

**Yesterday, the Subcommittee on Consumer Protection and Commerce, of the Committee on Energy and Commerce, held a hearing titled [“The Consumer Protection and Recovery Act: Returning Money to Defrauded Consumers.”](#) (Testimony and Member Statements available at this link)**

The hearing focused on proposed legislation, [The Consumer Protection and Recovery Act, H.R. 2668](#), that would amend the Federal Trade Commission Act in the wake of the Supreme Court’s *AMG Capital* decision to restore the FTC’s authority under Section 13(b) to go directly to federal courts and seek equitable monetary relief.

The hearing consisted of two panels. The first had Rebecca Slaughter, Acting Chairwoman of the FTC, as the only witness. The second had three witnesses: (1) Anna Laitin, Director, Financial Fairness and Legislative Strategy, Consumer Reports; (2) J. Howard Beales, Professor Emeritus of Strategic Management and Public Policy, George Washington University; and (3) Ted Mermin, Executive Director, Center for Consumer Law and Economic Justice, University of California, Berkeley School of Law.

### **Opening Statements**

Five different Representatives made opening statements.

The Chairman of the Committee on Energy & Commerce, Frank Pallone, Vice Chair and author of the bill Tony Cardenas, and Subcommittee Chairwoman Jan Schakowsky all agreed that Congress needs to take urgent action to quickly restore the FTC’s 13(b) authority and expressed support for the new legislation. Ranking member of the Subcommittee Gus Bilirakis understands the urgency but cautioned that Congress needs to take its time to get it right, and that rushing to pass a bill without hearing a sufficient amount of views from experts in the field would be a disservice to consumers. Mr. Bilirakis stated that all Republicans support restitution for victims of scams, but regulatory overreach is problematic, and he called on Democrats to work with Republicans to establish guard rails with new legislation to avoid overreach. Finally, Congressman Kelly Armstrong stated that *AMG* was the right legal decision and that more Republican-called witnesses should be heard, and called for Congress to enact real FTC reform that reflects bipartisan work by the Committee.

Overall, a large majority of Subcommittee members expressed unequivocal support for the new bill. Those who didn’t still supported some Congressional action but suggested a more cautious, bipartisan approach to prevent regulatory overreach.

### **Panel 1**

**Rebecca Slaughter** testified that *AMG* was a devastating outcome for consumers and honest businesses and that there is unanimous bipartisan support at the FTC for a restoration of 13(b) authority. She called Section 13(b) the FTC’s “best tool” for seeking

monetary relief for defrauded consumers, citing some examples including the Amazon Flex case where \$61.7 million were returned to consumers and the Volkswagen emissions case where \$9.5 billion were returned to consumers. She said absent congressional action, no other tools will be as effective as 13(b) in returning money to consumers.

Ms. Slaughter testified that the FTC currently has 24 pending cases under Section 13(b), with \$2.4 billion at stake. She said without 13(b) authority the FTC has long had, that money will not be on the table through the federal court path, the Commission will not be able to provide relief to consumers, and it will lose its ability to incentivize those companies to settle. She estimated that in the last five years, the FTC returned \$11.2 billion to consumers using Section 13(b), and there will likely be more money in the next five years that the FTC will not be able to return to consumers without its traditional 13(b) authority. She is a proponent of the new bill and believes it effectively restores the Commission's 13(b) authority to what it was prior to the *AMG* decision.

In his questioning, Rep. Gus Bilirakis expressed a desire to receive technical assistance from the Commission on the proposed bill that reflects the wishes of *all* the FTC Commissioners. He also expressed concerns that the new bill's ten-year statute of limitations might cause the FTC to go after past bad actors over current bad actors. Ms. Slaughter testified that the Commission's priority is and always has been current bad acts and preventing future bad acts.

She further testified that she disagrees with the opinion that Section 19 provides the FTC with enough authority to seek monetary relief. She stated it could take 7-12 years through Section 19 to get money, and the ability to find the effected consumers at that point is very limited. She maintained that 13(b) is much more efficient and effective for protecting consumers.

Rep. Neal Dunn and Rep. Greg Pence both stated there must be "guard rails" on new 13(b) legislation to protect against unintended consequences. Mr. Pence stated the conversation would be better suited for a broader discussion including Privacy Protection. He is concerned that the new legislation creates more centralized rule-making power for the FTC. Ms. Slaughter responded that input from other Commissioners, bureaus, and subject matter experts will always be an important part of the Commission's work regarding rule-making and in particular cases.

