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Before the
U.S. Senate Committee on Commerce, Science and Transportation

April 20, 2021

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FTC's authority not only in ongoing court cases, but also in settlement negotiations. We now face significant difficulty both prosecuting and resolving cases. As this Committee is aware, the Supreme Court in January held oral arguments for the AMG case³ that expressly challenges the FTC's authority to obtain monetary relief; we expect a decision soon.

I recognize that stakeholders have expressed concerns regarding various aspects of Section 13(b). Some are concerned about the absence of a statute of limitations; I support including one in legislative revisions to 13(b). Others are concerned about the unbounded use of 13(b) to achieve disgorgement in antitrust cases. I agree that guiding principles on when the FTC will seek disgorgement, perhaps as detailed in the FTC's now-rescinded 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, would provide appropriate guardrails. And yet others have expressed concern about the application of Section 13(b) in consumer protection cases that involve not fraud but legitimate companies selling legitimate products, albeit with deceptive claims. Congress could set forth a framework in 13(b) under which courts must evaluate the value consumers may have retained from the product or service despite the deception. This approach has support in the case law⁴ and could assuage those concerns.

v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016); FTC v. Ross, 743 F.3d 886, 890-892 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Gem Merch. Corp., 87 F.3d 466, 468-470 (11th Cir. 1996); FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571-572 (7th Cir. 1989); FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982). But the recent AMG case and others have ruled to the contrary. See

The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers. The FTC would be pleased to provide technical assistance with draft language.



The second topic I'd like to cover is federal privacy legislation. As members of this Committee know, FTC Commissioners on a bipartisan basis have urged Congress to pass federal privacy legislation for years. And the FTC is not alone in this request – consumer groups and industry groups agree on the need for federal privacy legislation.⁵

The first and best option would be for this Congress to enact privacy legislation. Congress is comprised of elected representatives empowered to represent the will of the American people. Consequently, it is this body that is uniquely situated to weigh and balance the important value judgments inherent in privacy legislation. And the FTC stands ready to assist

court has discretion in determining how to compensate consumers for the violations, was not constrained to total revenues, and could consider an award of the premium Defendants charged for the product over comparable products during the relevant period as well as Defendants' profits traced to only the offending advertisements); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 384 (D. Conn. 2009) (explaining that "[t]he formula for calculating redress for consumer injury is straightforward: "(1) calculate the gross receipts received from all consumers subjected to the contumacious acts of the defendants, (2) offset gross receipts to the extent the defendants prove that consumers either received refunds or were satisfied with their purchases, [and] (3) order the liable defendants to pay the resulting amount. . . ." (citation omitted)); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir 2004) (describing the calculation of consumer loss and explaining that "defendants might be able to show that some customers received full refunds of their payments or that others were wholly satisfied with their purchases and thus suffered no damages.")

⁵ Businesses need certainty in the form of guardrails governing information collection, use, and dissemination. Consumers need transparency regarding how their data is collected, used, and shared so they can make informed decisions about which goods and services to use. Gaps in sectoral laws like HIPAA are growing, a fact underscored by COVID-19. And the use of commercial data to police stay-at-home orders and track protestors across the political spectrum reminds us of the connection between consumer privacy and our civil liberties. For a longer discussion of these issues, see: Christine Wilson, "Covid-19 Underscores Need for Comprehensive Privacy Legislation" MLEX (May 18, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1576490/wilson_-_mlex_op-ed_5-18-20.pdf;

Christine Wilson, "Coronavirus Demands a Privacy Law," WSJ (May 13, 2020),

<https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Christine S. Wilson,

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Finally, I wish to address the many calls to overhaul antitrust enforcement, including through legislation. Here, I wish to offer a cautionary note. The calls for antitrust reform are usually premised on concerns about so-called “Big Tech.” Yet there are many threads to that concern, including consumer privacy, content moderation, and anticompetitive conduct. Some

In fact, some of these proposals undoubtedly will be discussed tomorrow at this Committee's confirmation hearing of FTC nominee Lina Khan. Make no mistake – these proposals and others threaten to wreak havoc on our broader economy by politicizing antitrust enforcement, stifling innovation and R&D, inhibiting the efficient allocation and reallocation of resources, and driving prices higher – at a time when many of our fellow Americans are still dealing with the economic fall-out from the pandemic. We need to ask ourselves what kind of incentives we want to create with our system of antitrust law – incentives to benefit consumers by investing in R&D, introducing new products, and charging low prices? Or incentives to engage in free-riding, regulatory gamesmanship, and rent-seeking? I'd vote for the first approach every day of the week.

That said, I am **not** asserting that our current approach on every issue is perfect and worthy of being carved in stone. One of the many great aspects of the FTC is its continuous focus on obtaining input from stakeholders to refine and update its policy and enforcement approaches. Our extended hearings on competition and consumer protection in the 21st century under Chairman Joseph Simons are emblematic of this characteristic. I support merger retrospectives to determine whether we are making the right calls in merger review. I support calls for greater transparency on the part of the agency, not only when we bring cases but when we decline to bring them. And Congress can facilitate efforts to update antitrust enforcement by, for example, clarifying that the same standard applies to merger challenges at both the FTC and DOJ; providing additional funding for the agencies, perhaps in part through merger filing fee adjustments; and giving the FTC authority over non-profits and common carriers.

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In closing, the FTC would welcome the opportunity to provide technical assistance to Congress on these issues. Thank you for your assistance in strengthening the FTC's ability to fulfill its mission of promoting competition and protecting consumers.

I am happy to answer any questions you may have.