May 26, 2021

TECH FREEDOM

The Honorable Maria Cantwell
Chair, Committee on Commerce, Science, & Transportation
United States Senate
Hart Senate Office Building 420 A
Washington, D.C. 20510

The Honorable Roger Wicker
Ranking Member, Committee on Commerce, Science, & Transportation
United States Senate
Dirksen Senate Office Building 512
Washington, D.C. 20510

Re: Reform of Section 13(b) of the FTC Act

Dear Senators,

As you know, on April 22 the Supreme Court ruled unanimously, in *AMG Capital Management v. FTC*, that the Federal Trade Commission may not use the words "permanent injunction," in Section 13(b) of the FTC Act, to obtain money.[1] The Court did not rule, as Acting Chairwoman Slaughter asserted the day the decision came down, "in favor of scam artists and dishonest corporations."[2] Quite the contrary. Indeed, as should come as no surprise, given the Justices' unanimity, the Court simply reviewed the FTC Act's text and structure, and then applied the law as written. At the center of the Court's analysis was a straightforward affirmation of a principle that would be easily understood by any first-year law student: "An 'injunction' is not . . . an award of equitable monetary relief."[3]

Acting Chairwoman Slaughter's complaint about *AMG Capital* is not, at bottom, that it deprives the FTC of the ability to recoup ill-gotten gains. The opinion does no such thing: the FTC can still obtain money from wrongdoers under Section 5 or Section 19. The Acting

[1] *AMG Cap. Mgmt, LLC v. FTC*, No. 19-508 (April 22, 2021).

[2] Federal Trade Commission, *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC*, https://bit.ly/3w4LpXw (April 22, 2021).

[3] *AMG Capital*, No. 19-508, slip op. at 6.

Chairwoman's objection, rather, is simply that the Court's decision makes it *too hard* for the FTC obtain money, because Sections 5 and 19 contain various procedural safeguards for defendants that are absent from Section 13(b). Yet as the Justices understood, the lower courts had adopted an expansive (and counterintuitive) reading of Section 13(b) *at the FTC's behest*.[4] If the FTC now laments the loss of a procedural shortcut—the loss, that is, of a judge-created evasion of certain congressionally granted rights for defendants—it has only itself to blame.

"If the Commission believes that [its] authority" under Sections 5 and 19 is "too cumbersome or otherwise inadequate," the Court observed, "it is, of course, free to ask Congress to grant it further remedial authority."[5] The Commission does, and it has. There is broad agreement, moreover, that Congress should act, and that its action should in some way enable the FTC to go directly to court to obtain monetary relief.[6] We are aware of no politician, interest group, or other stakeholder who opposes using this opportunity to create *efficiency*, by enabling the FTC to rely less on its administrative mechanisms, and more on the courts, when it is pursuing genuine fraudsters.

The problem, however—and the reason we write this letter—is that the FTC is now urging you to codify not only *procedural efficiency*, but also the *exact evasion of defendants' rights* that the Commission had extracted from the lower courts prior to *AMG Capital*. The FTC convinced the lower courts to adopt a purely atextual reading of Section 13(b) so that the agency could head straight to court to obtain money awards. This shortcut *also* lowered the standard of proof the FTC had to meet, in order to obtain such awards. The FTC is now asking you to cement that windfall into law (thereby rewarding the FTC for its campaign to flout the prior statutory scheme). You should not do so.

At present, the FTC's most direct path to a money award is through Section 19, which empowers the FTC to conduct an administrative adjudication, obtain a cease-and-desist order there, and *then* prove in court that a reasonable person would know the defendant's conduct was "dishonest or fraudulent."[7] Again, no one objects to dropping the administrative proceeding, and letting the FTC proceed straight to court. We certainly want the Commission to be able to get money back for consumers from "scam artists and dishonest corporations"

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[4] *Id.*, slip op. at 4-5.

[5] *Id.*, slip op. 14.

[6] See, e.g., Letter from Representatives Cathy McMorris Rodgers & Gus Bilirakis to Attorney General Merrick Garland, https://bit.ly/2T10RWv (May 17, 2021) ("[W]e endorse[] the spirit of H.R. 2668—the FTC should be able to seek monetary damages, in addition to equitable remedies, in cases of 'dishonest or fraudulent conduct.' However, we are concerned that H.R. 2668 goes much further and does not include necessary safeguards that ensure due process.").