Rep. Kelly Armstrong was particularly concerned with the issue of retroactivity. He stated it's Congress's duty to address the retroactivity question or risk facing continued uncertainty and litigation. He said Congress must adequately address it and should not leave it up to the courts, and the bill as it is now does not adequately address it.

Rep. Robin Kelly was particularly concerned with protecting senior citizens, and Rep. Kathleen Rice was particularly concerned with protecting veterans. Ms. Slaughter

testified that without this legislation, the FTC would be substantially worse off in helping seniors, veterans, and other vulnerable populations who have been scammed.

Ms. Slaughter's overall message was that it is critically important that Congress quickly passes legislation to give the FTC the tools it needs to effectively disgorge ill-gotten gains and return money to consumers. She emphasized that the FTC's biggest concern is returning money to consumers, and it needs its 13(b) authority to do that. She also emphasized that small businesses are often the victims of unfair and deceptive practices, and the FTC needs 13(b) authority to protect small businesses just as much as consumers.

## **Panel 2**

**Anna Laitin** was a strong proponent of the new bill. She testified that the FTC is underfunded and under-resourced, and that scammers will now feel empowered unless Congress immediately amends the FTC Act to restore 13(b) authority. She focused on the injustice of allowing fraudsters and scammers to keep ill-gotten gains, and argued the FTC needs to have authority to prevent that injustice and return money to consumers. She testified that the Commission's options for getting money back to consumers, without 13(b) authority to seek equitable monetary relief, are extremely limited if not existent.

**Rep. Kathy Castor** had particular concerns regarding big tech. Ms. Laitin testified that Section 13(b) has been an important tool used by the FTC in cases against tech companies, and that seeking disgorgement strengthens the FTC's hand. Further, not having that ability weakens the FTC's negotiating position. She also stated that the ability to get civil penalties and set rules in a meaningful way is incredibly important.

**J. Howard Beales was critical of the bill and emphasized two questions that Congress should explicitly answer. First, when can the Commission get monetary relief? Second, what procedures should it use to do so? He argued that Congress should be specific in answering these questions and not leave it up for the courts to decide. He also advocated for Congress to set the standard for when monetary relief is appropriate, rather than leaving it to the discretion of the FTC.**

**Rep. Gus Bilirakis expressed concerns with the new bill regarding due process.** Mr. Beales stated his opinion that the standards contained in Section 19 of the FTC Act maintain due process, and that he would amend the bill by inserting language that cites the standard laid out in Section 19. He also addressed Ms. Slaughter's testimony where she referenced large cases like Amazon Flex and Volkswagen. He said those cases with significant monetary relief were all consent agreements, and in consent agreements Section 19 works just fine. The only difference is you're citing different statutory authority. He said the middle ground is to use Section 13 against fraud, but not against legitimate companies where the illegality of practices is not well-established. Essentially,

his recommendation was for legislation with a Section 13 process but a Section 19 standard for getting money back.

In response to Mr. Beales distinction between fraud cases and other types of unfair-practice cases, Ms. Laitin testified that we should let courts figure out and decide over time where the line is between those cases rather than put it in statute, and we should similarly let courts figure out over time the line where restitution is available and where it is not.

Ted Mermin was also a strong proponent of the bill. He thinks the new bill is an urgent first step in ensuring the FTC has the tools it needs to handle the current “emergency” in the wake of the *AMG* decision, but also advocates for greater funding and resourcing for the FTC in general to do more to protect consumers. He stated that congressional inaction or delay will mean millions of unrecovered dollars to defrauded Americans. Mr. Mermin also called for flexibility in the bill for getting money back, and that flexibilities must be built into unfair-practice laws in general. He stated that not having 13(b) authority undermines everything the FTC is trying to do to protect consumers. He also stated that Section 19 remedies are inadequate.

Rep. Jerry McNerney was particular concerned with his low-income constituents. Mr. Mermin testified that the FTC needs Section 13(b) authority to return ill-gotten profits to consumers especially because low-income communities who lack resources to hire attorneys rely much more on the public sector to help them when they have been wronged. He stated that the pandemic left low-income consumers even more vulnerable, and we need a robust FTC to protect those consumers.

All three witnesses agreed that the current bill provides sufficient authority to enable the FTC to recover illegal profits and return them to consumers.

### **Conclusion**

Most Subcommittee members support the new bill and support swift legislative action. Others are more concerned with taking the time to listen to more experts and ensuring Congress reaches the best possible outcome. Overall, there seems to be a willingness on both sides for bipartisan efforts to pass legislation in response to the Supreme Court’s *AMG* decision.

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