

With a Supreme Court Decision Pending, Will Congress Intervene to Clarify the FTC's Enforcement Authorities Under 13(b)?

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Section 13 (b)log



Updated to reflect introduction of H.R. 2668, the Consumer Protection and Recovery Act by Rep. Cárdenas (D-CA)

As we inch closer to a Supreme Court decision in *AMG Capital Management, LLC v. Federal Trade Commission*, proponents of a 13(b) legislative fix are moving with a greater sense of urgency. In a Senate Commerce Committee [hearing](#) today entitled, “Strengthening the Federal Trade Commission’s Authority to Protect Consumers,” Chairwoman Maria Cantwell (D-WA) highlighted the agency’s endangered Section 13(b) authority – what she called the “bread and butter of the FTC’s consumer protection mission” – and asserted, “We have to do everything we can to protect this authority and, if necessary, pass new legislation to do so.”

Following statements from all four current FTC Commissioners in support of a legislative fix, Cantwell was adamant she did not want a post-*AMG* “free rein” atmosphere and noted her intent to move quickly in the event of an adverse ruling. Acting FTC Chairwoman Rebecca Slaughter pressed for an expeditious and comprehensive response, noting the effects of the ongoing legal uncertainty on the agency’s current cases and its ability to get redress to consumers.

Despite bipartisan concern about the future of the agency’s 13(b) authority, however, Congress has yet to settle upon a legislative framework to clarify that authority. Senate Commerce Committee Ranking Member Wicker (R-MS) – who last year [put forward](#) a 13(b) fix as part of a comprehensive data privacy bill – questioned how Congress could “ensure the proper assessment of monetary remedies.” Republican FTC Commissioner Noah Phillips, while affirming the importance of compensating harmed consumers, noted that appropriate remedies are not the same in every case and stressed the need to focus on restitution rather than disgorgement.

Phillips' fellow Republican Commissioner Christine Wilson noted in her testimony that "the legitimate concerns of stakeholders can be addressed while also restoring our ability to use 13(b) to pursue wrongdoers." Specifically, Wilson suggested: (1) the inclusion of a statute of limitations; (2) the establishment of boundaries on when the FTC could seek disgorgement; and (3) in cases involving legitimate companies making deceptive claims, Congressional direction to the courts to "account for the value consumers retain from the product despite the deception."

Ahead of today's hearing, the Chamber of Commerce weighed in with a letter to the Committee expressing concern with the FTC's practice of seeking injunction and monetary relief under 13(b) despite the fact that its statutory authority to seek monetary relief falls under Section 19 of the FTC Act. In particular, the Chamber noted that providing explicit monetary authority under Section 13(b) "expands monetary relief to many more consumer protection cases beyond the scope of Section 19 ... without corresponding safeguards against misuse." During the hearing, Ranking Member Wicker asked the Commissioners to opine further in writing on the Chamber's letter and its view that the use of 13(b) forecloses the agency's ability to seek monetary damages.

Hours later, across the Capitol, Representative Tony Cárdenas (D-CA) – who in February [signaled](#) his interest in a 13(b) fix during a House Energy and Commerce Committee hearing – [introduced](#) H.R. 2668, the *Consumer Protection and Recovery Act*. The [legislation](#) explicitly authorizes the FTC to seek permanent injunctions and other equitable relief, including restitution and disgorgement, to redress perceived consumer injury. H.R. 2668 also authorizes the FTC to go after prior conduct – an authority that is far from settled under current law – with a 10-year statute of limitations. And, likely in response to advocates for 13(b) reform who regularly note the detrimental effects of the ongoing legal uncertainty on the FTC's current enforcement activity, the enhanced authorities in the Cárdenas legislation will apply retroactively to pending cases as well as to future proceedings. While the bill is cosponsored by every Democrat on the Energy and Commerce Committee's Subcommittee on Consumer Protection and Commerce, it remains to be seen if Representative Cárdenas can recruit any bipartisan support – the Chamber letter may portend areas of focus for Republicans interested in a more limited fix. The Consumer Protection and Commerce Subcommittee has scheduled an April 27 [hearing](#) on the Cárdenas proposal.

We are likely to hear more on Section 13(b) on Wednesday, when the Senate Commerce Committee holds a [hearing](#) on nomination of Lina Khan, President Biden's pick to fill the FTC's current vacancy. In [answers](#) provided to the committee as part of the confirmation process, Khan highlighted legal threats to the FTC's penalty authority as one of the top three challenges currently facing the agency, signaling alignment with FTC Commissioners across the political spectrum.