

House Democrats Primed to Introduce 13(b) Legislative Fix

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Section 13 (b)log



On Thursday afternoon, the future of the Federal Trade Commission’s enforcement authority took center stage during a House Energy and Commerce Committee [hearing](#) entitled, “Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic.” While the Consumer Protection and Commerce Subcommittee hearing was ostensibly focused on pandemic-related fraud, calls to clarify the agency’s ability to use Section 13(b) of the FTC Act to provide restitution dominated the discussion. For their part, House Democrats appear ready to move forward with a legislative fix – perhaps even before the Supreme Court issues its ruling on the scope of 13(b) in *AMG Capital Management, LLC v. Federal Trade Commission* later this year.

During Thursday’s hearing, Representative Tony Cárdenas (D-CA) announced plans to introduce legislation to clarify the FTC’s ability to use Section 13(b) to provide refunds to consumers victimized by fraud and deception. In highlighting the need for the legislation, Representative Cárdenas cited an [October 2020 letter](#) from all five FTC Commissioners urging Congress to “act quickly so that the FTC can continue to effectively protect American consumers.” Consumer Protection and Commerce Subcommittee Chair Jan Schakowsky (D-IL) expressed strong support for the legislation, as did full committee Chair Frank Pallone (D-NJ), who noted that “the FTC’s ability to make consumers whole is under threat in the Supreme Court.”

Witnesses at the hearing – including former FTC Chairman William Kovacic and former director of the agency’s Bureau of Consumer Protection Jessica Rich – expressed concern that an adverse ruling by the Supreme Court in *AMG* would severely weaken the agency’s enforcement power. A top legislative priority, in Kovacic’s words, should be “repairing what is likely to be a hole in 13(b) authority.”

Notably, the witnesses were divided on the issue of whether Congress should act before the Supreme Court rules. In response to a question from Subcommittee Chair Schakowsky, Kovacic expressed concern that acting before the Court’s decision would “lead to the conclusion that the authority was never intended” by Congress. Rich and TINA.org Executive Director Bonnie Patten, however, noted that the agency’s ability to pursue restitution under 13(b) has already been severely curtailed by the courts and that Congress should move quickly.

While Representative Cárdenas urged committee Republicans to work with him on the legislation, none lined up in support of the yet-to-be introduced bill on Thursday. Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA) spoke about the importance of 13(b), but expressed concern that the agency might abuse the authority and use it “primarily to leverage defendants into settlements.” On the other side of the Capitol, the Senate Commerce Committee’s top Republican Roger Wicker (R-MS) [included a 13\(b\) fix](#) in a comprehensive privacy bill introduced last year – a point not lost on Representative Cárdenas.

Although the timing for legislative action remains uncertain, Thursday’s hearing strongly suggests that the new Democratic Congress is intent on revising the statute to provide the FTC with the express authority to obtain monetary penalties.

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