537163/wilson_-_prepared_remarks_at_ftc_facebook_press_conference_7-24-19_0.pdf

⁷ 15 U.S.C § 57a(a) (2012).

Proposals to Overhaul Antitrust Enforcement

Finally, I wish to address the many calls to overhaul antitrust enforcement, including through legislation. Here, I wish to offer a cautionary note. The calls for antitrust reform are usually premised on concerns about so-called “Big Tech.” Yet there are many threads to that concern, including consumer privacy, content moderation, and anticompetitive conduct. Some commentators aggregate these concerns and conclude that the appropriate response is to break up large tech companies. The better approach is to disaggregate the varied concerns about the tech sector and address each concern with the appropriate tools. Specifically, privacy concerns require federal privacy legislation; Congress may conclude that content moderation concerns require reforms to Section 230.

That leaves the competition concerns. I believe the antitrust laws as currently written are sufficiently broad and flexible to address the dynamic and rapidly evolving tech sector. In the 1990s, the Department of Justice won its antitrust case against Microsoft, the dominant tech firm of that era. In December 2020, the Commission and 48 State Attorneys General launched antitrust challenges against Facebook. Even before that, the Commission initiated an antitrust case against Surescripts, a multi-sided platform that facilitates electronic prescribing, alleging monopolization of two markets. In October 2020, the DOJ and 11 State Attorneys General brought an antitrust case against Google; State Attorneys General subsequently filed two additional cases against Google. With all due respect, it is important to allow these cases to play out before implementing sweeping legislative reforms.

But calls to overhaul antitrust are not limited to the tech sector. Critics of modern antitrust enforcement seek to abolish the consumer welfare standard, revitalize the essential facilities doctrine, inhibit product innovation, change the burden of proof in mergers, and so on.

In fact, some of these proposals undoubtedly will be discussed tomorrow at this Committee's confirmation hearing of FTC nominee Lina Khan. Make no mistake – these proposals and others threaten to wreak havoc on our broader economy by politicizing antitrust enforcement, stifling innovation and R&D, inhibiting the efficient allocation and reallocation of resources, and driving prices higher – at a time when many of our fellow Americans are still dealing with the economic fall-out from the pandemic. We need to ask ourselves what kind of incentives we want to create with our system of antitrust law – incentives to benefit consumers by investing in R&D, introducing new products, and charging low prices? Or incentives to engage in free-riding, regulatory gamesmanship, and rent-seeking? I'd vote for the first approach every day of the week.

That said, I am *not* asserting that our current approach on every issue is perfect and worthy of being carved in stone. One of the many great aspects of the FTC is its continuous focus on obtaining input from stakeholders to refine and update its policy and enforcement approaches. Our extended hearings on competition and consumer protection in the 21st century under Chairman Joseph Simons are emblematic of this characteristic. I support merger retrospectives to determine whether we are making the right calls in merger review. I support calls for greater transparency on the part of the agency, not only when we bring cases but when we decline to bring them. And Congress can facilitate efforts to update antitrust enforcement by, for example, clarifying that the same standard applies to merger challenges at both the FTC and DOJ; providing additional funding for the agencies, perhaps in part through merger filing fee adjustments; and giving the FTC authority over non-profits and common carriers.

Conclusion

In closing, the FTC would welcome the opportunity to provide technical assistance to Congress on these issues. Thank you for your assistance in strengthening the FTC's ability to fulfill its mission of promoting competition and protecting consumers.

I am happy to answer any questions you may have.