

**CURBING COVID CONS:
WARNING CONSUMERS ABOUT PANDEMIC
FRAUDS, SCAMS, AND SWINDLES**

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND DATA SECURITY

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

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**CURBING COVID CONS:
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TUESDAY, APRIL 27, 2021

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT
SAFETY, AND DATA SECURITY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m. in room SR-253, Russell Senate Office Building, Hon. Richard Blumenthal, Chairman of the Subcommittee, presiding.

Present: Senators Blumenthal [presiding], Blackburn, Klobuchar, Thune, Markey, and Luján.

**OPENING STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Good morning, everyone.

Thank you so much for joining us, all who are watching, and to our witnesses, particularly thank you for being here today, whether in person or remotely, and I want to say a special thanks to the Ranking Member, Senator Blackburn.

This subcommittee has been traditionally very, very bipartisan and we are beginning our hearings today in a very bipartisan way. The witnesses that we have before us are the result of a bipartisan consensus and there is nothing partisan about consumer protection. We all want to protect against the abuses and deception and lies that all too often we see in the marketplace.

We are completing a year of unimaginable heartbreak and hardship for all Americans, a year of pandemic crisis, healthcare crisis, and consumer crisis. This year of heartbreak for Americans has also been a breakout year for the swindlers and con artists. They have seen it as a bonanza and, in fact, they have made it a bonanza.

There have been 460,000 reports of consumer fraud in the past year, according to the FTC, at a cost of more than \$411 million, which represents a 45 percent increase in the numbers of reports, 83 percent rise in the dollars lost.

So these reports show the results of a flooding of online marketplaces with fake personal protective equipment, sophisticated counterfeits, and other kinds of frauds. These sophisticated counterfeits have infiltrated the supply chain, often unchecked by big tech plat-

forms, putting unsuspecting consumers and health care workers at risk. Truly it has become a matter of life and death.

As consumers have grown more fearful for their safety, social media platforms have become a mega mall for snake oil peddlers hawking fake cures and prevention. These platforms have been way too slow to respond. They've done too little too late and then often only as a result of vigorous prodding, in fact, very strong kicks by consumer advocates and Members of Congress as well as state AGs.

Hucksters, like Joseph Mercola, have spread medical misinformation to millions, denying the science of COVID-19 while reaping profit windfalls, selling expensive vitamins and supplements as cures. One of them, he has advertised is this Vitamin C liposomal with his name which he has said will successfully fight COVID and advised people to take it rather than get the vaccine.

To this day, despite FDA warnings, he tells consumers you likely don't need a vaccine. In fact, he creates false fears about the vaccine and then he offers these supplements, such as Vitamin C, as prevention strategies and treatments readily available. They've been shown, he says, to be effective. Of course, he's not only playing fast and loose. He's lying.

In protective equipment, we've seen similar kinds of scams, real and fake protective equipment which endangers lives. It literally puts lives at risk because the fake 3M devices are no substitute for the real ones.

Not only have these social media platforms been enablers, knowing and recklessly enabling these kinds of frauds to occur, but they've also been laggard and lacking in taking action when they had fair notice that many of these frauds were exploiting their platforms.

The Federal Trade Commission has been a line of defense but all too often what we've seen is warnings rather than court action. The time for warnings is over. The FTC must go to court against wrong-doings. It needs to create deterrence through hefty legal penalties and strict court orders and it needs to refer for criminal action more often and more effectively these kinds of cases.

The perpetrators of these frauds don't like to pay money. They don't like to pay penalties. They don't like to pay restitution, but, most importantly, they don't like to be behind bars and that's what the FTC has to seek. More than daring, it's teeth. This agency has to use those teeth through the penalties that have been provided, new penalties provided most recently by Congress.

So we need to bolster and support the FTC, providing more legal tools and resources where necessary to defend consumers and as a first step to ensure that the FTC can get consumers money back when they are scammed, we need to restore 13B authority that was taken away by the Supreme Court when it caved to a shadowy campaign to disarm the FTC. Unless Congress acts, the FTC will have in effect both hands tied behind its back.

Over the last 4 years, the FTC has secured over \$11 billion in refunds for consumers. There is approximately \$1.8 billion of American money at stake right now, and I hope that Congress will act promptly and effectively to restore that authority.

Let me just say in summary the path forward seems clear. The FTC must act more swiftly to stop scams, perhaps going to court without Department of Justice authority. It has to seek financial penalties against wrong-doing more vigorously. It has to hold the platforms accountable for aiding scams, and in that regard, we need to re-examine and revise Section 230 to enable victims to go against the platforms, as well, and the FTC needs to work with law enforcement to bring criminal penalties as a deterrent.

There's a lot of work ahead and I look forward to tackling it in combination with the Ranking Member, Senator Blackburn. Again, my thanks for your leadership over the years, Senator, and I turn to you.

**STATEMENT OF HON. MARSHA BLACKBURN,
U.S. SENATOR FROM TENNESSEE**

Senator BLACKBURN. Thank you, Mr. Chairman.

I want to welcome our witnesses who are with us and also joining us virtually, and I want to thank you and your staff for the work that they have done on pulling this hearing together.

People are truly spending more time on the Internet than ever before and many times this is through work or school or just simply connecting with family and friends, but the fraudsters are aware of this and they are wise to how people are on the Internet and where they are vulnerable and we continue to see this play out many times.

Ms. Patten, I know you and your group see quite a bit of it.

Even in the earliest days of the pandemic, it was difficult for people to get accurate information about the nature of the virus, how severe it was, where it started, how it spreads.

The disinformation took on a life of its own, becoming essentially a media pathogen. It's no surprise that when PPE items and household cleaners were out when you went to the grocery store, the big box, that buyers flocked to the Internet to get what they needed.

Tennessee has taken the lead in cracking down on some of the most high-profile scandals in this space. In the first consumer action brought by any state attorney general's office in response to COVID-19, Tennessee shut down a hoarding and price-gouging practice that deprived rural East Tennessee and Eastern Kentucky of hand sanitizer and other essential cleaning supplies.

Another Tennessee company falsely claimed that its products could protect surfaces from COVID-19 for 90 days. They falsely claimed that their products were FDA-and EPA-approved and falsely implied that it was being used by companies, like McDonald's and Panda Express. The attorney general's office immediately launched an investigation. The company settled, paid their fine, and promised to stop making false and misleading claims.

Individual consumers weren't the only victims of scam artists. Our Federal Government has been defrauded in countless instances. The Paycheck Protection Program or PPP has saved thousands of small businesses and kept hundreds of thousands of people on the payroll when the economy came to a standstill.

However, according to a report issued by the Small Business Administration's Office of Inspector General, nearly 55,000 loans were

made to potentially ineligible businesses, totaling more than \$7 billion.

While I know we're all ready for COVID to be over, it's important that we remain vigilant during this next and hopefully last phase of the virus and that soon we're all going to see things return to normal.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Blackburn.

I now would like to call remotely on Chairman Cantwell if she's available. Apparently she is not here as yet.

