

# Section 13(b) at the New Year: Where Things Stand in the Fight Over The FTC's Enforcement Authority

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## Section 13 (b)log



The year ended with a flurry of activity related to the FTC's ability to obtain permanent injunctions and restitution under Section 13(b) of the FTC Act. As we head into 2020, a level-set is in order.

### **To File or Not File is No Longer the Question**

On December 19, 2019, the FTC filed a petition for writ of certiorari following the 7<sup>th</sup> Circuit decision in *FTC v. Credit Bureau Center*. The Solicitor General (who had first dibs) chose not to file. By our count, this FTC filing marks only the fourth time that the agency has represented itself before the Supreme Court over the past 45 years.

That makes three petitions for review on this issue presently before the Supreme Court. In addition to the FTC's petition in *Credit Bureau Center*, petitions are pending in two 9<sup>th</sup> Circuit cases: *Publishers Business Services v. FTC* and *AMG Captial Management v. FTC*. Whether the Supreme Court will grant certiorari in any of these cases remains to be seen. While the Circuit split certainly appears to justify review, the numbers are the numbers: the Court hears only 100-150 of the 7,000 to 8,000 cases that it is asked to review each year.

As expected, the FTC petition argued that the 7<sup>th</sup> Circuit's ruling upset long-standing and well-grounded precedent: "a district court's authority to grant a permanent injunction under Section 13(b) includes the authority to require wrongdoers to return money that they illegally obtained." The petition focused on the plain meaning of the word "injunction," as well as other authority in support of its contention that Section 13(b) should be understood to include restitution and other forms of monetary relief.

The FTC also argued that its position is consistent with legislative intent, asserting that Congress understood how the Supreme Court interpreted the law under *Porter v. Warner Holding Co.* and

*Mitchell v. Robert DeMario Jewelry, Inc.* when Section 13(b) became law. Finally, the FTC argued Congress has since reviewed Section 13(b) more than once, without revision, after several circuits ordered defendants in FTC cases to repay consumers.

Where was Solicitor General Noel Francisco in all of this and why did his office decide to sit this one out? The answer lies with another case that will be heard by the Supreme Court this term: *Liu v. SEC*. In *Liu*, the petitioners have asked the Court to consider “whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as ‘equitable relief’ for a securities law violation even though [the Supreme] Court has determined that such disgorgement is a penalty.”

The petitioners in *Liu* rely on the Supreme Court’s decision in *Kokesh v. SEC*, and more specifically, a footnote in the opinion where the Court stated that it was not addressing “whether courts have properly applied disgorgement principles in this context” or “whether courts possess authority to order disgorgement in SEC enforcement proceedings.” The opinion in *Liu*, which is expected in June, will answer these questions. As the *Liu* petitioners have pointed out, following *Kokesh*, a number of Courts of Appeals have considered whether disgorgement is a legally permissible equitable remedy in SEC cases, and have concluded that it was not. For example, Justice Kavanaugh, while on the D.C. Circuit, noted in a concurrence (*Saad v. SEC*) that *Kokesh* “overturned a line of cases from [the D.C. Circuit] . . . that had concluded that disgorgement was remedial and not punitive.”

The importance of the outcome in *Liu* extends beyond the SEC to the FTC. Like the SEC, the FTC has relied on disgorgement of ill-gotten gains as one of its primary remedial tools. If the Court rules in favor of the *Liu* petitioners, and determines that disgorgement is not within the SEC’s statutory authority, the FTC will be forced to distinguish restitution to consumers under 13(b) from “disgorgement” in securities laws or arguably find itself in a position where it will have to rethink its fraud program entirely.

The Solicitor General, in his request for an extension of time to petition for a writ of certiorari, questioned whether the Court might benefit if it decided *Liu* before it considered the 13(b) issue: “The additional time sought in this application is needed to complete consultation with interested agencies and components of the government and to assess the legal and practical impact of the court of appeals’ ruling, including the relationship between the question presented here and the question presented in *Liu v. SEC*.” Those consultations apparently led the Solicitor General to conclude that *Liu* would have an impact on the 13(b) issue, which could not have been welcome news to the FTC.

In its petition, the FTC disagrees with the Solicitor General, arguing that these cases do not pose overlapping questions (a position also advanced by the FTC’s 9<sup>th</sup> Circuit adversaries in filings by petitioners in *Publishers Business Services* and *AMG Capital Management*). All of this explains why FTC General Counsel Alden Abbott is counsel of record on the FTC petition and not the Solicitor General.

Needless to say, eyes are on *Liu*. Twelve amici curiae briefs have been filed since December 16, 2019, with the general sentiment that Congress has not expressly authorized the SEC to obtain monetary relief through disgorgement.

Interested parties are also lining up on the 13(b) issue. Cause of Action Institute and Washington Legal Foundation filed [amici curiae](#) briefs in support of both the *AMG* and *Publishers Business Services* petition. These amici briefs argue that (1) the plain meaning of 13(b) does not allow for courts to order monetary relief, (2) an expansive interpretation of 13(b) violates the separation of powers and constitutional rights, and (3) district courts should not be allowed to continue using

“equity of the statute” (judicial discretion/judicial rulemaking) to order monetary relief.

### **Meanwhile, the Battles Rage On**

The continuing questions over the extent of the FTC’s enforcement authority to obtain monetary relief under Section 13(b) did not stop the Commission from filing a lawsuit on November 1, 2019 against multi-level marketer Neora, LLC and its CEO Jeffrey Olson for purportedly operating an illegal pyramid scheme that used deceptive marketing to sell supplements, skin creams, and other products. All indications are that it is business as usual at the FTC.

