UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 22, 2020

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

The Honorable Greg Walden
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Roger Wicker
Chairman
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

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

Dear Chairmen Pallone and Wicker and Ranking Members Walden and Cantwell,

As you know, the Commission has used Section 13(b) of the Federal Trade Commission Act for the last four decades to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, just to name a few.[1] More recently, in light of the pandemic, the FTC has used Section 13(b) to take action against entities operating scams based on COVID-19.[2] In the past 5 years alone, the agency has

[1] 15 U.S.C. § 53(b).

[2] *See*, *e.g.*, FTC Sues California Marketer of $23,000 COVID-19 "Treatment" Plan (July 31, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan.

used Section 13(b) to provide almost $11 billion in refunds to consumers victimized by a wide variety of schemes.[3] We, the five Commissioners, agree that 13(b) is a critical tool in our enforcement mission. We are writing today to inform you that its effectiveness is currently imperiled and this uncertainty is hurting our current enforcement efforts, and to urge Congress swiftly to clarify the statutory text and allow us to continue to protect consumers.

Without congressional action, the Commission's ability to use Section 13(b) to provide refunds to consumer victims and to enjoin illegal activity is severely threatened. As explained below, courts of appeals in the Third and Seventh Circuits have recently ruled that the agency cannot obtain any monetary relief under Section 13(b). Although review in the Supreme Court is pending, these lower court decisions are already inhibiting our ability to obtain monetary relief under 13(b). Not only do these decisions already prevent us from obtaining redress for consumers in the circuits where they issued, prospective defendants are routinely invoking them in refusing to settle cases with agreed-upon redress payments. Moreover, defendants in our law enforcement actions pending in other circuits are seeking to expand the rulings to those circuits and taking steps to delay litigation in anticipation of a potential Supreme Court ruling that would allow them to escape liability for any monetary relief caused by their unlawful conduct. This is a significant impediment to the agency's effectiveness, its ability to provide redress to consumer victims, and its ability to prevent entities who violate the law from profiting from their wrongdoing. Accordingly, it is imperative that Congress act quickly so that the FTC can continue to effectively protect American consumers.

In addition, another recent Third Circuit decision jeopardizes the FTC's ability to enjoin illegal conduct. In *FTC v. Shire ViroPharma*, the court held that the FTC can bring enforcement actions under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed.[4] That decision unnecessarily limits the Commission's ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred in the past but is not ongoing. The decision also hampers the Commission's longstanding ability to protect consumers by getting an injunction that prohibits defendants from resuming their unlawful activities in cases where the conduct has stopped but there is a reasonable likelihood that the defendants could resume their unlawful activities in the future. The decision also is impacting our ability to settle cases. Targets of FTC investigations now routinely argue that they are immune from suit because they are no longer violating the law, despite the fact that there is a likelihood of recurrence, and they make these arguments even in cases when they stopped violating the law only after learning that the FTC was investigating them.

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[3] https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.

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

Section 13(b) of the FTC Act is the agency's primary and most effective way of returning to consumers money that was unlawfully taken from them. The relevant portion of Section 13(b), often referred to as the "second proviso," authorizes the FTC to sue directly in federal court for violations of the FTC Act and states that "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent, interpreted the language in Section 13(b) to authorize district courts to award the full panoply of equitable remedies necessary to provide complete relief for consumers, including disgorgement and restitution of money. For decades, no court held to the contrary. In 1994, Congress ratified its intent to provide monetary remedies when it expanded the venue available for FTC enforcement cases, strengthening the Commission's ability to bring redress cases.[5]

Recent judicial rulings, however, indicate a dramatic shift in how courts are interpreting and applying Section 13(b) in FTC cases. For example, last year the Seventh Circuit, in *FTC v. Credit Bureau Center, LLC*,[6] overruled its three decades of precedent and held that Section 13(b) no longer allows the FTC to obtain monetary relief. The *Credit Bureau Center* opinion held that the word "injunction" in the statute allows only behavioral restrictions and not monetary remedies. The decision has severely limited, and in many cases eliminated, the FTC's ability to obtain equitable monetary relief against defendants located in Illinois, Indiana, and Wisconsin.[7]

The Seventh Circuit's decision is now persuading other courts to follow suit. Just a few weeks ago, the Third Circuit, in *FTC v. AbbVie*,[8] relied heavily on the analysis in *Credit Bureau Center* and similarly concluded that the Commission could not obtain any monetary relief under Section 13(b)—adding Pennsylvania, New Jersey, and Delaware to the list of jurisdictions in which the FTC's redress option has been largely neutered. Indeed, the court held that the defendant drug company violated the antitrust laws, but nevertheless reversed the district court's award of $448 million meant to repay overcharged consumers. The net effect of the *AbbVie* ruling is that an adjudicated violator is nonetheless free to keep substantial ill-gotten profit based on a legal interpretation of Section 13(b) that no court of appeals held prior to 2019.

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[5] Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91. As the Senate Report noted, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC Act. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress…. The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts." *Id*.

[6] *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

[7] Under Section 13(b), the agency can sue defendants located in Illinois, Indiana, or Wisconsin in any federal district court where they transact business, but such defendants can seek to transfer the case to the Seventh Circuit. If a transfer is successful, *Credit Bureau Center* would be controlling law.

[8] *FTC v. AbbVie, Inc.*, No. 18-2621 slip op. (Sept. 30, 2020).

Now the issue is pending before the Supreme Court, with oral arguments expected in January 2021.[9] Although we hope the high court agrees with us, the recent judicial trends exemplified by *Credit Bureau Center* and *AbbVie* are concerning. If the Supreme Court adopts the Seventh and Third Circuit's interpretation of Section 13(b), it would eliminate the primary tool that the FTC uses to return money to consumer victims.

The uncertainty in the law is already taxing the Commission's law enforcement resources. Defendants now routinely attempt to delay ongoing litigation for as long as possible in the hope that another circuit will reverse its precedent or that the Supreme Court rules against us this coming spring. Defendants are also refusing to engage in settlement discussions unless the Commission agrees to abandon all claims for monetary relief. Some defendants have gone as far as to initiate preemptive litigation in the Seventh Circuit (and now likely will do so in the Third Circuit) to take advantage of the fact that the Commission already is precluded from seeking monetary relief under 13(b) there. These tactics have slowed the resolution of our pending enforcement cases, required the Commission to expend more resources, and prevented staff from taking on new consumer protection work.

Overall, the judicial threats outlined above are grave and, if Congress does not act promptly, the FTC's ability to protect consumers and execute its law enforcement mission will be significantly impaired. Accordingly, we urge Congress to take quick action to amend Section 13(b) to make clear that the Commission can bring actions in federal court under Section 13(b) even if conduct is no longer ongoing or impending when the suit is filed and can obtain monetary relief, including restitution and disgorgement, if successful. Amending Section 13(b) in such a manner will restore Section 13(b) to the way it has operated for four decades.

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[9] *AMG Capital Mgmt. LLC v. FTC*, No. 19-508. *AMG* is an appeal by defendants from a 2019 Ninth Circuit ruling in which the court re-affirmed its prior precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief. The Supreme Court has consolidated *AMG* with the FTC's appeal of the adverse ruling from the Seventh Circuit in *Credit Bureau Center*.

We would be pleased to provide any technical assistance you need to ensure the FTC continues to be able to get meaningful relief for consumers.

Sincerely,

Joseph J. Simons
Chairman

Noah Joshua Phillips
Commissioner

Rohit Chopra
Commissioner

Rebecca Kelly Slaughter
Commissioner

Christine S. Wilson
Commissioner

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