Is Senator Wicker available? If not, let me move ahead to introduce the witnesses.

The two who are with us this morning in person, first Daniel Kaufman, who is Acting Director of the Bureau of Consumer Protection at the FTC. He served for 8 years as the Bureau's Deputy Director and before that, before joining the FTC in 1998 as a staff attorney, he was a litigator. He spent 4 years as a litigator in New York City. He received his B.A. from Cornell University and graduated Cum Laude from the University of Pennsylvania Law School.

Bonnie Patten, who is the CEO of Truth in Advertising, graduated from Boston University and received her JD from Boston University and her B.A. from the University of Pennsylvania. Prior to helping found the Truth in Advertising organization, she spent most of the past two decades working as a litigation attorney in New Haven, Connecticut.

We're joined remotely by William Kovacic, who is Global Competition Professor of Law and Policy at the George Washington University Law School. Professor Kovacic has taught antitrust, contracts, and government contracts. Before joining the Law School in 1999, he was the George Mason University Foundation Professor at the George Mason University School of Law, and he was a member of the FTC from January 2006 to October 2011, and he chaired the agency from 2008 to March 2009.

Kevin Rhodes is Senior Vice President and Deputy General Counsel at 3M. He leads that company's Legal Team on a global basis and he has helped lead 3M's ongoing efforts during the COVID-19 pandemic to address fraud, counterfeiting, and price gouging of personal protective equipment, most notably of 3M's N95 respirators, and I held up one of them a few moments ago.

Prior to joining 3M in 2000, he was a partner at Kirkland Ellis in Chicago where he specialized in intellectual property litigation. He received his JD Magna Cum Laude from Northwestern University and his B.A. from Grinnell College.

Cynthia Alexander is Assistant Attorney General, Consumer Protection Division, in the Washington Attorney General's Office. She played a significant role in leading her office's response to COVID-19 scams and COVID-related consumer complaints.

Prior to joining the Attorney General's Office, she served for 17 years as a trial attorney in the Civil Division of the United States Department of Justice. She holds an MBA and a Ph.D. in Clinical Psychology and she is a licensed psychologist in the state of Washington.

So we welcome all of you, and let's begin with Daniel Kaufman.

**STATEMENT OF DANIEL KAUFMAN, ACTING DIRECTOR,
BUREAU OF CONSUMER PROTECTION,
FEDERAL TRADE COMMISSION**

Mr. KAUFMAN. Thank you.

Chairman Blumenthal, Ranking Member Blackburn, and Members of the Subcommittee, I am Daniel Kaufman, Acting Director of the Bureau of Consumer Protection at the Federal Trade Commission.

My written statement represents the views of the Commission but this opening statement represents my views and not necessarily the views of the Commission or any individual commissioner.

I'm pleased to appear before you today to discuss protecting Americans from COVID-19 scams. My written statement describes the extensive work that the FTC has accomplished and continues to accomplish in combating COVID-related frauds.

The FTC's Bureau of Consumer Protection is comprised of eight divisions and eight regional offices and each has been actively working on COVID-related issues. So far, we have brought more than a dozen law enforcement actions, engaged in extensive consumer education efforts, kept the public informed about the scams we are seeing, and have also directed the removal of deceptive claims related to COVID made by more than 350 companies.

Our most recent law enforcement action utilized the new civil penalty tool that Congress recently gave us and we are very thankful for that important new statutory authority as well as the increased funding that we have recently received.

As part of that work, the FTC is committed to expanding its outreach to lower income communities. Just last month, we launched a new way for legal service organizations to report fraud and other illegal business practices that their clients may have experienced.

Through the Community Advocate Center on our Complaint Intake Site, *reportfraud.ftc.gov*, we aim to get their fraud reports into the hands of law enforcers and connect people with tailored advice on how to try to recover their money.

I had hoped to use my opening statement to describe in more detail all of the work set forth in the FTC's recently released COVID Report that the agency has done related to the pandemic. Instead, I would like to discuss last week's Supreme Court decision in the AMG matter, which held that returning money to harmed consumers and disgorging the ill-gotten gains of lawbreakers are not authorized by Section 13(b) of the FTC Act. This decision eliminated the primary tool that the FTC uses today to return money to harmed consumers.

Over the past four decades, the Commission has relied on Section 13(b) to return billions and billions of dollars back to consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, scams that target seniors and veterans, and other deceptive business practices.

I am a 22-year veteran of the Federal Trade Commission and it is not hyperbole to say that this decision will dramatically curtail the ability of the FTC to effectively protect consumers.

For example, looking at the cases that the FTC currently has in litigation, the Supreme Court's decision, if left unfixated by Congress,

puts about 24 active consumer protection and competitive litigations at real risk with potential consumer harms of upwards of \$2.4 billion.

In addition to the huge challenges presented by the AMG decision, some courts recently have also ruled that the Commission cannot seek injunctive relief under 13B in cases where the unlawful conduct is no longer occurring, even when there is a reasonable likelihood that it will recur. This magnifies the challenges before the Commission.

Congress can fix this situation and at a minimum restore the FTC to the authority that it has used for almost four decades to protect American consumers and the longer it takes to implement the fix, the longer the FTC will be greatly weakened in our ability to protect consumers.

Let me be clear. Although the AMG decision has had a very significant impact on our ability to protect consumers and indeed to protect honest businesses, there are other tools and authority that we will use and are using to do the best we can under these circumstances.

The FTC will keep fighting but there will be more litigation that will last longer and use up more resources. There will be less protection for consumers and the only benefits will accrue to lawbreakers.

Thank you for the opportunity to testify, and I welcome your questions.

[The prepared statement of Mr. Kaufman follows:]

PREPARED STATEMENT OF DANIEL KAUFMAN, ACTING DIRECTOR, BUREAU OF
CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

I. INTRODUCTION

Chairman Blumenthal, Ranking Member Blackburn, and Members of the Subcommittee, I am Daniel Kaufman, Acting Director of the Bureau of Consumer Protection at the Federal Trade Commission (Commission or FTC).¹ I am pleased to appear before you today. Despite the unprecedented challenges of the past year, the Commission has endeavored to protect consumers and competition. A key part of this work has been combatting COVID-related harms. The Commission staff recently released a report describing the major challenges consumers face from the pandemic and the Commission's efforts to help: using reports from consumers to identify and respond to emerging unlawful practices in real time; filing more than a dozen law enforcement cases; directing the removal of deceptive claims related to COVID-19 made by more than 350 companies; and educating consumers and businesses through more than 100 alerts on COVID-related topics.

The civil penalty authority in the newly-enacted COVID-19 Consumer Protection Act² and additional funding the Commission recently received from the American Rescue Plan will enable us to intensify our efforts to protect consumers from unscrupulous actors that seek to exploit the pandemic and its economic fallout. The Commission just brought its first action seeking monetary penalties under its new authority, targeting deceptive COVID-19 marketing of vitamin D and zinc products.³

In this testimony, I provide a high-level summary of the Commission's efforts.