[7] 15 U.S.C. § 57b(a).

expeditiously. The problem is that the FTC wants not only to get to go straight to court, but also to get money there *without* having to clear the "dishonest or fraudulent" bar. It wants instead to be able to recover monetary relief whenever it meets the lower "unfair or deceptive" standard in Section 5.

But Congress wrote the dishonest-or-fraudulent standard into Section 19 for a reason. The lower unfair-or-deceptive standard is "amorphous."[8] It is "counterbalance[d]," therefore, by a "detailed framework" that ensures a defendant always has "fair notice"—that is, fair notice of what *specific* conduct *counts* as "unfair or deceptive"—before being ordered to pay money.[9] One element of this framework enables the FTC to obtain money in order to enforce a cease-and-desist order.[10] Another enables the FTC to obtain money from anyone who violates a cease-and-desist order with "actual knowledge" that they are doing so.[11] Yet another enables the FTC to obtain money if it is enforcing a previously issued rule that "defines with specificity" what conduct is prohibited.[12] And finally, Section 19 enables the FTC to obtain money by obtaining a cease-and-desist order and then meeting the dishonest-or-fraudulent standard.

Note well: of these many tools Congress gave the FTC, *not one* enables the FTC to obtain money simply by meeting the unfair-or-deceptive standard, without doing *something* more to protect the rights of defendants. There is currently *no such route* to a monetary recovery. A law that created such a route would be breaking new ground.

Our understanding is that, in seeking new statutory power to obtain money under the unfair-or-deceptive standard, the FTC is arguing that the dishonest-or-fraudulent standard is untested and, in any event, too hard to meet. As to the first point: it is untested only because the FTC has avoided testing it, opting instead to convince the courts to expand Section 13(b).

As to the second point: the burden should be on the FTC—the party seeking a *new* power—to identify cases in which (1) it can *now* obtain money, (2) it *should* be entitled to obtain money, and (3) it *won't* be able to obtain money under the dishonest-or-fraudulent standard. For out part, we see no case that checks all three boxes. On the contrary, the main thing we see are cases that fit (1) and (2) but not (3). We see cases, in other words, where the consumer fraud is clear, and in which the FTC both should *and can readily* obtained money under the dishonest-or-fraudulent standard. For examples, see the cases in Appendix A.

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[8] *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 774 (7th Cir. 2019).
[9] *Id*.
[10] 15 U.S.C. § 45(*l*).
[11] *Id*. § 45(m)(1)(B).
[12] *Id.* § 57a(a)(1).

As Appendix A shows, the FTC neither *has* had trouble meeting the dishonest-or-fraudulent standard, the few times it has proceeded under Section 19, nor *would* have had trouble meeting that standard, in cases in which it has proceeded under Section 13(b). The dishonest-or-fraudulent standard is simply not something the FTC should fear. (Indeed, the FTC need not even show actual knowledge under that standard. It need merely show that a "hypothetical reasonable person" would have known the conduct to be dishonest or fraudulent.[13])

To the extent there are cases that meet point (3) (the FTC *won't* be able to obtain money under the dishonest-or-fraudulent standard), we submit that those cases *don't* meet point (2) (the FTC *should* be entitled to obtain money). In cases where the FTC *has* obtained money under the unfair-or-deceptive standard, and perhaps *couldn't* obtain it under the dishonest-or-fraudulent standard, there is good reason to think a money award *shouldn't*, in fact, have been available to begin with. We explore a couple such cases in Appendix B.[14]

The FTC wants you to think that every case it brings is about hardcore fraud. Don't believe it. And don't take our word for it: during oral argument in *AMG Capital*, Justice Breyer cited the *Skechers* and *Cardinal Health* cases (see Appendix B) as evidence of the FTC's mission creep. "History matters," he said:

> I think Justice Brandeis, when he started [as a proponent of what would become the FTC Act], was faced with a business community that was very suspicious of the FTC's power and thought it would be abused and a progressive community that thought it's absolutely necessary to bring bad business practices under control. So they compromised.
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> The compromise was you've got to do what the FTC says, but before it tells you to do something, it will find that what you're doing now is wrong. It will find that. It will be a cease-and-desist order, later expanded under [Magnuson-Moss], I think, to include violation of a rule.

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[13] *FTC v. Figgie Int'l*, 994 F.2d 595, 603 (9th Cir. 1993).

