

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
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April 20, 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:

We write concerning the Federal Trade Commission's ("FTC") statutory authority under Section 19 of the Federal Trade Commission Act of 1914 ("the Act") ahead of a full committee hearing entitled "Strengthening the Federal Trade Commission's Authority to Protect Consumers," to be held on April 20, 2021.

The Chamber has been in conversation with our members over proposed legislative text designed to address a core concern the FTC has over its ability to seek monetary relief in certain types fraud cases. We believe that the ability for the FTC to seek and the courts to award monetary relief in such cases is consistent with long standing Congressional intent for such fraudulent activities. However, the law has not been followed by the Federal Trade Commission.

Congressional intent and the FTC's statutory authority to seek monetary damages are found within Section 19 of the Act. However, the FTC has chosen not to use Section 19 as it requires the FTC to first use its administrative authorities to determine a violation before going to court and seeking monetary relief for cases where a reasonable person should have known they were violating the law.

Instead, the FTC has chosen to seek injunctive relief under 13b, avoiding its own administrative process, as well as seeking monetary relief under that statutory provision. The issue for the FTC however, is that the text of the statutes only allow the FTC to seek, and the courts to grant, monetary relief under Section 19, not Section 13b.

As a result, the FTC is seeking a legislative change, because it does not view Section 19 as being as effective as Section 13b to address certain types of alleged fraud cases. But by using 13b, the FTC has foreclosed its ability to seek monetary damages.

The agency has proposed legislative text in an effort to transplant its authority for monetary remedies that resides within Section 19 into Section 13b. As more fully described below, we have significant concerns with this approach as it seeks to dramatically extend FTC

authority in unbounded ways, instead of narrowly addressing the problem with a technical change focused on Section 19.

13b Monetary Relief

The FTC is seeking to extend 13b authority beyond injunctive relief to now include restitution and/or disgorgement remedies. It is important to recognize that 13b authority found within the Act applies universally to the laws the FTC enforces. As a result, attempts to import the monetary authority Congress gave the FTC in Section 19 into section 13b, expands monetary relief to many more consumer protection cases beyond the scope of Section 19, but also to antitrust cases. Such an expansion is deeply problematic without corresponding safeguards against misuse.

One of the most important safeguards is the “reasonable person standard” Congress wrote into the Section 19 statute. Monetary relief should not be available for every consumer protection violation but should be reserved for the most egregious types of cases. Section 19 recognizes this by inserting a “reasonable person test” for the courts to utilize, however, the FTC draft language fails to include such a standard in its proposed text.

In addition, extending monetary relief as a statutory remedy for antitrust violations prosecuted by the FTC is similarly problematic. Antitrust violations are routinely subject to actions by private plaintiffs, where compensation and treble damages are awarded. Subjecting antitrust violations to restitution and/or disgorgement fails to recognize the role private litigation plays and the manner in which those harmed by are already effectively compensated.

Further, the Chamber has concerns about establishing expanded statutory authority for the FTC to seek monetary relief in competition cases this new authority would not extend to the Department of Justice. While we have two agencies that enforce the antitrust laws, we have one law. The law does not distinguish which companies go before which agencies. It becomes a fundamental due process consideration if the FTC has a different remedy tool kit for civil enforcement.

“Has Violated”

The FTC is seeking to insert into 13b the ability to go after conduct that is no longer occurring. Currently, 13b, which is focused on injunctive relief, is targeted at conduct that is occurring in the market or is about to occur in the market. It does not provide for the ability to seek injunctive relief for conduct that has occurred in the past. It is unnecessary to block conduct that is no longer occurring in the market, further, if the ceased conduct may occur again, the FTC can seek an injunction at that point. It can also under existing law seek an injunction if it believes it may or likely resume.

The ability to target past conduct is presumably important to the agency, not in the context of seeking an injunction to prohibit such conduct, but to go after monetary relief for recent conduct that has ceased. This is a result of the FTC seeking to make 13b no longer just about injunctive relief, but now to also include monetary relief. A major problem with the

insertion of “has violated” into 13b is the draft language offers no clear statute of limitation for how far back the agency can go to address past conduct that is no longer occurring in the market.

In closing, the Chamber is willing to work with the Congress and the FTC on a narrowly tailored approach that would allow the FTC to go to court, in order to seek appropriate equitable monetary relief for clearly fraudulent cases that are found to be in violation of the law. However, the Chamber will continue to oppose changes to 13b that would dramatically expand FTC authority beyond the purported reason being given to justify the legislation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley", with a stylized flourish at the end.

Neil L. Bradley

cc: Members of the Committee on Commerce, Science, and Transportation