¹ This written statement presents the views of the Federal Trade Commission. The oral statements and responses to questions reflect my own views and do not necessarily reflect the views of the Commission or any Commissioner.

² Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

³ FTC Press Release, *In First Action Under COVID-19 Consumer Protection Act, FTC Seeks Monetary Penalties for Deceptive Marketing of Purported Coronavirus Treatments*, <https://www.ftc.gov/news-events/press-releases/2021/04/first-action-under-covid-19-consumer-protection-act-ftc-seeks> (Apr. 15, 2021).

II. COVID-19 CONSUMER PROTECTION EFFORTS

The Commission has worked diligently to identify and address the effects of the COVID-19 pandemic on American consumers and businesses. The Commission's response to COVID-19 has included law enforcement, consumer education and outreach, and data collection, each of which is discussed in more detail below.

a. Law Enforcement

Most recently, the FTC deployed its new authority under the COVID-19 Consumer Protection Act to charge that a chiropractor and his company deceptively marketed products containing vitamin D and zinc as scientifically proven to treat or prevent COVID-19.⁴ The Federal court complaint seeks civil penalties authorized by the new statute and an order barring baseless health claims.

This action is merely the latest in a long line of enforcement efforts that began early in the pandemic. The FTC issued its first warnings to consumers about COVID-19 related scams in February 2020, even before the declaration of a national emergency.⁵ As schemes proliferated in response to demand for scarce goods, to peddle treatments and cures, and to exploit consumers' and small businesses' financial distress, the FTC moved quickly to challenge deceptive claims.

The agency filed its first court action⁶ just one month after the national emergency declaration.⁷ In that case, the FTC alleged that a company falsely claimed to be an approved lender to induce struggling small businesses to submit applications for the Paycheck Protection Plan loan program, administered by the Small Business Administration (SBA).⁸ In response, a Federal court order has barred the defendants from misrepresenting affiliation with the SBA or that they are authorized to issue SBA loans.⁹

In a second action against a government impostor, the FTC sued a company that allegedly deceived consumers with mailers that featured a Great Seal of the United States and a mock stimulus check and promised to get them Federal COVID-19 stimulus benefits.¹⁰ As alleged in the complaint, rather than assisting consumers obtain stimulus benefits, the mailers sought to lure consumers to a car dealership.

Companies also have been quick to capitalize on consumers' concerns about their health and safety. The FTC has sued entities for allegedly breaking promises to quickly ship much needed goods, including personal protective equipment (PPE) and cleaning products.¹¹ In one such action, the FTC sued a website operator that misrepresented that critical PPE, such as masks and hand sanitizer, were in stock and would ship the next day. In reality, the Commission alleged, the defendant failed to ship the PPE for weeks without seeking consent for the delay or offering consumers refunds.¹²

The FTC also has taken action against the operator of counterfeit websites that tricked consumers into paying for sanitizing products that were never delivered.¹³ The Commission obtained a Federal court order that, while litigation proceeds, prohibits the defendants from making deceptive claims, suspends their deceptive

⁴ See *supra* n. 3.

⁵ *Coronavirus: Scammers follow the headlines*, <https://www.consumer.ftc.gov/blog/2020/02/coronavirus-scammers-follow-headlines> (Feb. 10, 2020).

⁶ Complaint, *FTC v. Ponte Investments, LLC*, Case No. 1:20-cv-00177 (D.R.I.), available at <https://www.ftc.gov/system/files/documents/cases/sbacomplaint.pdf>.

⁷ Proclamation 9994 of March 13, 2020, available at <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf>.

⁸ See *supra* n. 6.

⁹ Stipulated Final Order, *FTC v. Ponte Investments, LLC*, Case No. 1:20-cv-00177 (D.R.I.), available at https://www.ftc.gov/system/files/documents/cases/x200042_ponte_inv_-_stipulated_final_order.pdf.

¹⁰ Complaint, *In re Traffic Jam Events, LLC*, Docket No. 9395 (FTC), available at https://www.ftc.gov/system/files/documents/cases/d9395_traffic_jam_complaint_final.pdf.

¹¹ Complaint, *FTC v. SuperGoodDeals.com, Inc.*, Case No. 20-cv-3027 (E.D.N.Y.), available at https://www.ftc.gov/system/files/documents/cases/202_3135_supergooddeals_-_complaint.pdf;

Complaint, *FTC v. QYK Brands LLC*, Case No. 8:20-cv-01431-JLS-KES (C.D. Cal.), available at https://www.ftc.gov/system/files/documents/cases/202_3147_qyk_brands_-_complaint.pdf;

Complaint, *FTC v. Am. Screening, LLC*, Case No. 4:20-cv-1021 (E.D. Mo.), available at https://www.ftc.gov/system/files/documents/cases/202_3158_american_screening_-_complaint.pdf;

Complaint, *FTC v. Zaappaaz LLC*, Case No. 4:20-cv-02717 (S.D. Tex.), available at https://www.ftc.gov/system/files/documents/cases/202_3136_zaappaaz_-_complaint.pdf.

¹² Complaint, *FTC v. SuperGoodDeals.com, Inc.*, Case No. 20-cv-3027 (E.D.N.Y.), available at https://www.ftc.gov/system/files/documents/cases/202_3135_supergooddeals_-_complaint.pdf.

¹³ Complaint, *FTC v. One or More Unknown Parties Deceiving Consumers Into Making Purchases Through: www.cleanyos.com et al.*, Case No. 5:20-cv-02494 (N.D. Ohio), available at https://www.ftc.gov/system/files/documents/cases/complaint_w-a_filed.pdf.

websites, and bars them from using their websites to collect money from consumers.¹⁴

The Commission also has used its enforcement efforts to attack dangerous, false claims of COVID-19 treatments and cures. For example, the Commission sued a company that, even after receiving a warning from the FTC, deceptively advertised a \$23,000 treatment plan as a scientifically-proven way to treat COVID-19.¹⁵ During litigation, the court ordered the defendants to stop making deceptive health claims.¹⁶

Similarly, the Commission sued a marketer for making baseless claims that his dietary supplement could treat or prevent COVID-19,¹⁷ and issued an administrative order prohibiting those claims in the future and requiring the defendant to notify consumers and retailers that the supplement will not treat, prevent, or reduce the risk of COVID-19.¹⁸

In addition, to protect consumers attempting to replace or supplement income during the pandemic, the Commission—along with 19 federal, state, and local partners—led a nationwide crackdown against scams making false promises of income and financial independence.¹⁹

Starting in March 2020, the FTC also launched a campaign to challenge companies’ deceptive COVID-19 claims—directing the companies to cure violations and pursuing enforcement actions if problematic claims were not quickly removed. To date, the FTC has issued more than 350 warning letters, many in conjunction with the Food and Drug Administration (FDA), to sellers and marketers that claimed that their products could treat or prevent COVID-19.²⁰ The Commission also issued warning letters with the SBA regarding small business relief²¹ and joint letters with the Federal Communications Commission (FCC) to Voice Over Internet Protocol service providers and others “assisting and facilitating” illegal telemarketing calls, including calls to market products such as fraudulent home test kits.²²

Warning letters can be issued more quickly than a court complaint, and proved to be overwhelmingly successful in removing potentially dangerous claims from the markets. The Commission has monitored responses to these warning letters closely,

¹⁴ Preliminary Injunction, *FTC v. One or More Unknown Parties Deceiving Consumers Into Making Purchases Through: www.cleanyos.com et al.*, Case No. 5:20-cv-02494 (N.D. Ohio), available at https://www.ftc.gov/system/files/documents/cases/ftc_v_unknown_preliminary_injunction_with_att_a.pdf.

