

**“Transforming the FTC: Legislation to Modernize Consumer Protection”
Testimony Before the House Energy and Commerce Committee
Subcommittee on Consumer Protection and Commerce**

Chair Schakowsky, Ranking Member Bilirakis, and members of the Subcommittee, we appreciate the opportunity to present the Commission’s testimony on the 16 bills to modify the FTC’s authority and address other pressing issues, and to describe briefly some of the Commission’s work and the challenges we face.¹ The Commission is thankful for the Subcommittee’s continued commitment to protecting the American public from unfair and deceptive practices and unfair methods of competition.

The FTC plays a critical role in ensuring that markets are fair for families and honest businesses, but today we face many challenges. The global pandemic has devastated families across the United States, and bad actors are seeking to prey on their pain. A surge in corporate mergers threatens more transactions that may substantially lessen competition. And the Commission’s ability to tackle key challenges – from COVID fraud to anticompetitive conduct – has been substantially diminished after the Supreme Court’s recent decision in *AMG*, which barred the Commission from seeking monetary relief under Section 13(b) of the FTC Act.

In spite of these challenges, the FTC has worked vigorously to ensure that its critical work can continue. Since the beginning of the pandemic, thanks in part to the civil penalty authority provided by this Subcommittee in the COVID-19 Consumer Protection Act,² the Commission has successfully halted dozens of COVID-related scams. For example, the agency has sued entities for allegedly breaking promises to quickly ship personal protective equipment and

¹ This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions reflect our own views and do not necessarily reflect the views of the Commission or any other Commissioner.

² Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

cleaning products, tricking consumers into paying for sanitizing products that were never delivered, falsely claiming that their products could treat and/or prevent COVID-19, and making deceptive claims regarding stimulus benefits. We complement these efforts by reaching out to communities most affected by fraud, and by alerting the public to the threats posed by scams and those who facilitate them.³

We are grateful to this Subcommittee for all it is doing to ensure our critical work can continue. Of particular importance is the work this Committee has done to restore the Commission's ability to secure monetary relief from those that violate the law. As you know, until the Supreme Court's recent decision in *AMG*, the Commission relied on Section 13(b) of the FTC Act to return billions of dollars to defrauded Americans, and to ensure that lawbreaking companies could not pocket their ill-gotten gains. For example, pending cases today involve \$2 billion in potential relief to victims, which is not available after *AMG*. Unless the agency has clear authority to obtain monetary relief, this decision will continue to impede our ability to provide refunds to Americans harmed by deceptive, unfair, or anticompetitive conduct.

The Commission also now faces challenges in obtaining injunctive relief. In *FTC v. Shire ViroPharma, Inc.*, the Third Circuit held that the language in Section 13(b) of the FTC Act describing a company that "is engaged in, or is about to engage in" illegal conduct means the FTC can initiate enforcement actions only when a violation is either ongoing or "impending" at the time the suit is filed.⁴ This decision limits the Commission's ability to hold accountable

³ See, e.g., Press Release, FED. TRADE COMM'N, Scams starting on social media proliferate in early 2020 (Oct. 12, 2020), <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/10/scams-starting-social-media-proliferate-early-2020>, Press Release, FED. TRADE COMM'N, Income scams: big promises, big losses (Dec. 10, 2020), <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses>.

⁴ *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

entities who engaged in illegal conduct that occurred entirely in the past. The district court's recent dismissal of the FTC's antitrust complaint against Facebook cited the *ViroPharma* opinion in concluding that the Commission could not use Section 13(b) to address Facebook's alleged past anticompetitive conduct.⁵ Restoring the FTC's power to seek injunctions and monetary relief is critical to our work to protect Americans from unlawful business conduct.

In addition, the Commission is currently facing extremely severe resource constraints. Global mergers and acquisitions have soared to new records, putting heavy stress on our ability to effectively investigate and challenge unlawful transactions.⁶ The pandemic has also led to large numbers of complaints to the FTC about marketplace abuses. The Commission believes that additional resources are necessary to help it effectively achieve its mission.

We are grateful that this Subcommittee is working to craft reforms to assist the agency in meeting its mission to protect consumers. We will not attempt to discuss each of the many measures in this testimony, but we are of course happy to provide technical assistance and other feedback on any of them. We appreciate that many of the measures give the Commission a much-needed boost in some critical areas where enforcement tools are needed.

Several of the reform bills are among those that have had longstanding bipartisan support at the Commission.⁷ For example, the FTC has long called for the repeal of the

⁵ *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590, --- F.Supp.3d ----, 2021 WL 2643627 (D.D.C. June 28, 2021).

⁶ Through the first three quarters of this fiscal year (FY 2021), the antitrust agencies have processed over 2,400 transactions reportable under the HSR Act. This level of activity is already higher than the *total* number of reportable transactions received in any fiscal year since the HSR thresholds were adjusted in 2000. See *Premerger Notification Program*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/premerger-notification-program>, (last visited on July 23, 2021).

⁷ Additionally, several of the bills highlight areas of critical importance to the Commission. For example, the Veterans and Servicemember Consumer Protection Act of 2021 directs the Commission's Bureau of Consumer Protection to establish a coordinator within the FTC's Bureau of Consumer Protection to focus on the prevention of fraud and other scams targeting or adversely affecting United States military veterans and servicemembers. H.R. 4481, 117th Cong. (2021), <https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1174483ih.pdf>. The FTC supports the goals of this legislation, which builds upon the FTC's longstanding commitment to addressing the unique challenges affecting military consumers. Similarly, Section 101(c)(2) of the Elder Abuse Prevention and

telecommunications common carrier exemption,⁸ which has impeded the FTC’s enforcement initiatives, such as tackling illegal telemarketing. Other reform bills – including legislation that would subject nonprofits to the FTC Act⁹ and in certain contexts give the Commission rulemaking and civil penalty authority¹⁰ – have also received broad support, although some Commissioners would support such measures in more limited ways.

We would like to thank the Subcommittee for its efforts to strengthen and hone the FTC’s tools. Your continued support for the agency’s work to address COVID, the 13(b) legislation, and the additional resources given last year to bolster the agency are all critical in the FTC’s mission to protect Americans from unlawful business practices. The Commission stands ready to assist you with these bills, should you ask, and with any other matters you believe we should prioritize. We look forward to your questions.

Prosecution Act of 2017 requires the Commission to issue an annual report describing its enforcement efforts against fraud targeting seniors. Pub. L. 115–70, 115th Cong. (enacted Oct. 18, 2017). The FTC currently issues an annual report highlighting its work targeting elder fraud, and stands ready to work with the Committee to continue to prioritize this important issue. See *Report of the Federal Trade Commission, Protecting Older Consumers 2019-2020* (Oct. 18, 2020), https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf.

⁸ 15 U.S.C. § 45(a)(2) excepts from the FTC Act “common carriers subject to the Acts to regulate commerce.” 15 U.S.C. § 44 defines the “Acts to regulate commerce” as “subtitle IV of title 49 [interstate transportation] and the Communications Act of 1934” and all amendments thereto.

⁹ H.R. 3918, To amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations, 117th Cong. (2021), <https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1173918ih.pdf>.

¹⁰ H.R. 4447, The 21st Century FTC Act, 117th Cong., <https://docs.house.gov/meetings/IF/IF17/20210728/113972/BILLS-1174447ih.pdf>.