

May 26, 2021

The Honorable Jan Schakowsky
Chair
Subcommittee, Consumer Protection
& Commerce
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Gus Bilirakis
Ranking Member
Subcommittee, Consumer Protection
& Commerce
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chair Schakowsky and Ranking Member Bilirakis:

On behalf of the Electronic Transactions Association (ETA), I am writing to raise concerns with H.R. 2668, the *Consumer Protection and Recovery Act* introduced by Rep. Tony Cardenas ahead of the May 27, 2021 markup.

ETA supports a legislative solution that is narrowly crafted to address “scams,” however, H.R. 2668 goes well-beyond the issues raised in the Supreme Court’s decision or the FTC’s stated need to combat “scams.” As FTC Commissioner Noah Phillips testified on April 20, 2021, the focus of amending Section 13(b) should not be on inappropriately punishing businesses but rather helping consumers. As written, H.R. 2668 would punish businesses.

Specifically, we are concerned with:

- H.R. 2668 would allow the FTC to obtain, via court order, multiple forms of equitable relief, including rescission of contracts, refunds, and disgorgement. Disgorgement is problematic because the FTC has consistently sought joint and several liability against multiple defendants, even where there are no “ill-gotten gains” traceable to individual defendants.
- As written, H.R. 2668 does not specify whether the FTC is entitled to monetary remedies based on a theory of joint and several liability. This is problematic because the FTC takes the default position that it can hold defendants, including individuals, jointly and severally liable for violations of the FTC Act. This transforms an “equitable” remedy into a penalty.
- Unlike Section 19, which is subject to a three-year statute of limitations, H.R. 2668 would apply a ten-year statute of limitations.
- Unlike Section 19, which requires the FTC to prove that a reasonable person would have known that the conduct was “dishonest or fraudulent,” H.R. 2668 does not contain any such requirement.
- H.R. 2668 proposes to apply the bill’s amendments retroactively to all cases brought under Section 13(b) that are pending at the time the legislation is passed and to conduct

that has already occurred. This is a problem because defendants are entitled to know what the law is when allegedly unlawful conduct occurs. Retroactivity is contrary to traditional notions of due process.

- H.R. 2668 grants the FTC the unfettered right to seek temporary or preliminary injunctive relief. This is problematic because the FTC frequently uses temporary and preliminary injunctive relief, including asset freezes, to deprive private parties of legal counsel and the ability to conduct a vigorous defense. Any changes to Section 13(b) should require the FTC to meet a higher burden of proof to obtain *ex parte* temporary or preliminary injunctive relief where the relief includes appointment of a receiver to oversee a party's assets or imposes other draconian remedies, such as freezes on use of all funds during the pendency of litigation.

We share policymakers' goals of protecting consumers from bad actors, and we look forward to working with you and your staff to address the concerns above. If you have any questions, please contact me or ETA's Senior Vice President of Government Affairs, Scott Talbott at stalbott@electran.org.

Sincerely,



Jeff Patchen
Senior Manager of Government Affairs
Electronic Transactions Association