¹⁵ Complaint, *FTC v. Golden Sunrise Nutraceutical, Inc.*, Case No. 1:20-cv-00540-DAD-SKO (E.D. Cal.), available at https://www.ftc.gov/system/files/documents/cases/202_3146_golden_sunrise_-_complaint.pdf.

¹⁶ Stipulation to Preliminary Injunction as to Defendants Golden Sunrise Nutraceutical, Inc, Golden Pharmaceutical, Inc., and Huu Tieu, *FTC v. Golden Sunrise Nutraceutical, Inc.*, Case No. 1:20-cv-00540-DAD-SKO (E.D. Cal.), available at https://www.ftc.gov/system/files/documents/cases/030_-_gs_order_re_stipulation_pi_to_defendants_golden_sunrise_nutraceutical_inc_golden_pharmaceutical_inc_and_tieu.pdf; Stipulation to Preliminary Injunction as to Defendant Stephen Meis, *FTC v. Golden Sunrise Nutraceutical, Inc.*, Case No. 1:20-cv-00540-DAD-SKO (E.D. Cal.), available at https://www.ftc.gov/system/files/documents/cases/029_-_gs_order_re_stipulation_pi_to_def_meis.pdf.

¹⁷ Complaint, *FTC v. Ching*, Case No. 2:20-cv-03775 (C.D. Cal.), available at https://www.ftc.gov/system/files/documents/cases/whole_leaf_complaint.pdf; Complaint, *In re Ching*, Docket No. 9394 (FTC), available at https://www.ftc.gov/system/files/documents/cases/d09394_administrative_part_iii_complaint.pdf.

¹⁸ Decision and Order, *In re Ching*, Docket No. 9394 (FTC), available at https://www.ftc.gov/system/files/documents/cases/d09394_whole_leaf_decision_and_order.pdf. The Federal case is still pending.

¹⁹ FTC Press Release, *As Scammers Leverage Pandemic Fears, FTC and Law Enforcement Partners Crack Down on Deceptive Income Schemes Nationwide*, <https://www.ftc.gov/news-events/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners> (Dec. 14, 2020).

²⁰ Copies of all of the FTC’s COVID-19 related warning letters are available here: <https://www.ftc.gov/coronavirus/enforcement/warning-letters>.

²¹ FTC Press Release, *FTC and SBA Warn Operator of SBA.com and Lead Generator Lendio to Stop Potentially Misleading Coronavirus Relief Loan Marketing*, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sba-warn-operator-sbacom-lead-generator-lendio-stop> (May 18, 2020); Press Release, *FTC and SBA Warn Six Companies to Stop Potentially Misleading Marketing Aimed at Small Businesses Seeking Coronavirus Relief Loans* <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-sba-warn-six-companies-stop-potentially-misleading-marketing> (June 24, 2020).

²² FTC Press Release, *FTC and FCC Send Joint Letters to VoIP Service Providers Warning against ‘Routing and Transmitting’ Illegal Coronavirus-related Robocalls*, <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-fcc-send-joint-letters-voip-service-providers-warning-against> (Apr. 3, 2020); FTC Press Release, *FTC and FCC Send Joint Letters to Additional VoIP Providers Warning against ‘Routing and Transmitting’ Illegal Coronavirus-related Robocalls*, <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-fcc-send-joint-letters-additional-voip-providers-warning> (May 20, 2020).

and has been pleased to see that in the vast majority of cases, letter recipients removed problematic claims quickly. The Commission is determined to pursue swift enforcement action against noncompliant warning letter recipients.

The FTC also took enforcement actions to protect consumers' privacy and data.²³ Although the conduct in these matters occurred before the COVID-19 outbreak, the relief in these orders seeks to protect consumers from digital harms that have been exacerbated by the pandemic.²⁴

In light of the eviction crisis caused by the pandemic, the Commission has partnered with fellow enforcers at the Consumer Financial Protection Bureau (CFPB) to focus on ensuring renters are not subjected to unlawful practices.²⁵ The Commission also will continue its efforts to ensure that tenant screening companies comply with the Fair Credit Reporting Act, so that consumers who have gone or will go through an eviction are not further stigmatized by incomplete or inaccurate information as they seek new housing.²⁶ The Commission is also monitoring and investigating conduct by multistate landlords that may violate the FTC Act or other laws if they evict tenants in violation of national, state, or local eviction moratoriums, as Acting Chairwoman Slaughter and Acting CFPB Director Uejio recently warned in a joint statement.²⁷

The Commission will remain vigilant in order to protect the public from harms that stem directly and indirectly from the COVID-19 pandemic. The FTC is committed to tackling emerging threats, adjusting our strategies wherever necessary, and working in close coordination with our partners.

b. Consumer Education and Outreach

The Commission has buttressed its law enforcement actions with consumer and business education. Since the beginning of the pandemic, the FTC has worked aggressively to dispel misinformation and confusion about the pandemic and related issues that have fueled COVID-related scams. The Commission's education campaign has several facets: consumer and business alerts; a multi-media campaign; substantive business guidance; and outreach with partners.

Early in the pandemic, the Commission began issuing alerts warning consumers and the business community of COVID-related frauds. To date, the FTC has issued more than 100 consumer and business alerts on a wide range of COVID-related topics, including economic impact payments, health claims, online shopping, privacy in a virtual environment, contact tracing, government imposter scams, job scams, and

²³ See Complaint, *United States v. HyperBeard, Inc.*, Case No. 3:20-cv-3683 (N.D. Cal.) (enforcement of the COPPA Rule against kids app developer for allegedly collecting personal information from children under age 13 without obtaining parental consent), available at https://www.ftc.gov/system/files/documents/cases/192_3109_hyperbeard_-_complaint.pdf; Complaint, *In re Zoom Video Comms., Inc.*, Docket No. C-4731 (FTC) (administrative action challenging claims that gave consumers a false sense of security about how the company protected their information), available at https://www.ftc.gov/system/files/documents/cases/1923167zoomcomplaint_0.pdf; Complaint, *In re Flo Health, Inc.*, File No. 1923133 (FTC) (charges a developer of a period and fertility-tracking app with allegedly sharing consumer health information with outside data analytics providers after promising that such information would be kept private), available at https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf.

