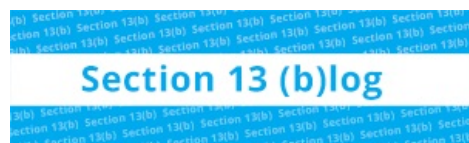


Update: Chair Cantwell Introduces S. 4145, A One-Sided 13(b) Fix

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On Wednesday, we described draft legislation circulating in the Senate Commerce Committee that would have given the Federal Trade Commission almost unfettered authority to enjoin permanently any act, practice or method of competition that did not meet its approval.

<https://www.adlawaccess.com/2022/05/articles/senate-commerce-committee-chair-pushes-one-sided-13b-fix/> All the Commission would need to do is show that a reasonable person had fair notice that the conduct “could” violate the FTC Act.

Senator Cantwell has now introduced the bill and it’s more one-sided today than it was in draft form. The need to show fair notice of even a possible violation is gone.

S. 4145, the “Consumer Protection Remedies Act,” was introduced by Chair Cantwell last night, with co-sponsors Senators Klobuchar (D-MN), Warnock (D-GA), and Lujan (D-NM). If this bill becomes law, to stop a practice, the Commission would merely need to persuade a judge that “the public interest” is on its FTC’s side . That is effectively no standard at all.

At least defendants will have an opportunity to argue that the Commission cannot obtain money until it proves a violation of some law the FTC enforces. The bill says that restitution, disgorgement, and rescission or reformation of contracts are available only in suits with respect to a violation of a provision of law enforced by the Commission.”

The Cantwell bill no longer confines relief under Section 13(b) to violations that are occurring or about to occur. Any violation within the past ten years remains exposed to monetary recovery. This doubles or triples the period for which the Commission can seek money.

In short, S. 4145 gives the Commission virtually unlimited authority to enjoin methods of competition, marketing practices, privacy protections, and information-security practices. And it would expose a decade of revenues to the agency’s monetary demands. The “Consumer Protection Remedies Act” would not simply streamline the procedures in the FTC Act; it would expand the Commission’s powers, handcuff the courts, and leave American businesses wondering when their conduct might run afoul of three Commissioners’ interpretation of the public interest.

Expect some movement next week in advance of the Commerce Committee markup, with Senator Lee likely to offer an amendment in the nature of a substitute. With 14 Democrats and 14

Republicans on the Committee, however, a party line vote would allow the Cantwell bill to advance. But once it does, it likely loses traction. Without 60 votes as a stand-alone on the Senate floor, Chair Cantwell would need to slip this into must-pass legislation for it to become law.