

June 28, 2021

BY OVERNIGHT MAIL

Hon. Nancy Pelosi
Speaker
U.S. House of Representatives

Hon. Kevin McCarthy
Minority Leader
U.S. House of Representatives

Hon. Maria Cantwell
Chair
U.S. Senate Committee on Commerce,
Science, & Transportation

Hon. Frank Pallone, Jr.
Chairman
U.S. House Committee on Energy and
Commerce

Hon. Roger Wicker
Ranking Member
U.S. Senate Committee on Commerce,
Science, & Transportation

Hon. Cathy McMorris Rogers
Ranking Member
U.S. House Committee on Energy and
Commerce

Re: **Consumer Protection and Recovery Act**
(H.R. 2668)

Dear Speaker Pelosi, Minority Leader McCarthy, Chair Cantwell, Chairman Pallone, Jr., Ranking Member Wicker, and Ranking Member McMorris Rogers:

As the leading antitrust and consumer protection officers in our respective States, we write to express our strong support for the Consumer Protection and Recovery Act, H.R. 2668 (“Act”), which will ensure the ability of the Federal Trade Commission (“FTC”) to obtain equitable monetary relief and redress harms to consumers impacted by fraud or anticompetitive conduct. We applaud the Act’s goal of redressing harms suffered by victims of anticompetitive, unfair, or deceptive trade practices, and its application to FTC cases that are currently in litigation.

The Act is essential to prevent the severe harm to consumers that will result from the Supreme Court’s recent decision in *AMG Capital Management, LLC, et al. v. Federal Trade Commission*,¹ which held that the FTC lacks the authority to obtain equitable monetary relief through its Section 13(b) enforcement actions.² The *AMG* decision upends four decades of FTC practice and seriously undermines the FTC’s efforts to combat fraud and other anticompetitive or unfair trade practices. If the FTC cannot obtain equitable monetary relief under Section 13(b), violators of the FTC Act who are sued in federal court will retain the monetary benefits of their illegal activity and ill-gotten gains, limiting both the deterrent and remedial values of the FTC Act.³ In the words of FTC Acting Chairwoman Slaughter, the decision “deprived the FTC of the strongest tool [the FTC] had to help consumers.”⁴

The *AMG* decision limits the FTC’s remedies when going directly to court to obtain a preliminary or permanent injunction. Curtailing the available remedies drastically changes the calculus for those who defraud or harm consumers through their illegal activity. Simply being prohibited from committing the same bad acts in the future without any additional consequence enables bad actors to keep their ill-gotten gains, thereby emboldening wrongdoers and incentivizing unlawful conduct. The *AMG* decision leaves harmed consumers without meaningful redress and threatens the availability of a fair marketplace for businesses that do abide by the law, reducing confidence in the ability of the U.S. government—and the FTC in particular—to protect consumers from harm.

Unfair and deceptive trade practices are a serious and pervasive problem in the United States. In the past five years, the FTC has received more than 7 million reports of consumer fraud.⁵ In 2020, consumers reported losing over \$3.3 billion to such practices.⁶ The COVID-19 pandemic has contributed to this explosion of fraud complaints—between January 2020 and April 7, 2021, the FTC received over 436,000 complaints associated with COVID-19 in which consumers

¹ *AMG Capital Management, LLC et al. v. FTC*, 141 S. Ct. 1341 (2021).

² The Act also reverses recent appellate court holdings that restrict the FTC’s ability to seek injunctive relief under Section 13(b) when the unlawful conduct is no longer occurring. *See, e.g., FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019). These appellate court decisions undermine the FTC’s ability to protect consumers and allow companies to strategically stop wrongful conduct to evade enforcement, only to restart that same conduct when a case has concluded or the threat has passed.

³ Indeed, because of the Supreme Court’s ruling, the defendant in the *AMG* case will likely retain the \$1.27 billion restitution and disgorgement awarded by the lower court to victims of the defendant’s fraudulent payday loan business.

⁴ Federal Trade Commission, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021).