²⁴ For example, the settlement in *HyperBeard* imposed a \$4 million civil penalty requiring the defendants to delete personal information the company illegally collected from children under 13. See Proposed Stipulated Order, *United States v. HyperBeard, Inc.*, Case No. 3:20-cv-3683 (N.D. Cal.) available at https://www.ftc.gov/system/files/documents/cases/192_3109_hyperbeard_-_proposed_stipulated_order.pdf. In addition, as part of the settlement in *Flo Health*, Flo must notify affected users about the disclosure of their personal information and instruct any third party that received users' health information to destroy that data. See Agreement Containing Consent Order, *In re Flo Health, Inc.*, File No. 1923133 (FTC) available at https://www.ftc.gov/system/files/documents/cases/flo_health_order.pdf.

²⁵ Press Release, FACT SHEET: *The Biden-Harris Administration's Multi-Agency Effort to Support Renters and Landlords*, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/> (Mar. 29, 2021).

²⁶ An example of the FTC's efforts to protect tenants even before the pandemic is our case against AppFolio, in which the defendant agreed to settle charges that it failed to follow reasonable procedures to ensure the accuracy of criminal and eviction records in tenant screening reports and reported obsolete information. See Complaint, *United States v. AppFolio, Inc.*, Case No. 1:20-cv-03563 (D.D.C. Dec. 8, 2020), available at https://www.ftc.gov/system/files/documents/cases/ecf_1_-_us_v_appfolio_complaint.pdf.

²⁷ Joint Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter and CFPB Acting Director Dave Uejio (Mar. 29, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/joint-statement-ftc-acting-chairwoman-rebecca-kelly-slaughter>.

misinformation.²⁸ The FTC sends its alerts to more than 367,000 e-mail subscribers, which include consumers, businesses, partners, and the media. In turn, many of these subscribers share the information with their communities, greatly expanding the reach of the agency’s message. The FTC has developed a multimedia campaign with a dedicated website (ftc.gov/coronavirus) that contains a library of materials for consumers and businesses in several different languages.

As the pandemic required many work, school, recreational, and social activities to transition from in-person to online and virtual platforms, the shift to digital life presented new opportunities for bad actors to exploit. The Commission worked to prevent this exploitation from occurring in the first instance. Accordingly, in April 2020, the Commission published guidance for education technology companies and schools regarding their duties to protect children’s privacy and personal data—including warnings of the parental consent requirements for data collection imposed by the Children’s Online Privacy Protection Act (COPPA).²⁹

Finally, FTC staff has engaged in national and local outreach with partners to reach a variety of audiences, including older consumers, ethnic and community media, housing organizations, re-entry groups, library patrons, and the military community. The staff has used webinars, tele-town halls, Twitter chats, Facebook Live events, and interviews with local and national media, to reach its audiences. During the pandemic, FTC staff has participated in hundreds of virtual webinars, presentations, and interviews—in English, Spanish, and Mandarin. The FTC also has used new methods to reach people in economically and geographically diverse communities who are targeted by COVID-19 scam artists. For example, the FTC conducted a national radio media tour, mailed post cards to communities with low broadband access, and delivered letters to community health professionals in 5,000 rural and urban health clinics to help people avoid COVID-related fraud.

As the pandemic has deepened, some new consumer financial issues have arisen and others have been exacerbated. To ensure we are responding appropriately to the issues consumers are facing, the FTC coordinated a series of virtual listen-and-learn sessions across the country. Participants have included representatives from legal services, social services, elder justice centers, departments of aging, housing counselors, religious organizations, the Better Business Bureau, and the offices of State Attorneys General. Based on input from stakeholders, the FTC is enhancing and expanding its COVID-19 financial recovery and resiliency campaign, the centerpiece of which will be a web-based toolkit available in multiple languages.

c. Data Collection

The FTC’s Consumer Sentinel Network collects millions of reports from the public about fraud, identity theft, and other consumer problems, and makes them available to thousands of law enforcement users across the country. In the weeks following the first known cases of COVID-19 in the U.S., the FTC developed systems to track and alert the public to shifts in Sentinel reporting. On ftc.gov/exploredata, the FTC launched public dashboards showing aggregate Sentinel data on reports associated with COVID-19 by age, type of fraud, and geographic location, with figures that are updated daily. Since January 2020 and as of April 7, 2021, the FTC has received more than 436,000 such reports, reflecting \$399 million in fraud losses.³⁰

The FTC’s monitoring and analyses of Sentinel data reveal increased fraud activity in 2020. Specifically, the number of fraud, identity theft, and other reports to Sentinel (excluding Do Not Call) increased more than 45 percent over 2019 numbers, and reported losses from fraud grew from more than \$1.8 billion in 2019 to \$3.3 billion in 2020.³¹ Being able to use Sentinel data to spot trends has helped the FTC respond to emerging scams in real time—from bringing cases to halt fraudulent activity, to targeting alerts warning of the newest fraud, to addressing specific

²⁸ All of the FTC’s business and consumer alerts are available at <https://www.ftc.gov/coronavirus>.

²⁹ COPPA Guidance for Ed Tech Companies and Schools during the Coronavirus, <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/coppa-guidance-ed-tech-companies-schools-during-coronavirus> (Apr. 9, 2020).

³⁰ The figures reflect reports in Sentinel that specifically mention words related to the pandemic, such as COVID, stimulus, N95 and related terms. To provide the most relevant results, some subcategories are excluded. For more information, visit <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map>.

³¹ Some of the increase in complaints for 2020 is due to a new large data contributor, namely the FBI’s Internet Crime Complaint Center, which added about 200,000 complaints in 2020. In addition, the FTC launched a re-designed website to capture consumer reports more easily at the end of October 2020. Nevertheless, the rise in reports is highly significant. From FTC’s websites and call center alone, the surge in reports was about 970,000 in 2020, and many Sentinel data contributors also experienced an increase in complaint volume in 2020.

threats, such as the proliferation of identity theft related to unemployment insurance benefits.³²

Ensuring that the experiences of all consumers are represented in Sentinel is critically important to the agency's work. To expand accessibility, the FTC launched a new modernized reporting website, ReportFraud.ftc.gov, in October 2020. The updated site includes a COVID-19 banner, providing an easy way for consumers to report COVID-related issues. And, this month, the FTC launched the Community Advocate Center, which is part of the agency's ongoing work to collaborate with legal services organizations to learn about consumer protection needs and problems affecting the lower-income communities they serve. The Center provides a new way for organizations that provide free and low-cost legal services to report fraud and other illegal business practices directly to the FTC on behalf of their clients.

III. CONCLUSION

Throughout the past year, the Commission has worked tirelessly to stop bad actors from exploiting the pandemic at the public's expense. But the Commission's work is far from over. COVID-related scams are likely to persist as the country continues to grapple with this pandemic. Combatting these scams will remain a top priority for the Commission, and we will continue to use every tool we have to stop this predatory behavior, including seeking civil penalties under the newly enacted COVID-19 Consumer Protection Act, where appropriate.³³

We look forward to continuing to work with the Subcommittee and Congress, and I am happy to answer your questions.

