

April 26, 2021

The Honorable Maria Cantwell, Chair
The Honorable Roger Wicker, Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

The Honorable Frank Pallone, Jr. Chairman
The Honorable Cathy McMorris Rodgers, Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: Call to update Federal Trade Commission's enforcement tools under the FTC Act, Section 13(b)

Dear Chairs Cantwell and Pallone and Ranking Members Wicker and McMorris Rogers:

The undersigned consumer and privacy organizations, representing millions of American consumers, write to convey our strong support for legislative action to ensure that the Federal Trade Commission has the full range of equitable authority to curb unfair, deceptive, fraudulent and anticompetitive acts and practices. While the FTC plays a critical role in protecting both consumers and businesses, the agency's ability to protect consumers has been seriously compromised by the Supreme Court's recent decision in *AMG Capital Management, LLC, et al. v. Federal Trade Commission*. In that case, the Court held that the Commission does not have the ability to obtain equitable monetary relief in its 13(b) enforcement actions. In this letter, we urge you to act to amend the FTC Act to ensure that the Commission's full slate of enforcement tools, including its ability to seek injunctive as well as monetary and equitable remedies on behalf of consumers affected by violations of the law, is preserved. Indeed, we urge that the Commission's powers to protect consumers be expanded, not curtailed as some seek to do.

The timing is urgent. Millions of Americans including seniors, servicemembers, and others are facing widespread fraud in the wake of the COVID-19 pandemic. The Commission reported that it received 2.2 million fraud reports from consumers in 2020, in the midst of the COVID-19 health and financial crisis – an almost 33% jump from the year before.¹

The FTC historically relied on Section 13(b) of the Federal Trade Commission Act to hold bad actors accountable when they violate the law. Last week's Supreme Court decision takes away essential remedial powers that had been effectively used for decades to deprive wrongdoers of the profits of their illegal activities. Consequently, the FTC's ability to prosecute and deter wrongdoers will be seriously weakened going forward. The ability to obtain remedial injunctive relief has always been essential in the FTC's fight against consumer fraud, and that is especially true today.

¹ Federal Trade Commission, *New Data Shows FTC Received 2.2 Million Fraud Reports from Consumers in 2020*, Feb. 4, 2021, <https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers>

Enforcement of laws under its jurisdiction is one of the Commission's integral functions and serves as a necessary safeguard to help maintain an open and honest marketplace for consumers and businesses. First, the FTC should be able to not only seek injunctions to stop illegal and harmful acts as they are occurring, but also turn to the courts to seek temporary restraining orders and injunctions to eradicate these acts even when violators of the law appear to have voluntarily ended the respective illegal practice. That way, the Commission can ensure that scams or other risky behavior will likely not be restarted.

Second, disgorgement and restitution are critical aspects of the Commission's enforcement authority. It is essential that perpetrators of anticompetitive, or unfair, fraudulent and deceptive acts or practices not be allowed to retain all the benefits of their illegal conduct. If wrongdoers continue profiting from their harmful behavior without accountability, they will be motivated to continue breaking the law, knowing that they can carry on and reap the benefits while suffering few if any consequences. This perverse incentive system hurts consumers and honest, law-abiding business competitors.

Therefore, it is crucial that the Commission have the ability to obtain equitable relief including but not limited to restitution and disgorgement. Monetary remedies compensate seniors, veterans and other consumers for their losses and help to restore fairness by deterring unlawful practices. The FTC Act does not provide a private right of action for harmed consumers to seek remedies against bad actors on their own. It is the Commission's responsibility to obtain relief for victims and to provide meaningful accountability on the public's behalf.

We echo the views of the bipartisan group of FTC commissioners who have called for Congress to pass legislation to clearly establish the agency's ability to disgorge wrongdoers' ill-gotten gains and to obtain essential equitable remedies. Notably, we share the urgent concern expressed in the October 22, 2020 letter to Congress signed by all five commissioners, and in the recent congressional testimony of William Kovacic, a former chair, member, and general counsel of the FTC. We agree, with former Chair Kovacic, that the Commission should have the "power to obtain the full range of equitable remedies, including monetary recoveries as remedies for consumer protection violations."²

While this legislation is necessary to restore the Commission's equitable authorities, more should be done to bolster the Commission if Congress is truly committed to protecting U.S. consumers and honest businesses from the frauds and scams that are proliferating in today's economy. We urge Congress to, at a minimum, act to provide the FTC with broad-based penalty authority, establish a penalty authority fund to reimburse consumers for their losses, allow the FTC to establish rules using the Administrative Procedure Act, and provide the Commission with the resources it needs to accomplish its broad mission.

But most immediately, in light of the *AMG Capital Management* decision, we urge Congress to amend Section 13(b) of the FTC Act and ensure that the Commission is authorized to vigorously enforce laws and obtain adequate remedies for the marketplace.

² Written Testimony of William E. Kovacic before the U.S House of Representatives, Committee on Energy and Commerce, Hearing Before the Subcommittee on Consumer Protection and Commerce, *Safeguarding American Consumers: Fighting Frauds and Scams During the Pandemic*, February 4, 2021.

Thank you for considering our views.

Sincerely,

Access Now

American Association for Justice

Americans for Financial Reform

California Reinvestment Coalition

Campaign for a Commercial-Free Childhood

Center for Digital Democracy

Center for Justice & Democracy

Common Sense

Consumer Action

Consumer Federation of America

Consumer Reports

Electronic Frontier Foundation (EFF)

Jacksonville Area Legal Aid

Main Street Alliance

Media Alliance

National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

National Consumers League

National Fair Housing Alliance

New America's Open Technology Institute

Privacy Rights Clearinghouse

Public Citizen

Public Good Law Center

Public Justice

Public Knowledge

Public Law Center

Strategic Organizing Center

Texas Appleseed

truthinadvertising.org (TINA.org)

Tzedek DC

U.S. PIRG

Woodstock Institute