

**PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION:  
STRENGTHENING THE FEDERAL TRADE COMMISSION'S AUTHORITY TO  
PROTECT CONSUMERS**

**Before the  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**

**UNITED STATES SENATE**

**WASHINGTON, DC**

**APRIL 20, 2021**

## I. INTRODUCTION

Chair Cantwell, Ranking Member Wicker, and Members of the Committee, we are pleased to appear before you today.<sup>1</sup> Despite the unprecedented challenges of the past year, the Federal Trade Commission (Commission or FTC) has endeavored to protect consumers and competition. A key part of this work has been combatting COVID-related harms. The Commission staff recently released a report describing the major challenges consumers face from the pandemic and the Commission's efforts to help: using reports from consumers to identify and respond to emerging unlawful practices in real time; filing more than a dozen law enforcement cases; directing the removal of deceptive claims related to COVID-19 made by more than 350 companies; and educating consumers and businesses through more than 100 alerts on COVID-related topics.

The civil penalty authority in the newly-enacted COVID-19 Consumer Protection Act<sup>2</sup> and additional funding the Commission recently received from the American Rescue Plan will enable us to intensify our efforts to protect consumers from unscrupulous actors that seek to exploit the pandemic and its economic fallout. The Commission just brought its first action seeking monetary penalties under its new authority, targeting deceptive COVID-19 marketing of vitamin D and zinc products.<sup>3</sup>

In this testimony, we provide a high-level summary of the Commission's efforts and highlight the pressing need, in light of legal challenges, for Congress to affirm the FTC's authority to return money to consumers using Section 13(b) of the Federal Trade Commission

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<sup>1</sup> This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions reflect the views of individual Commissioners, and do not necessarily reflect the views of the Commission or any other Commissioner.

<sup>2</sup> Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

<sup>3</sup> FTC Press Release, *In First Action Under COVID-19 Consumer Protection Act, FTC Seeks Monetary Penalties for Deceptive Marketing of Purported Coronavirus Treatments*, <https://www.ftc.gov/news-events/press-releases/2021/04/first-action-under-covid-19-consumer-protection-act-ftc-seeks> (April 15, 2021).

Act.

## II. COVID-19 CONSUMER PROTECTION EFFORTS

The Commission has worked diligently to identify and address the effects of the COVID-19 pandemic on American consumers and businesses. The Commission's response to COVID-19 has included law enforcement, consumer education and outreach, and data collection, each of which is discussed in more detail below.

### a. Law Enforcement

Most recently, the FTC deployed its new authority under the COVID-19 Consumer Protection Act to charge that a chiropractor and his company deceptively marketed products containing vitamin D and zinc as scientifically proven to treat or prevent COVID-19.<sup>4</sup> This action is merely the latest in a long line of enforcement efforts that began early in the pandemic. The FTC issued its first warnings to consumers about COVID-19 related scams in February 2020, even before the declaration of a national emergency.<sup>5</sup> As schemes proliferated in response to demand for scarce goods, to peddle treatments and cures, and to exploit consumers' and small businesses' financial distress, the FTC moved quickly to challenge deceptive claims. The agency filed its first action<sup>6</sup> just one month after the President declared a national emergency concerning the COVID-19 outbreak on March 13, 2020.<sup>7</sup> Since then, the FTC has sued entities for allegedly

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<sup>4</sup> See *supra* n. 3.

<sup>5</sup> *Coronavirus: Scammers follow the headlines*, <https://www.consumer.ftc.gov/blog/2020/02/coronavirus-scammers-follow-headlines> (Feb. 10, 2020).

<sup>6</sup> Complaint, *FTC v. Ponte Investments, LLC*, Case No. 1:20-cv-00177 (D.R.I.), available at <https://www.ftc.gov/system/files/documents/cases/sbacomplaint.pdf>. The FTC alleged that the company falsely claimed an affiliation with the U.S. Small Business Administration (SBA) and marketed themselves to small businesses as an approved lender under SBA's Paycheck Protection Program (PPP).