Senator BLUMENTHAL. Thanks very much, Mr. Kaufman.

I'd like to turn now to William Kovacic, who joins us remotely.

**STATEMENT OF WILLIAM E. KOVACIC, GLOBAL COMPETITION
PROFESSOR OF LAW AND POLICY, PROFESSOR OF LAW,
DIRECTOR, COMPETITION LAW CENTER,
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL**

Mr. KOVACIC. Thank you very much, Chairman Blumenthal. My thanks also to Ranking Member Blackburn and the Subcommittee Members. I'm most grateful for the opportunity to participate in these important proceedings.

The COVID pandemic is the latest grim demonstration that catastrophe often inspires serious fraud, and I'd like to discuss several ways that Congress and the FTC, the states, and other law enforcement bodies and their partners can respond to what has been a merciless stress test on the ability of public administration to respond to this type of crisis.

In offering suggestions, I immediately acknowledge the admirable efforts already undertaken by the Congress, the FTC, the states and their partners to protect Americans from exploitation.

My first suggestion echoes the comment that the Chairman made in opening the proceedings and that is my belief that serious fraud will only be deterred when we bring the full range of our criminal enforcement powers to bear on the wrong-doers.

I think the Chair described accurately the state of mind of the wrong-doers here. They have sinister skill. They have utter cravenness, and I don't think they will respond fully if the worst that can

³² Identity thieves targeted unemployment insurance benefits in record numbers in 2020. Of the identity theft reports received in 2020, over 400,000 came from people who said their information was misused to apply for a government benefit, and the overwhelming majority of these related to unemployment insurance. This represents a staggering increase of nearly 3000 percent from 2019. These reports were overwhelmingly about fraudulently obtained unemployment benefits claims, a problem that has proliferated during the pandemic. Working in cooperation with the U.S. Department of Justice Unemployment Insurance Fraud Task Force, the FTC launched www.IdentityTheft.gov/unemploymentinsurance to provide information to the public on where to report and how consumers can protect their credit.

³³ Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

happen to them is that we take the money away from them and return it to the Treasury or return it to consumers.

In many instances, they squander the assets they gained improperly and they hide the funds that they have. I think the only way to deter their misconduct effectively is to take away their freedom through criminal enforcement.

Now as the Chair said, the FTC already has a platform, the Criminal Liaison Unit, to encourage and work with criminal enforcement authorities to use their powers on behalf of consumers by bringing criminal sanctions to bear on the wrong-doers.

I think an unmistakable lesson of this recent experience is that augmenting that capability, increasing the cooperation with criminal enforcement authorities, with the FTC playing a crucial role in helping set up cases, identify areas for examination, in many instances to assist in compiling a record that will be useful in criminal prosecution is the only way to bring our fullest and most powerful deterrent to bear on these individuals.

Civil enforcement is an important part of the mix, let there be no doubt, but I think our first and foremost strategy in many respects has to be dealing with serious criminals with serious criminal enforcement process.

My second suggestion deals with themes that Daniel and the Chair have raised already and that is we must restore the ability of the Federal Trade Commission to go directly to District Court and to receive restitution or to achieve disgorgement, restitution for victims, disgorgement of other assets to place in the Treasury.

These measures do have important deterrent value and they are the best tool that the FTC has at its disposal to achieve compensation for victims and this must be a priority of legislative drafting in the months to come.

My third suggestion is a dramatic expansion of funding and resources for the FTC, along with some ideas about how to spend it.

Last fall before this committee and proceedings convened by Senator Wicker, I suggested that a threefold increase in the budget of the FTC would be appropriate to put the Commission in a position to do the work that it must do and that it was important not simply to add to the size of the professional staff. The Commission is blessed with wonderful professionals and you have one of them seated before you with Daniel Kaufman.

But I think it is important to consider bringing the salary levels up to the level, for example, that the Consumer Financial Protection Bureau enjoyed, roughly a 20 percent boost, so that we can recruit the best and, more important, to keep them.

What would I do with the salaries? I would enhance what are presently the best data collection and consumer education systems in the world. Those are the FTCs. I would use the money to enhance Sentinel, to expand the consumer and business education projects that the FTC has underway. I would invest more in building the data analytics capability that the agency already has, to use the information that it has, and to apply it more effectively, and I would use the competition and markets authority regime, the data unit there, as a model for doing this.

And, finally, I would indeed use the money to expand cooperation with state partners, with state and local governments to enforce more effectively.

I welcome your questions and those of other committee members. Thank you.

[The prepared statement of Mr. Kovacic follows:]

PREPARED STATEMENT OF WILLIAM E. KOVACIC¹

Introduction

I thank the Subcommittee and its leadership for the invitation to participate in these proceedings.

The COVID-19 crisis has provided the occasion for the latest iteration of a grim phenomenon in human experience. Calamity creates conditions in which serious fraud flourishes. Amid catastrophe occasioned by natural disaster, economic collapse, or disease, craven individuals and organizations prey upon victims with false promises to alleviate misery. The desperation of victims to gain relief renders them especially vulnerable to malicious conduct.

The COVID Pandemic has administered a merciless stress test to our government institutions. Our public institutions have responded admirably to this test. Congress has strived to create new capabilities to challenge and deter serious fraud. The adoption of the COVID-19 Consumer Protection Act is but one illustration.² The Federal Trade Commission (FTC) and its partners at the state and local level have confronted COVID-related fraud with extraordinary dedication. The commitment, drive, and ingenuity of these institutions is inspiring to behold. With their offices shuttered and staff working remotely, our consumer protection agencies have devised creative methods to challenge fraudulent, oppressive commercial conduct that has followed in COVID-19's wake.

The pandemic stress test also has illuminated weaknesses in the framework through which the United States and other countries address supplier misconduct amid crisis conditions. My testimony derives lessons from this experience to suggest how Congress and the regulatory community at home and abroad might improve the existing consumer protection framework. I also identify how the regulators since early 2000 have strengthened operational techniques and devised new approaches for the exercise law enforcement and related policy duties. I recommend that agencies make recent, positive policymaking innovations lasting elements of agency practice.

Most of my suggestions deal with authority that the FTC can apply directly, or could apply, with an enhanced mandate from Congress. I offer an initial cautionary note about the effectiveness of the civil enforcement tools at the FTC's disposal. I believe the only way to deter the most serious fraudulent schemes we have observed is to subject violators to criminal punishment. Severe civil sanctions, including the imposition of monetary penalties and orders mandating restitution or disgorgement, are unlikely to deter truly corrupt individuals or malign enterprises, which often are adept at hiding or squandering assets to render them judgment proof in civil actions.

The FTC has a Criminal Liaison Unit which works with criminal prosecutors at the federal, state, and local levels to assist in the development of criminal cases against participants in serious fraud.³ I see an urgent priority to be the expansion of this effort to ensure that a greater number of malicious behaviors uncovered during the COVID-19 crisis, and in other settings, be punished through criminal proceedings. I doubt that we can approach desired levels of deterrence if potential wrongdoers do not face a growing possibility that fraud will cost them their freedom.