Pursuant to Section 13(b), the FTC seeks an injunction to stop Neora’s alleged pyramid scheme and an award of restitution to return money to consumers. The lawsuit, filed in the District of New Jersey, alleges that Neora (formerly known as Nerium International) and its CEO offered false promises that potential distributors could earn financial independence if they joined the company’s pyramid scheme – while, in reality, most recruits would end up losing money.

Believing that the best defense is a good offense, Neora beat the FTC to the punch and filed a lawsuit in the Northern District of Illinois against the FTC, asking the court to declare that the company did not operate a pyramid scheme. The company’s complaint also asserted that the FTC is not authorized to seek restitution or disgorgement under Section 13(b).

The FTC will appear in the Northern District of Illinois on January 7, 2020 to present its Motion to Dismiss or, in the Alternative, Failure to State a Claim. The FTC will argue that Neora filed this suit in an attempt to preempt the FTC’s enforcement action in New Jersey, which seems obvious, particularly when you consider timing and Neora’s forum choice (7<sup>th</sup> Circuit). The FTC will further argue that Neora has only one possible cause of action under the Administrative Procedure Act but fails the requirements for judicial review. As a result, the claims are not ripe for judicial consideration or, alternatively, the court should decline to exercise its discretionary jurisdiction to hear the case.

December also saw the 10<sup>th</sup> Circuit joining the 13(b) debate with its holding in *FTC v. Nudge*. There, the FTC alleged that the defendants engaged in a real-estate investment seminar fraud. The court found that because one of the named parties, Buy PD, was part of a common enterprise and continued to provide services to further the fraud, it is “about to violate” the law. Buy PD argued it had stopped marketing real-estate investment seminars directly to consumers in 2016. In an opinion that must have provided a measure of relief to the FTC, Judge Robert J. Shelby concluded that, because Buy PD continued to provide services related to the fraud and was a part of the common enterprise, it was enough for liability under *Shire* (“the Complaint alleges facts sufficient to reasonably infer the common enterprise is violating or is about to violate the law.”).

As predicted, the dispute over the scope of the FTC’s 13(b) authority has resulted in a steady flow of motions in federal court. These include, among many others, *FTC v. Hoyal & Assocs.*, *FTC v. Abbvie, Inc.*, *FTC v. Dorfman*, and *Complete Merchant Solutions v. FTC*. Indeed, given the Circuit split, one might argue that it would almost be malpractice not to raise the issue in litigation at this point.

And one can only wonder how this is all playing out during the investigational phase, under Part 2 of the FTC’s Rules of Practice, as respondents become more emboldened during settlement discussions related to redress. After all, there is a very real prospect that litigation might lead to a payment of \$0. It is not hard to understand why respondents might stand their ground in negotiations and prefer to roll the dice in litigation, as opposed to agreeing to voluntarily pay tens or hundreds of millions of dollars to the U.S. Government.

## Eyes on Congress

With the judicial outcome uncertain, the FTC has turned to Congress, floating proposed legislation that seeks (1) clear authority to seek permanent injunctions without the requirement that a defendant “is violating, or is about to violate” the law, (2) express permission to seek monetary relief, including restitution and disgorgement, and (3) a 10-year statute of limitations.

This effort mirrors the effort in Congress to minimize the impact of any decision in *Liu*. In March 2019, Senator Mark Warner (D-VA) introduced the Securities Fraud Enforcement and Investor Compensation Act, which would authorize the SEC to seek and courts to award disgorgement and restitution (Senator Warner has included similar language in a bipartisan anti-money laundering bill, S. 2563, the ILLICIT CASH Act). Related legislation also has been introduced: the Investor Protection and Capital Markets Fairness Act (H.R. 4344), the Stronger Enforcement of Civil Penalties Act of 2019 (S. 1854 / H.R. 3641), and the Strengthening Fraud Protection Provisions for SEC Enforcement Act of 2019 (H.R. 3701).

Of these bills, H.R. 4344 is furthest along. On November 18, 2019, by a vote of 314-95, the House passed H.R. 4344, authored by Reps. Ben McAdams (D-UT) and Bill Huizenga (R-MI). The legislation – endorsed by SEC Chairman Clayton – would authorize disgorgement as a remedy that the SEC can seek. It would also establish a 14-year statute of limitations.

In remarks on the House floor, Rep. McAdams stated: “The SEC estimates that, in the two years since the *Kokesh* decision, they have had to forgo over \$1.1 billion of ill-gotten gains that bad actors can now keep that don’t get returned to investors. . . . In addition to \$1.1 billion in forgone funds, the SEC is increasingly spending time and staff resources fighting new legal challenges from bad actors claiming that the SEC shouldn’t be able to seek disgorgement at all.”

The strong (and unusual, in this day and age) bi-partisan support for the bill suggests that prospects in the Senate are probably pretty good. If this legislation becomes law, the Court’s holding in *Liu* would be a non-issue and prospects for legislation on the Section 13(b) issue would improve.

To date, we have not seen a stand-alone bill that would expressly provide the authorization that the FTC contends it already possesses, but one is likely in the making and there are other ways to achieve the same result. Revisions to Section 13(b) could be included in an appropriations bill or as part of comprehensive privacy legislation. We will have to wait and see.

When it comes to this issue, it is going to be an eventful year.

Stay tuned for more installments of the “Section 13 (b)log.”