[14] Actually, a strong case can be made that something like the dishonest-or-fraudulent standard affords a *required* amount of notice, as a matter of due process, as to what conduct could trigger any monetary remedies you might add to Section 13(b). If monetary *penalties* are to be imposed, "a regulated party acting in good faith" must be able, when "reviewing the regulations and other public statements issued by the agency," to "identify, with ascertainable certainty, the standards with which the agency expects parties to conform." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation omitted). And for the reasons set forth in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the "restitution" available "under § 13(b)," before the Supreme Court (re-)imposed the correct statutory scheme, "appear[ed] to be a penalty." *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 433 (9th Cir. 2018) (O'Scannlain, J., specially concurring).

> So Section 5, cease-and-desist order or violation of a rule, damage of some kind. [Section 19], the same thing. And now we have right in the middle [Section] 13, no protection like that whatsoever. Do not worry, says the FTC [in its 2003 Disgorgement Policy Statement], we will only use it in exceptional cases.
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> Ha! In 2012, they repeal that. And now, 10 years later, after this has been in effect for a few years, I read that 100 cases under this provision are in the courts, compared with 10 or 12 under [other provisions].
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> And you say it's just obvious, we're going to get those people who think their bad conduct is obvious. Look at *Skechers*. Look at the *Cardinal* case. Go back to the famous *Un-Burn* case. Add substantiation.
>
> . . .
>
> [I]f we interpret [the statute] your way, we say your fears, business community, were absolutely right. It is now up to the FTC. Before you know the thing is wrong, they hit you with bad damages.[15]

"The famous *Un-Burn* case" and "add substantiation" are references to *In re Pfizer, Inc*.[16]—in which the FTC ultimately dismissed a case over claims a company had made about sunburn ointment—and the FTC's requirement that businesses be able to "substantiate" the claims they make in their advertisements. Building on the standard it formulated in the *Pfizer* case, in 1984 the FTC issued an Advertising Substantiation Policy Statement. In the statement, the FTC declared that a company must have a "reasonable basis" for its advertising claims. What, in turn, qualified as a "reasonable basis"? The FTC set forth a flexible, totality-of-the-circumstances-type test:

> The Commission's determination of what constitutes a reasonable basis depends . . . on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.[17]

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[15] Trans. at 37:3-39:1, *AMG Capital Mgmt v. FTC*, No. 19-508 (U.S. Jan. 13, 2021).
[16] 81 F.T.C. 23 (1972).
[17] Federal Trade Commission, *Policy Statement Regarding Advertising Substantiation*, https://bit.ly/3yhCMKZ (Nov. 23, 1984).

In the late 2000s, the FTC started aggressively pursuing substantiation cases under its open-ended test.[18] It is out of this enforcement push that actions against puffery, such as the *Skechers* case, arose.

The FTC absolutely should monitor advertisements, and it absolutely should have (and clearly does have) the power to shut down advertising campaigns that it believes are deceptive. What it should *not* be able to do, however, is obtain money for advertisements that make claims that are *contestable* but not fraudulent or dishonest. In such cases, the defendant has not received adequate notice, in advance, of *what* claims will subject it to monetary liability. In fact, because a restriction on commercial speech must not only "directly advance" a governmental interest, but also "*not [be] more extensive than necessary to serve that interest*,"[19] it is far from clear that making a defendant incur a *monetary* loss for commercial speech that is not *clearly* misleading would pass muster under the First Amendment. If the FTC were to use the threat of monetary remedies to over-deter potentially misleading advertising claims, consumers would "be denied useful, truthful information about products," an outcome "that would subvert rather than promote the objectives of the commercial speech doctrine."[20]

"It makes sense to post the speed limit, and fine you if you exceed it," FTC Commissioner Noah Phillips observed, when he appeared before your committee last month.[21] But "it *doesn't* make sense," he continued, "to announce that you can drive at a 'fair' speed, and fine you when you drive over 65."[22] "This concept," explained Commissioner Phillips, "is central to the design of the FTC":

> The agency was created to examine business practices . . . and, where we deem them violative of broad terms, like 'unfair' and 'deceptive,' condemn them. This broad authority enables us to be nimble; to address new issues, like privacy;

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[18] See Randal Shaheen & Amy Ralph Mudge, *Has the FTC Changed the Game On Advertising Substantiation?*, Antitrust Magazine, Vol. 25, No. 1 (Fall 2010), available at https://bit.ly/2SSkO1r.

[19] *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 501 (D.C. Cir. 2015) (emphasis added) (quoting *C. Hudson Gas Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). See also *Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 146 (1994) ("If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant [the government's] burden to demonstrate that the harms it recites are real and that its restriction will, in fact, alleviate them to a material degree.") (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985), and *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

[20] *POM Wonderful*, 777 F.3d at 502.