My testimony is guided partly by experience in serving as a Non-executive Director of the United Kingdom's Competition and Markets Authority (CMA). In today's proceedings I do not speak on CMA's behalf, but my comments are informed by the CMA's work in addressing problems related to COVID-19.

¹ Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London; Non-Executive Director, UK Competition and Markets Authority. I thank Robert Anderson, Anna Caroline Müller, Will Hayter, Alison Jones, Antonella Salguero, and Nadhya Sporysheva for useful comments about topics concerning my testimony. The views expressed here are mine only. Contact: wkovacic@law.gwu.edu.

² Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401(b)(1).

³ The functions of this group are described in Federal Trade Commission, Criminal Liaison Unit, at <https://www.ftc.gov/enforcement/criminal-liaison-unit>.

Filling Gaps and Correcting Vulnerabilities: Priorities for New Legislation or Deliberations that Could Yield New Legislation

In the following areas, new legislation would improve the effectiveness of the U.S. consumer protection regime.

Federal Trade Commission Remedial Powers

Last Friday, the Supreme Court ruled that the FTC lacks authority under Section 1(b) of the Federal Trade Commission Act to obtain restitution and similar forms of equitable relief in antitrust and consumer protection cases.⁴ The ability to obtain equitable monetary relief (restitution and disgorgement) in actions filed directly in Federal district court is vital element of the FTC's anti-fraud program. I endorse efforts by Congress to amend the FTC Act to give the FTC express authority to obtain the full range of equitable remedies, including monetary recoveries, for consumer protection violations. The ability to deprive wrongdoers of the financial gains from misconduct provides compensation for victims and increases deterrence by diminishing the returns to fraud and other forms of oppressive behavior.

I also suggest that Congress conduct deliberations concerning the Commission's ability to recover monetary remedies for antitrust violations. I believe there is a useful role for civil monetary relief in FTC antitrust enforcement, and I endorse the approach the Commission set out in a 2003 policy statement to seek such remedies in "exceptional cases" involving clear violations of the antitrust laws.⁵ The consideration of equitable monetary relief as a remedy in FTC actions filed in Federal district court should be part of a larger discussion about what Congress believes to be the agency's role in developing competition law standards through, respectively, administrative adjudication and litigation in the Federal district courts.

Another enhancement of the FTC's remedial authority I recommend for the Committee's consideration would be to establish a U.S. replica of the markets regime now implemented in the United Kingdom by the Competition and Markets Authority.⁶ Part 4 of the Enterprise Act 2002⁷ enables the CMA to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers in the market is harming competition and, where problems are identified, to impose remedies (including price caps) and make proposals to legislators to correct observed problems. This would enable the FTC to study sectoral or economy-wide phenomena and to order remedies regardless of whether the conditions or practices in question violate existing consumer protection laws.

Federal Trade Commission Jurisdictional Limitations

Congress should eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not-for-profit institutions, the business of insurance, and banks.⁸ Most of these jurisdictional limitations date back to the agency's creation. Some exemptions may have made sense when established; the economy and the affected fields of activity were much different. Today, the exemptions are embarrassing anachronisms that diminish the FTC's capability to perform the competition policy role that Congress set out in 1914 and to carry out the consumer protection and privacy responsibilities that now are key elements of the agency's law enforcement portfolio. On many occasions over the past two decades, the FTC has pled with the Congress to revisit and eliminate—or at least curtail—the jurisdictional exemptions.

Federal Trade Commission Budget and Compensation Levels for Employees

There is a grave mismatch between the duties Congress has assigned the FTC and the resources it has given the agency to carry out its mandate. There is a serious need to raise the FTC's budget, but not simply to build a larger staff by hiring more people. Reforms to the Federal compensation system are necessary to attract and retain a larger number of elite personnel. I do not see how the FTC or many other public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to managers and staff.

⁴AMG Capital Management, LLC. v. Federal Trade Commission, No. 19–508 (S.Ct., Apr. 22, 2021).

⁵Federal Trade Commission, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (2003). The Commission withdrew this policy statement in 2012. Federal Trade Commission, Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071 (2012).

⁶William E. Kovacic, *Market structure and market studies*, in COMPETITION LAW AND ECONOMICS 30 (Jay Pil Choi, Wonhyuk Lim & Sang-Hyop Lee eds., 2020).

⁷Enterprise Act 2000, c.40, Section 4 ("Market Investigations").

⁸See David A Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1119, 1133 (2019).

Consider two possibilities for compensation reform. The first is to align FTC salaries with the highest scale paid to the various U.S. financial service regulators. One model would be the compensation scale used to pay employees of the banking regulatory agencies; the salary scale for these bodies exceeds the General Schedule (GS) Federal civil service wage scale by roughly twenty percent.⁹

In adopting the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,¹⁰ Congress concluded that the importance of the mission of the new Consumer Financial Protection Bureau (CFPB) warranted higher salaries for the agency's personnel. If the higher salary scale made sense for the CFPB, I see no good reason why a more generous compensation schedule is not appropriate for what is the Nation's leading consumer protection agency (and its leading Federal data protection authority).¹¹

A second, more ambitious alternative would be to triple the FTC's existing budget of about \$330 million per year and use the increase mainly to raise salaries and partly to add more employees. This experiment might be carried out for a decade to test whether a major hike in pay would increase the agency's ability to recruit the best talent, retain the talent for a significant time, and apply that talent with greater success in a program that involves prosecuting numerous ambitious cases and devising other significant policy initiatives.

A major increase in compensation, either by adopting the CFPB model or trying our my more ambitious proposal, is a crucial test of our national commitment to improve the foundations for effective consumer protection enforcement. The nation should spend what it takes to get the best possible personnel to run the difficult cases (and carry out other measures, such as the promulgation of trade regulation rules) that will be the pillars of a new, expanded enforcement program. Such steps will become even more important if new political leadership seeks to close the revolving door, which has operated as a mechanism to encourage attorneys and economists to accept lower salaries in Federal service in the expectation of receiving much higher compensation in the private sector at a later time.

Federal Trade Commission Administrative Process

I propose two legislative changes to the FTC's administrative framework to enable the Commission to carry out the full range of its duties, including consumer protection, more effectively. The first is to relax the limits that the Government in the Sunshine Act¹² imposes on the ability of commissioners to deliberate together privately to discuss matters of strategy and tactics. Among other consequences, the Sunshine Act severely limits the ability of a quorum of commissioners to deliberate over matters of agency policy except in meetings open to the public.¹³ Policy planning, strategy-setting, and case selection functions cannot be executed at the highest level of effectiveness without this reform. A central reason to entrust governance to a multimember body, rather than to govern an agency with a single executive, is to gain the benefits of deliberation. Collective decision making, and the informal collaborative discussions that surround it, are deemed useful to improve the agency's ability to make wise choices when setting priorities, formulate strategies for litigation and nonlitigation programs, and selecting projects. As now written and interpreted, the Sunshine Act severely reduces the FTC's ability to realize the theoretical advantages of collective governance. I know of no jurisdiction abroad that relies on an administrative commission to implement consumer protection law and encumbers the enforcement with so many restrictions on collegial decision making.¹⁴ In

⁹See Paul H. Kupiec, *The Money in Banking: Comparing Salaries of Bank and Bank Regulatory Employees* (American Enterprise Institute, April 2014), https://www.aei.org/wp-content/uploads/2014/04/-the-money-in-banking-comparing-salaries-of-bank-and-banking-regulatory-employees_17170372690.pdf.