<sup>7</sup> Proclamation 9994 of March 13, 2020, available at <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf>.

breaking promises to quickly ship personal protective equipment (PPE) and cleaning products,<sup>8</sup> tricking consumers into paying for sanitizing products that were never delivered,<sup>9</sup> falsely claiming that their products could treat and/or prevent COVID-19,<sup>10</sup> and making deceptive claims regarding stimulus benefits.<sup>11</sup> In addition, to protect consumers attempting to replace or supplement income during the pandemic, the Commission—along with 19 federal, state, and local partners—led a nationwide crackdown against scams making false promises of income and financial independence.<sup>12</sup>

Starting in March 2020, the FTC also launched a campaign to challenge companies’ deceptive COVID-19 claims—directing the companies to cure violations and pursuing enforcement actions if problematic claims were not quickly removed. To date, the FTC has issued more than 350 warning letters, many in conjunction with the Food and Drug Administration (FDA), to sellers and marketers that claimed that their products could treat or

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<sup>8</sup> Complaint, *FTC v. SuperGoodDeals.com, Inc.*, Case No. 20-cv-3027 (E.D.N.Y.), available at [https://www.ftc.gov/system/files/documents/cases/202\\_3135\\_supergooddeals\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/202_3135_supergooddeals_-_complaint.pdf); Complaint, *FTC v. QYK Brands LLC*, Case No. 8:20-cv-01431-JLS-KES (C.D. Cal.), available at [https://www.ftc.gov/system/files/documents/cases/202\\_3147\\_qyk\\_brands\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/202_3147_qyk_brands_-_complaint.pdf); Complaint, *FTC v. Am. Screening, LLC*, Case No. 4:20-cv-1021 (E.D. Mo.), available at [https://www.ftc.gov/system/files/documents/cases/202\\_3158\\_american\\_screening\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/202_3158_american_screening_-_complaint.pdf); Complaint, *FTC v. Zaappaaz LLC*, Case No. 4:20-cv-02717 (S.D. Tex.), available at [https://www.ftc.gov/system/files/documents/cases/202\\_3136\\_zaappaaz\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/202_3136_zaappaaz_-_complaint.pdf).

<sup>9</sup> Complaint, *FTC v. One or More Unknown Parties Deceiving Consumers Into Making Purchases Through: www.cleanyos.com*, Case No. 5:20-cv-02494 (N.D. Ohio), available at [https://www.ftc.gov/system/files/documents/cases/complaint\\_w-a\\_filed.pdf](https://www.ftc.gov/system/files/documents/cases/complaint_w-a_filed.pdf).

<sup>10</sup> Complaint, *FTC v. Golden Sunrise Nutraceutical, Inc.*, Case No. 1:20-cv-00540-DAD-SKO (E.D. Cal.), available at [https://www.ftc.gov/system/files/documents/cases/202\\_3146\\_golden\\_sunrise\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/202_3146_golden_sunrise_-_complaint.pdf); Complaint, *FTC v. Ching*, Case No. 2:20-cv-03775 (C.D. Cal.), available at [https://www.ftc.gov/system/files/documents/cases/whole\\_leaf\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/whole_leaf_complaint.pdf); Complaint, *In re Ching*, Docket No. 9394 (FTC), available at [https://www.ftc.gov/system/files/documents/cases/d09394\\_administrative\\_part\\_iii\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/d09394_administrative_part_iii_complaint.pdf).

<sup>11</sup> Complaint, *In re Traffic Jam Events, LLC*, Docket No. 2:20-cv-1740,9395 (FTC), available at [https://www.ftc.gov/system/files/documents/cases/traffic\\_jam\\_events\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/traffic_jam_events_complaint.pdf) [https://www.ftc.gov/system/files/documents/cases/d9395\\_traffic\\_jam\\_complaint\\_final.pdf](https://www.ftc.gov/system/files/documents/cases/d9395_traffic_jam_complaint_final.pdf).

<sup>12</sup> FTC Press Release, *As Scammers Leverage Pandemic Fears, FTC and Law Enforcement Partners Crack Down on Deceptive Income Schemes Nationwide*, <https://www.ftc.gov/news-events/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners> (Dec. 14, 2020).

prevent COVID-19.<sup>13</sup> The Commission also issued warning letters with the Small Business Administration regarding small business relief<sup>14</sup> and joint letters with the Federal Communications Commission (FCC) to Voice Over Internet Protocol service providers and others “assisting and facilitating” illegal telemarketing calls, including calls to market products such as fraudulent home test kits.<sup>15</sup> The Commission has monitored responses to these warning letters closely, and has been pleased to see that in the overwhelming majority of cases, letter recipients removed problematic claims quickly. The Commission is determined to pursue swift enforcement action against noncompliant warning letter recipients.