[21] U.S. Senate Committee on Commerce, Science, & Transportation, *Strengthening the Federal Trade Commission's Authority to Protect Consumers*, https://bit.ly/3wesREa, video at 50:45-51:00 (Apr. 20, 2021).

[22] *Id*.

> and to help develop the law. . . . *But*, because we are enforcing broad terms, that give businesses less notice, we do not have general penalty authority.[23]

We urge you to closely consider this statement, along with the quote from Justice Breyer, above ("Before you know the thing is wrong, they hit you with bad damages."). They capture why the FTC, if it were empowered to head straight to court to collect money, must meet the dishonest-or-fraudulent standard. The unfair-or-deceptive standard is a broad boundary within which the FTC can engage in policymaking, crafting rules that, if violated, result in money awards. The standard is not *itself* that rule. It is too vague to serve that role. Fairness, efficiency, and common sense demand that businesses know not merely what conduct is prohibit*able*, but what conduct is *already* prohibited, before they are subjected to the perils of monetary liability.

Proceeding under Section 19, the FTC brought its administrative complaint in *Figgie International* (see Appendix A) in 1983. The Ninth Circuit's opinion affirming a money judgment was not issued until 1993. As that ten-year prosecution shows, the FTC indeed needs a Section 13(b) "fix," in the sense that it needs a *faster* way, in cases of *clear wrongdoing*, to obtain money. But that is exactly what the "fix" should be limited to: clear wrongdoing. The FTC has always had the power, under Section 13(b), to obtain an injunction under the unfair-or-deceptive standard. Congress can create the proper fix by leaving that power in place, while adding the power to obtain equitable monetary remedies under the dishonest-or-fraudulent standard.

We recognize that, as you consider how to amend the FTC Act in response to *AMG Capital*, there are several important issues on the table. If monetary remedies are added to Section 13(b), how long should the statute of limitations be? Which specific remedies should be available? How much should the FTC be able to recover—the amount of the consumers' loss? the defendant's profits? civil penalties? Should the amendments be retroactive? There are a number of dials to turn. We understand, moreover, that when one dial gets turned one way, it might make sense to turn another a different way. If, for example, the monetary remedies available are carefully tailored—ensuring that the FTC can, say, recover consumers' loss in some cases, a defendant's full profits in others, and civil penalties in yet others, depending on the defendant's level of culpability—that might justify a longer statute of limitations, or some other change that gives the FTC more flexibility. A key part of the legislative process, we well know, is discussing, and reaching compromises on, just these sorts of questions.

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[23] *Id*. at 51:00-51:50.

We firmly believe, however, that a defendant, before being ordered to pay money, needs more notice of what conduct is prohibited than the unfair-or-deceptive standard can provide. The easiest, simplest way to ensure that such notice is supplied is to attach the dishonest-or-fraudulent standard into any monetary remedy that gets written into Section 13(b).

Thank you for your time.

Sincerely,

Berin Szóka	Corbin K. Barthold
President	Internet Policy Counsel
TechFreedom	TechFreedom

APPENDIX A

Cases in which the FTC both should *and can readily* obtained money under the dishonest-or-fraudulent standard:

- *FTC v. Figgie International, Inc*., involved a defendant that sold heat detectors.[24] It misled consumers by failing to disclose that its heat detectors were dramatically less effective than smoke detectors, and often activated much too late, in the event of a fire, to save lives.[25] It marketed its non-life-saving product as a life-saving product; in other words, as fundamentally something it was not—akin to passing off rhinestones as diamonds.[26] Proceeding under Section 19, the FTC had no trouble whatsoever establishing that the defendant's conduct was dishonest or fraudulent.[27]

- *FTC v. Turner* involved a defendant that operated a pyramid scheme.[28] "Although the sales structure was set up ostensibly to market cosmetics, the system was designed so that the sale of distributerships [sic] was primarily encouraged."[29] "Distributerships [sic] were sold when no products were available, and the potential return from the sale of distributerships [sic] was misrepresented."[30] The FTC prosecuted under Section 19, and the district court easily found, on summary judgment, that the defendant's conduct was dishonest or fraudulent.[31]