⁵ Fed. Trade Comm’n, FTC Consumer Sentinel Network, Trends Over Time, <https://tabsoft.co/35M23Rx> (last updated Oct. 16, 2020).

⁶ Fed. Trade Comm’n, Consumer Sentinel Databook 2020, https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf.

reported \$399 million in fraud losses.⁷ Many consumers are more financially vulnerable than ever due to the COVID-19 pandemic and rely on federal and state enforcers to protect their interests and return their hard-earned money if they have been defrauded.

Likewise, anticompetitive practices have serious adverse impacts on consumers and businesses. Monopolization, collusion, and other unlawful conduct threaten the proper functioning of the American marketplace and cost consumers and honest businesses billions of dollars a year.⁸ FTC actions against anticompetitive practices protect fair and stable markets. The array of equitable relief available under Section 13(b), including restitution and disgorgement, provides an important check on anticompetitive conduct and a vital tool to redress antitrust violations.

Restoring the FTC's authority to seek equitable monetary relief, such as restitution and disgorgement under Section 13(b), benefits the States and their residents.⁹ The FTC plays a vital role in policing America's marketplace and for decades its ability to obtain equitable monetary relief has been an essential and effective tool. When the FTC obtains restitution awards, it can directly provide redress to victims of anticompetitive, unfair, or deceptive trade practices. For example, the FTC's nationwide jurisdiction has historically enabled it to efficiently obtain redress for consumers affected by unlawful activity spanning multiple States. In fact, the FTC has recovered over \$11.2 billion in refunds to consumers over the last five years.¹⁰ In addition to redressing specific harms to defrauded consumers, the FTC's enforcement efforts benefit the States by promoting fair and competitive markets.

Disgorgement is a similarly powerful tool that likewise promotes and protects a fair marketplace throughout the country. Disgorgement is an equitable remedy that complements injunctive relief by ensuring that wrongdoers do not profit from past unlawful acts. The Act takes a conservative approach by specifying that any amount a court orders to be returned in other equitable relief must be offset by any amount the court orders be paid in disgorgement. Even with this conservative approach, disgorgement remains an important deterrent to misconduct.

⁷ Fed. Trade Comm'n, Protecting Consumers During the COVID-19 Pandemic: A Year in Review, https://www.ftc.gov/system/files/documents/reports/protecting-consumers-during-covid-19-pandemic-year-review/covid_staff_report_final_419_0.pdf.

⁸ See, e.g., Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions, FTC Staff Study, Jan. 2010, at 2, available at <https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf> (stating that just one type of anticompetitive conduct – pharmaceutical pay-for-delay agreements – is estimated to cost American consumers \$3.5 billion per year).

⁹ Although the FTC may seek restitution in state or federal court under Section 19 of the FTC Act, it may do so only if the defendant has violated one of the FTC's own rules or violates an FTC cease-and-desist order issued after an administrative hearing. 15 U.S.C. §§ 57b(a), (b). These limited and cumbersome alternatives are no substitute for the ability to seek injunctive and equitable monetary relief directly in court.

¹⁰ See Tableau, *FTC Refunds to Consumers*, https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds_157979584020/RefundsbyCase.

Furthermore, the States’ own enforcement efforts are fortified through collaboration with the FTC. The FTC is an important partner to the States in our vital role policing anticompetitive, unfair, and deceptive trade practices. The lack of authority to seek equitable monetary relief under Section 13(b) will undermine the FTC’s efforts to combat unfair and deceptive practices. This, in turn, frustrates federal-state collaboration and forces States to divert resources away from other consumer protection efforts and perform duties previously fulfilled by the FTC. Even enhanced State action will not fully compensate for the FTC’s weakened enforcement authority. The FTC has nationwide jurisdiction where, in some matters, the States may lack such jurisdiction. Moreover, in those circumstances where the FTC Act is broader than a State’s unfair and deceptive trade practices statutes, the FTC’s ability to seek restitution ensures that a State’s residents are made whole. For example, some States’ unfair and deceptive practices statutes exempt certain businesses—such as the insurance industry or real estate businesses—from their coverage while the FTC Act does not.¹¹