In light of the eviction crisis caused by the pandemic, the Commission has partnered with fellow enforcers at the Consumer Financial Protection Bureau (CFPB) to focus on ensuring renters are not subjected to unlawful practices.<sup>16</sup> The Commission also will continue its efforts to ensure that tenant screening companies comply with the Fair Credit Reporting Act, so that consumers who have gone or will go through an eviction are not further stigmatized by incomplete or inaccurate information as they seek new housing.<sup>17</sup> The Commission is also

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<sup>13</sup> Copies of all of the FTC’s COVID-19 related warning letters are available here: <https://www.ftc.gov/coronavirus/enforcement/warning-letters>.

<sup>14</sup> FTC Press Release, *FTC and SBA Warn Operator of SBA.com and Lead Generator Lendio to Stop Potentially Misleading Coronavirus Relief Loan Marketing*, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sba-warn-operator-sbacom-lead-generator-lendio-stop> (May 18, 2020); Press Release, *FTC and SBA Warn Six Companies to Stop Potentially Misleading Marketing Aimed at Small Businesses Seeking Coronavirus Relief Loans* <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-sba-warn-six-companies-stop-potentially-misleading-marketing> (June 24, 2020).

<sup>15</sup> FTC Press Release, *FTC and FCC Send Joint Letters to VoIP Service Providers Warning against ‘Routing and Transmitting’ Illegal Coronavirus-related Robocalls*, <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-fcc-send-joint-letters-voip-service-providers-warning-against> (Apr. 3, 2020); FTC Press Release, *FTC and FCC Send Joint Letters to Additional VoIP Providers Warning against ‘Routing and Transmitting’ Illegal Coronavirus-related Robocalls*, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-fcc-send-joint-letters-additional-voip-providers-warning> (May 20, 2020).

<sup>16</sup> Press Release, *FACT SHEET: The Biden-Harris Administration’s Multi-Agency Effort to Support Renters and Landlords*, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/> (Mar. 29, 2021).

<sup>17</sup> An example of the FTC’s efforts to protect tenants even before the pandemic is our case against AppFolio, in which the defendant agreed to settle charges that it failed to follow reasonable procedures to ensure the accuracy of criminal and eviction records in tenant screening reports and reported obsolete information. *See* Complaint, *United*

monitoring and investigating conduct by multistate landlords that may violate the FTC Act or other laws if they evict tenants in violation of national, state, or local eviction moratoriums, as Acting Chairwoman Slaughter and Acting CFPB Director Uejio recently warned in a joint statement.<sup>18</sup>

The Commission will remain vigilant in order to protect the public from harms that stem directly and indirectly from the COVID-19 pandemic. The FTC is committed to tackling emerging threats, adjusting our strategies wherever necessary, and working in close coordination with our partners.

#### **b. Consumer Education and Outreach**

The Commission has buttressed its law enforcement actions with consumer and business education. Since the beginning of the pandemic, the FTC has worked aggressively to dispel misinformation and confusion about the pandemic and related issues that have fueled COVID-related scams. The Commission's education campaign has several facets: consumer and business alerts; a multi-media campaign; substantive business guidance; and outreach with partners.

Early in the pandemic, the Commission began issuing alerts warning consumers and the business community of COVID-related frauds. To date, the FTC has issued more than 100 consumer and business alerts on a wide range of COVID-related topics, including economic impact payments, health claims, online shopping, privacy in a virtual environment, contact tracing, government imposter scams, job scams, and misinformation.<sup>19</sup> The FTC sends its alerts to more than 367,000 email subscribers, which include consumers, businesses, partners, and the

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*States v. AppFolio, Inc.*, Case No. 1:20-cv-03563 (D.D.C. Dec. 8, 2020), available at

[https://www.ftc.gov/system/files/documents/cases/ecf\\_1\\_-\\_us\\_v\\_appfolio\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf).

<sup>18</sup> Joint Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter and CFPB Acting Director Dave Uejio (Mar. 29, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/joint-statement-ftc-acting-chairwoman-rebecca-kelly-slaughter>.

<sup>19</sup> All of the FTC's business and consumer alerts are available at <http://ftc.gov/coronavirus>.

media. In turn, many of these subscribers share the information with their communities, greatly expanding the reach of the agency’s message. The FTC has developed a multimedia campaign with a dedicated website ([ftc.gov/coronavirus](https://ftc.gov/coronavirus)) that contains a library of materials for consumers and businesses in several different languages.