- *FTC v. Credit Bureau Center, LLC*, involved "websites [that] offered a 'free credit report and score' while obscuring a key detail in much smaller text: that applying for this 'free' information automatically enrolled customers in an unspecified $29.94 monthly 'membership' subscription."[32] "The subscription was for [a] credit-monitoring service, but customers learned this information only when [the defendant] sent them a letter after they were automatically enrolled."[33] Although the FTC proceeded under Section 13(b), and thus the unfair-or-deceptive standard, the Seventh Circuit stated the obvious when it called the conduct before it a "fraudulent scheme."[34]

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[24] 994 F.2d 595 (9th Cir. 1993).
[25] *Id*. at 603-04.
[26] *Id*. at 604.
[27] *Id*. at 603-05.
[28] 1982 WL 1947 (M.D. Fla. Dec. 29, 1982).
[29] *Id*. at *2.
[30] *Id*.
[31] *Id*. at *3.
[32] 937 F.3d 764, 766 (7th Cir. 2019).
[33] *Id*.
[34] *Id*.

- The FTC brought *FTC v. Volkswagen Group of America, Inc.*, in response to the Volkswagen emissions scandal.[35] The FTC alleged that Volkswagen "equipped its 2.0 liter diesel vehicles with illegal software that detects when the car is being tested for compliance with EPA or California emissions standards and turns on full emissions controls only during that testing process."[36] In its settlement with the FTC, Volkswagen agreed to pay up to $10.033 billion to consumers.[37] Although the FTC proceeded under Section 13(b), Volkswagen's surreptitious use of "defeat devices," which enabled its cars to emit nitrogen oxides at 40 times the EPA limit, clearly amounted to dishonest or fraudulent conduct.

[35] 3:16-cv-1534 (N.D. Cal.).

[36] Federal Trade Commission, *Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Test and Deceiving Customers on 2.0 Liter Diesel Vehicles*, https://bit.ly/3eVMNpP (June 28, 2016).

[37] *In re: Volkswagen "Clean Diesel" Marketing, Sale Practices, & Products Liability Litig.*, Dkt. 1607, 3:15-md-2672 (N.D. Cal. June 28, 2016).

APPENDIX B

Cases in which the FTC *did* obtain money under the unfair-or-deceptive standard, perhaps *couldn't* obtain it under the dishonest-or-fraudulent standard, and perhaps *shouldn't have been able* to obtain money as it did:

- In the *Skechers* case, the FTC used Section 13(b) to prosecute a shoe company for puffery in its advertising.[38] The company had made claims about how its "shape-up" fitness shoes could promote weight loss, strengthen legs, and increase "muscle activation." Unlike the heat detector company, the shoe company was not claiming its shoes were something they fundamentally weren't—it was not selling rhinestones and calling them diamonds. At most, it was making exaggerated claims about *how much* its shoes could contribute to health and well-being. Nonetheless, the company had to pay $40 million to settle the FTC's charges.[39]

- In the *Cardinal Health* case, the FTC used Section 13(b) to prosecute a company for supposedly monopolizing, and charging supra-competitive prices in, local markets for low-energy radiopharmaceuticals.[40] The company agreed to settle the case for $26.8 million. As Commissioner Ohlhausen noted in a dissenting statement, however, the FTC had not contested the acquisitions underlying its charges at the time they were made.[41] "This case," she wrote, "raises significant policy concerns regarding the pursuit of disgorgement in competition cases and the lack of guidance that the Commission has provided the business community about when it will seek this remedy."[42] In its 2003 Disgorgement Policy Statement, the FTC had committed to seeking disgorgement only in cases where the violation at hand was clear. Yet the FTC withdrew the statement in 2012, paving the way for prosecutions like the *Cardinal Health* case. As Commissioner Ohlhausen explained, the acquisitions at issue in that case could "not serve as the basis for any *clear* violation—particularly in the absence of any allegations that Cardinal misled the Commission."[43]

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[38] *FTC v. Skechers U.S.A., Inc.*, Dkt 1, 1:12-cv-1214 (N.D. Ohio May 16, 2012).

[39] Federal Trade Commission, *Skechers Will Pay $40 Million to Settle FTC Charges That It Deceived Consumers with Ads for "Toning Shoes"*, https://bit.ly/3hy2R2M (May 16, 2012).

[40] Federal Trade Commission, *Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics*, https://bit.ly/2Qoln2a (Apr. 20, 2015); *FTC v. Cardinal Health, Inc.*, Dkt 1, 15-cv-3031 (S.D.N.Y. Apr. 20, 2015).

[41] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *Cardinal Health, Inc.*, File No. 1001-0006, https://bit.ly/3u10KXS (Apr. 17, 2015).

[42] *Id*. at 1.

[43] *Id*. at 3.