The FTC’s ability to pursue equitable monetary relief under Section 13(b) should be restored not just for future enforcement actions, but also for cases currently being litigated. At present, the FTC has 24 active enforcement cases, representing \$2.4 billion that should be returned to victims, that rely exclusively on Section 13(b) for a monetary remedy and are adversely affected by the Supreme Court decision.¹² States are co-plaintiffs in many of these suits. For example, the FTC and the New York Attorney General have partnered to challenge the false marketing of a vitamin supplement as a memory enhancer.¹³ In another case, the FTC has partnered with a bipartisan coalition of seven States to seek injunctive and equitable monetary relief from a pharmaceutical company that engaged in a monopolization scheme resulting in a 4,000 percent increase in the consumer list price of a lifesaving antiparasitic drug.¹⁴ If FTC authority to secure equitable monetary relief is not restored, the harm suffered by consumers and law-abiding businesses as a result of these and other illegal schemes may go unredressed.

We strongly urge you to quickly restore the essential tools that the FTC needs to combat fraud and anticompetitive conduct and protect an honest marketplace. Without such authority, consumers and businesses in the States will be deprived of what is rightfully theirs, wrongdoers

¹¹ *Compare, e.g.*, 815 Ill. Comp. Stat. 505/10b(6) (exemption for “false, misleading, or deceptive information by an insurance producer . . . unless the insurance producer has actual knowledge of the false, misleading, or deceptive character of the information”) and Ind. Code §§ 24-5-0.5-2(a)(8), 24-5-0.5-4(c) (exemption for real property transactions unless defendants possessed “intent to defraud or mislead”) and Wis. Stat. § 100.18(12)(a) (exemption for “insurance business”) with *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 297-99 (1960) (applying the FTC Act’s prohibition on unfair and deceptive practices to the insurance industry) and *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989) (FTC need not “prove subjective intent to defraud” or “actual knowledge of material misrepresentations” to seek restitution).

¹² Hearing before the Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce, 117th Cong. (2021) (Opening Statement of FTC Chairwoman Rebecca Kelly Slaughter, April 27, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589456/opening_statement_april_27_house_13b_hearing_427.pdf.

¹³ See *FTC v. Quincy Bioscience Holding Co., Inc.*, 389 F. Supp. 3d 211 (S.D.N.Y. 2019).

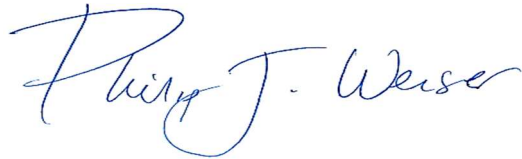
¹⁴ See *FTC v. Vyera Pharmaceuticals, LLC*, 479 F. Supp. 3d 31 (S.D.N.Y. 2020).

will be allowed to retain the profits of their illegal conduct, and markets will become less competitive. Thank you for your attention to this critical matter.

Respectfully submitted,



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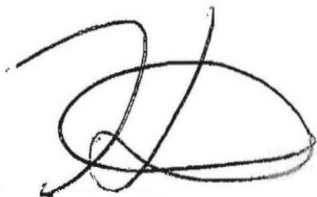
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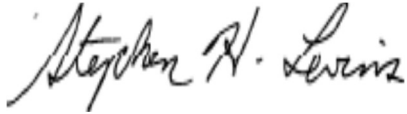
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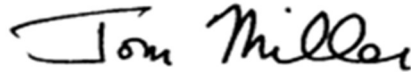
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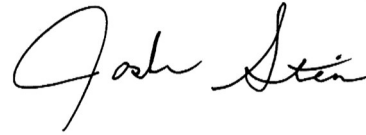
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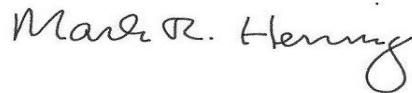
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