As the pandemic required many work, school, recreational, and social activities to transition from in-person to online and virtual platforms, the shift to digital life presented new opportunities for bad actors to exploit. The Commission worked to prevent this exploitation from occurring in the first instance. Accordingly, in April 2020, the Commission published guidance for education technology companies and schools regarding their duties to protect children’s privacy and personal data—including warnings of the parental consent requirements for data collection imposed by the Children’s Online Privacy Protection Act (COPPA).<sup>20</sup> The FTC also took enforcement actions to stop digital harms.<sup>21</sup>

Finally, FTC staff has engaged in national and local outreach with partners to reach a variety of audiences, including older consumers, ethnic and community media, housing organizations, re-entry groups, library patrons, and the military community. The staff has used webinars, tele-town halls, Twitter chats, Facebook Live events, and interviews with local and national media to reach its audiences. During the pandemic, FTC staff has participated in

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<sup>20</sup> *COPPA Guidance for Ed Tech Companies and Schools during the Coronavirus*, <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/coppa-guidance-ed-tech-companies-schools-during-coronavirus> (Apr. 9, 2020).

<sup>21</sup> Although the conduct in these matters occurred before the COVID-19 outbreak, the relief in these orders seeks to protect consumers from digital harms that have been exacerbated by the pandemic. *See* Complaint, *United States v. HyberBeard, Inc.*, Case No. 3:20-cv-03683 (N.D. Cal.) (enforcement of the COPPA Rule against kids app developer), available at [https://www.ftc.gov/system/files/documents/cases/192\\_3109\\_hyperbeard\\_-\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/192_3109_hyperbeard_-_complaint.pdf); Complaint, *In re Zoom Video Comms., Inc.*, Docket No. C-4731 (FTC) (administrative action challenging claims that gave consumers a false sense of security about how the company protected their information), available at [https://www.ftc.gov/system/files/documents/cases/1923167zoomcomplaint\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/1923167zoomcomplaint_0.pdf); Complaint, *In re Flo Health, Inc.*, File No. 1923133 (FTC) (charges a developer of a period and fertility-tracking app with allegedly sharing consumer health information with outside data analytics providers after promising that such information would be kept private, available at [https://www.ftc.gov/system/files/documents/cases/flo\\_health\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf)).

hundreds of virtual webinars, presentations, and interviews—in English, Spanish, and Mandarin. The FTC also has used new methods to reach people in economically and geographically diverse communities who are targeted by COVID-19 scam artists. For example, the FTC conducted a national radio media tour, mailed post cards to communities with low broadband access, and delivered letters to community health professionals in 5,000 rural and urban health clinics to help people avoid COVID-related fraud.

As the pandemic has deepened, some new consumer financial issues have arisen and others have been exacerbated. To ensure we are responding appropriately to the issues consumers are facing, the FTC coordinated a series of virtual listen-and-learn sessions across the country. Participants have included representatives from legal services, social services, elder justice centers, departments of aging, housing counselors, Catholic Charities, the Better Business Bureau, and the offices of State Attorneys General. Based on input from stakeholders, the FTC is enhancing and expanding its COVID-19 financial recovery and resiliency campaign, the centerpiece of which will be a web-based toolkit available in multiple languages.

### **c. Data Collection**

The FTC's Consumer Sentinel Network collects millions of reports from the public about fraud, identity theft, and other consumer problems, and makes them available to thousands of law enforcement users across the country. In the weeks following the first known cases of COVID-19 in the U.S., the FTC developed systems to track and alert the public to shifts in Sentinel reporting. On [ftc.gov/exploredata](https://ftc.gov/exploredata), the FTC launched public dashboards showing aggregate Sentinel data on reports associated with COVID-19 by age, type of fraud, and geographic location, with figures that are updated daily. Since January 2020 and as of April 7,

2021, the FTC has received more than 436,000 such reports, reflecting \$399 million in fraud losses.<sup>22</sup>

The FTC's monitoring and analyses of Sentinel data reveal increased fraud activity in 2020. Specifically, the number of fraud, identity theft, and other reports to Sentinel (excluding Do Not Call) increased more than 45% over 2019 numbers, and reported losses from fraud grew from more than \$1.8 billion in 2019 to \$3.3 billion in 2020.<sup>23</sup> Being able to use Sentinel data to spot trends has helped the FTC respond to emerging scams in real time—from bringing cases to halt fraudulent activity, to targeting alerts warning of the newest fraud, to addressing specific threats, such as the proliferation of identity theft related to unemployment insurance benefits.<sup>24</sup>

