

July 12, 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:

On behalf of the undersigned organizations, we support giving the Federal Trade Commission (“FTC”) the appropriate tools necessary to efficiently bring enforcement actions against frauds and scams, including collecting monetary relief for consumers harmed. However, H.R. 2668, the “Consumer Protection and Recovery Act,” is the wrong way to give the FTC these tools.

Section 19 of the Federal Trade Commission Act of 1914 provides clear statutory authority for the FTC to collect monetary relief in fraud cases that have occurred within the last three years. The statute also provides a process the Commission must undertake before relief can be collected. Finally, the Commission would have to demonstrate to a court that a reasonable person should have known they were violating the law.

However, the FTC can only ask the court to award such relief after it has concluded an internal administrative proceeding finding the conduct in a question a fraud and thus a violation of the law. The legal requirement to go through an administrative process is time consuming and the FTC would rather bring the case on the merits and seek equitable relief as remedy before a court in an efficient manner.

For years, despite not having clear statutory authority under Section 13(b) to collect equitable relief, the FTC bypassed these steps and went straight to court. In a 9-0 decision, the Supreme Court issued a stark rebuke that the FTC was not given the power by Congress to shortcut the process to collect equitable relief. The Consumer Protection and Recovery Act is intended to address this concern, but unfortunately it goes much, much further.

H.R. 2668 would allow the FTC to bypass its administrative process and quickly get before a court, but it would also expand the statute of limitations to as many as 10 years, would expand the scope of cases where monetary relief can be rewarded well beyond fraud, and would place no guardrails to determine when monetary relief is appropriate similar to the reasonable person standard in Section 19.

Such an approach would hard-wire monetary relief as the go to remedy for any alleged consumer protection violation or any antitrust violation. This is a massive expansion of the FTC’s tool kit extending well beyond fraud cases. This may very well be the intent of some in Congress, but we believe that any expansion of authority must also be restrained by appropriate guardrails.

We would like to see a bipartisan solution, one that gives the FTC the potential to pursue monetary relief but cannot support legislation without a reasonable statute of limitations, a differentiation between consumer protection and antitrust cases, and guidance as to when equitable relief is an appropriate remedy.

This last point is exceedingly critical – restitution and disgorgement are forms of monetary relief that seek to remove ill-gotten gains and to make consumers whole but are not penal in nature. Many cases the FTC brings are highly subjective. In these cases, to the degree that a consumer is “harmed” and there is a need to make them whole, the appropriate remedy may only be a partial disgorgement or partial restitution, because outside of the context of fraud, the consumer often retains much of the value from the product or service sold.

H.R. 2668 is deeply flawed, as it would overcorrect by giving the FTC statutory authority the agency has never held and would expand this new authority without any corresponding guardrails. And as drafted, it enables the agency to wield this newfound authority retroactively, which also presents a host of fairness and constitutional concerns.

H.R. 2668 was advanced by the House Energy and Commerce Committee on party lines. In fact, the only proposal that had bipartisan support was a Republican amendment during the full committee markup that had Democratic support. We write to ask you to work in a bipartisan fashion to give the FTC the tools it needs, but also safeguard against potential abuse. The Supreme Court suggested Congress needed to address these concerns with a legislative solution. This legislation should not be partisan, and we look forward to working with offices on both sides of the aisle to support legislation with appropriate safeguards that will protect consumers.

Sincerely,

American Financial Services Association
Consumer Health Products Association
Direct Selling Association
Electronic Transactions Association
FMI- The Food Industry Association
Metals Service Center Institute
National Association of Convenience Stores
National Retail Federation
NetChoice
Pharmaceutical Research and Manufacturers of America, PhRMA
Small Business Finance Association
Texas Retailers Association
United Natural Products Alliance
U.S. Chamber of Commerce

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