Ensuring that the experiences of all consumers are represented in Sentinel is critically important to the agency's work. To expand accessibility, the FTC launched a new modernized reporting website, ReportFraud.ftc.gov, in October 2020. The updated site includes a COVID-19 banner, providing an easy way for consumers to report COVID-related issues. And, this month, the FTC launched the Community Advocate Center, which is part of the agency's ongoing work to collaborate with legal services organizations to learn about consumer protection needs and

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<sup>22</sup> The figures reflect reports in Sentinel that specifically mention words related to the pandemic, such as COVID, stimulus, N95 and related terms. To provide the most relevant results, some subcategories are excluded. For more information, visit <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map>.

<sup>23</sup> Some of the increase in complaints for 2020 is due to a new large data contributor, namely the FBI's Internet Crime Complaint Center, which added about 200,000 complaints in 2020. In addition, the FTC launched a re-designed website to capture consumer reports more easily at the end of October 2020. Nevertheless, the rise in reports is highly significant. From FTC's websites and call center alone, the surge in reports was about 970,000 in 2020, and many Sentinel data contributors also experienced an increase in complaint volume in 2020.

<sup>24</sup> Identity thieves targeted unemployment insurance benefits in record numbers in 2020. Of the identity theft reports received in 2020, over 400,000 came from people who said their information was misused to apply for a government benefit, and the overwhelming majority of these related to unemployment insurance. This represents a staggering increase of nearly 3000% from 2019. These reports were overwhelmingly about fraudulently obtained unemployment benefits claims, a problem that has proliferated during the pandemic. Working in cooperation with the U.S. Department of Justice Unemployment Insurance Fraud Task Force, the FTC launched [www.IdentityTheft.gov/unemploymentinsurance](http://www.IdentityTheft.gov/unemploymentinsurance) to provide information to the public on where to report and how consumers can protect their credit.

problems affecting the lower-income communities they serve. The Center provides a new way for organizations that provide free and low-cost legal services to report fraud and other illegal business practices directly to the FTC on behalf of their clients.

### **III. LEGISLATION IS NEEDED TO ENSURE EQUITABLE MONETARY RELIEF UNDER SECTION 13(b) OF THE FTC ACT**

Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act 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, among many others.<sup>25</sup> More recently, in light of the pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams.<sup>26</sup> Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including \$11.2 billion in refunds to consumers during just the past five years.<sup>27</sup> Section 13(b) is a critical tool in support of our enforcement missions, but its effectiveness is currently imperiled, and this uncertainty is hurting our ongoing enforcement efforts.

Section 13(b) of the FTC Act is the agency’s primary and most effective way of returning money to consumers 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

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<sup>25</sup> 15 U.S.C. § 53(b).

<sup>26</sup> See, e.g., FTC Press Release, *FTC Sues California Marketer of \$23,000 COVID-19 “Treatment” Plan*, <https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan> (July 31, 2020).

<sup>27</sup> See [https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds\\_15797958402020/RefundsbyCase](https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase).

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 enable the FTC to obtain monetary remedies when it expanded the venues available for FTC enforcement cases, strengthening the Commission’s ability to bring redress cases.<sup>28</sup>

Recent judicial rulings, however, indicate a dramatic shift in how courts are interpreting and applying Section 13(b) in FTC cases. For example, in 2019, the Seventh Circuit, in *FTC v. Credit Bureau Center, LLC*,<sup>29</sup> 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. Last fall, the Third Circuit, in *FTC v. AbbVie*,<sup>30</sup> relying heavily on the analysis in *Credit Bureau Center*, similarly concluded that the Commission could not obtain any monetary relief under Section 13(b). In *AbbVie*, for example, the court held that the defendant drug company violated the antitrust laws by engaging in sham litigation to keep out generic competition, but nonetheless 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

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<sup>28</sup> Federal Trade Commission Act Amendments of 1994, S. Rep. No. 103-130, at 15-16, *as reprinted in* 1994 U.S.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.*

<sup>29</sup> *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

<sup>30</sup> *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020).

nonetheless free to keep substantial ill-gotten profits extracted from consumers, based on a legal interpretation of Section 13(b) that no court of appeals had adopted prior to 2019.

This issue is now pending before the U.S. Supreme Court, and the agency presented oral argument before the Court in January 2021.<sup>31</sup> Although the Commission hopes to obtain a favorable ruling, the recent judicial trends exemplified by *Credit Bureau Center* and *AbbVie* are concerning. If the Supreme Court were to adopt the Seventh and Third Circuit's interpretation of Section 13(b), it would eliminate the primary tool that the FTC uses today to return money to consumer victims.

The uncertainty in the law is taxing the Commission's law enforcement resources. Defendants now routinely attempt to delay ongoing litigation for as long as possible in the hope that the Supreme Court will allow them to escape liability for any monetary relief, and several matters have been stayed pending the forthcoming Supreme Court decision.<sup>32</sup> Defendants are also refusing to engage in settlement discussions unless the Commission agrees to abandon all claims for monetary relief. One defendant has gone as far as to initiate preemptive litigation in the Seventh Circuit to take advantage of the fact that the Commission already is precluded from seeking monetary relief under Section 13(b) there.<sup>33</sup> These developments have slowed the resolution of our pending enforcement cases, requiring the Commission to expend more resources, and preventing staff from taking on new work.

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<sup>31</sup> *AMG Capital Mgmt. LLC v. FTC*, No. 19-508. *AMG* is an appeal by defendants from a 2018 Ninth Circuit ruling in which the court re-affirmed its prior precedent interpreting Section 13(b) to allow the FTC to obtain monetary relief. *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

<sup>32</sup> See, e.g., *FTC v. Cardiff*, No. 5-18-CV-02104, Dkt. # 511 (C.D. Cal. Oct. 9, 2020) (staying ruling on monetary relief pending disposition of *AMG*); *FTC v. Match Group Inc.*, No. 3-19-CV-02281, Dkt. # 54 (N.D. Tex. Oct. 9, 2020); *FTC v. Lending Club Corp.*, No. 18-CV-02454, 2020 WL 4898136 (C.D. Cal. Aug. 20, 2020).

<sup>33</sup> See *Nerium Int'l, LLC v. FTC*, No. 1:19-CV-7189 (N.D. Ill. filed Nov. 1, 2019) (motion to dismiss granted Aug. 31, 2020).

In addition, two other recent Third Circuit decisions reinterpreting Section 13(b) jeopardize the FTC's ability to enjoin illegal conduct in federal court. In *FTC v. Shire ViroPharma*, a case involving a drug company's alleged abuse of FDA's citizen petition process to delay generic competition, 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.<sup>34</sup> That decision unnecessarily limits the Commission's ability to obtain monetary relief for consumers who have been harmed by unlawful conduct that occurred entirely in the past. And, in the Third Circuit's decision in *FTC v. AbbVie*, the court cited *Shire ViroPharma* in dicta while agreeing, incorrectly, that the FTC cannot sue under Section 13(b) unless conduct is imminent or ongoing.<sup>35</sup> Notably, in its motion to dismiss the Commission's antitrust complaint, Facebook has cited these decisions and argued that Section 13(b) bars the federal court suit.<sup>36</sup>

These decisions hamper the Commission's longstanding ability to protect consumers by enjoining defendants from resuming their unlawful activities in cases where the conduct has stopped but there is a reasonable likelihood that the defendants will resume their unlawful activities in the future. These decisions also limit the FTC's ability to settle cases efficiently. Targets of FTC investigations now routinely argue that they are immune from suit in federal court 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.

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

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<sup>34</sup> *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

<sup>35</sup> *AbbVie*, 976 F.3d at 376.

<sup>36</sup> Memorandum in Support of Facebook, Inc.'s Motion to Dismiss FTC's Complaint, *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590-JEB (D.D.C.).

be significantly impaired.

#### **IV. CONCLUSION**

Throughout the past year, the Commission has worked tirelessly to stop bad actors from exploiting the pandemic at the public's expense. But the Commission's work is far from over. COVID-related scams are likely to persist as the country continues to grapple with this pandemic. Combatting these scams will remain a top priority for the Commission, and we will continue to use every tool we have to stop this predatory behavior, including seeking civil penalties under the newly enacted COVID-19 Consumer Protection Act, where appropriate.<sup>37</sup> We also request that Congress act to clarify Section 13(b) of the FTC Act and preserve the FTC's ability to enjoin illegal conduct and restore to consumers money they have lost. A legislative solution that addresses the threat to the FTC's authority to obtain redress for consumers would enhance our efforts to protect consumers from COVID-related harms.

We look forward to continuing to work with the Committee and Congress, and we would be happy to answer your questions.

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<sup>37</sup> Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).