¹⁰Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹¹As a member of the FTC, I observed firsthand how the disparity in salaries between the CFPB and the FTC resulted in a significant migration after 2010 of the Commission's elite consumer protection attorneys and economists to the CFPB. Many of these individuals were major contributors to the FTC's consumer protection programs because they combined outstanding intellectual skills with decades of experience (much of it in middle-level and senior management positions) at the Commission. It was impossible to replace them with individuals of comparable skill and experience, and the FTC's performance suffered as a consequence.

¹²P.L. 94-409, 90 Stat. 1241 (1976).

¹³The Sunshine Act and its requirements are analyzed in Reeve T. Bull, *The Government in the Sunshine Act in the 21st Century* (Mar. 10, 2014) (report prepared for the Administrative Conference of the United States), <https://acus.gov/report/final-sunshine-act-report>.

¹⁴My experience as a non-executive director of the CMA has highlighted how the FTC is largely foreclosed from using policy planning and prioritization techniques that are commonly employed to great advantage in other jurisdictions.

numerous conversations, officials with consumer protection agencies in other jurisdictions with multi-member commissions express disbelief that the United States created an administrative mechanism with enormous potential and then chose to undermine its implementation so severely.

To serve the accountability and transparency aims that motivated the adoption of the Sunshine Act, Congress could press the FTC to use other disclosure techniques. Here, as well, experience in foreign jurisdiction suggests a superior alternative path. A number of jurisdictions achieve desired transparency through measures that require their competition authorities to publish an annual statement of priorities, to issue their prioritization criteria, to provide explanations of the decision to prosecute and not to prosecute in individual cases, and to issue annual reports that discuss the agency's progress in realizing its goals.¹⁵ In many instances, documents that set out priorities, case selection criteria, and results achieved are issued first in draft form for public comment. In addition to these measures, agency officials make regular appearances before legislative committees and in public fora to discuss the work of their institutions. These techniques can be supplemented with a program of ex post evaluation that tests, through actual experience, the assumptions that guided agency decisions in specific cases and supplies an additional basis for public debate about the agency's policymaking. Experience with the disclosure mechanisms described here suggests that other jurisdictions achieve informative public disclosure, and rigorous agency accountability, without the limits imposed by the Sunshine Act.

A second legislative measure is to enable the FTC to recruit and hire competition and consumer protection specialists to serve as administrative law judges.¹⁶ The administrative adjudication of cases was a crucial basis for the establishment of the Commission in 1914. Several pillars of the institution were designed solely, or principally, to support administrative adjudication: the multi-member governance configuration (with the board performing the functions of deciding to prosecute and of hearing appeals from administrative cases), the broad, scalable mandate of Section 5 of the FTC Act,¹⁷ and special information gathering powers to inform the development of legal standards to meet evolving commercial conditions. All of these characteristics put administrative adjudication at the center of the agency's work. There was little point in Congress designing the agency as it did except to create a platform for administrative adjudication and norms creation.

The proceedings before the administrative law judge (ALJ) are the vital first step of the FTC's administrative process. The administrative hearing collects and analyzes evidence and applies the law. It is the foundation for subsequent deliberation by the Commission sitting as a plenum in appeals. At present, the Commission has no ability to insist that ALJ appointees have significant prior experience in competition law or consumer protection law. The ALJ selection process is controlled by government-wide processes that accord no weight to the FTC's institutional considerations. Congress can correct this deficiency by amending the government's ALJ selection process to use competition and consumer protection expertise as a key criterion in the choice of FTC ALJs.

Priorities for Future Legislative Oversight and Policy Discussion

In this section I identify possible focal points for congressional oversight and policy discussions.

Preserving and Extending Recent Operational Innovation and Identifying Other Areas to Improve FTC Capacity

I suggest that the Subcommittee convene formal proceedings or conduct informal discussions with the FTC to ask the agency to describe what new measures it devised to deal with the COVID crisis and how it adapted existing procedures and policy tools to detect and attack fraudulent schemes and to provide information to consumers. It appears that the Commission used a number of innovative methods to provide additional information to consumers and to expedite, as much as possible, the investigations and cases involving fraud. The Subcommittee might engage with

¹⁵For example, it is sensible for the FTC to emulate the practice of many foreign authorities issue closing statements after the agency has conducted an investigation but decided not to intervene. The triggering event in the United States might be matters in which the agency has used compulsory process to conduct an inquiry.

¹⁶See William E. Kovacic, Chairman, U.S. Federal Trade Commission, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY* 42–45 (2009).

¹⁷As amended by the Wheeler-Lea Act, Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition” and proscribes “unfair or deceptive acts or practices.” 15 U.S.C. § 45.

the Commission in an ongoing conversation about what worked well and ought to be continued in more normal times.

The COVID stress test undoubtedly identified for the Commission areas in which greater expenditures and changes to operations are necessary for the future. This might be an ideal moment for the Subcommittee and the Commission to consider what type of capital investment might be needed to upgrade the agency's Consumer Sentinel system or to create net information networks to join up the FTC more closely with other public agencies with consumer protection duties and with civic bodies that monitor problems affecting consumers.

This would also be an appropriate time for a stocktaking exercise in which the Subcommittee and Commission reflect upon ways that, based on the experience of the past year, the pandemic has changed the commercial environment for the longer term—in some instances, creating conditions that pose greater hazards for consumers but in other cases inspiring commercial innovations that benefit consumers. In short, the Subcommittee might use its policy making deliberations to assess, with the FTC and other consumer protection bodies, how COVID has altered the commercial landscape in ways that dictate adjustments in consumer protection policy.

To my view, the FTC has the world's best consumer protection complaint database (the Consumer Sentinel Network) and the world's best program of consumer and business education. During the COVID-19 pandemic, the Commission has made excellent, creative use of these tools.

The Consumer Sentinel Network and the FTC's consumer and business education programs are the product of decades of farsighted investments in building a superior team of professionals and in creating an administrative infrastructure to support them. The formation of these capabilities is a genuine success story in modern public administration. As the Nation emerges from the harshest period of the pandemic and returns to greater health and economic prosperity, there is an opportunity to use recent experience to consider how these efforts might be enhanced. The FTC and its many partners no doubt have learned about ways in which these systems can be improved. The Senate Commerce Committee might convene proceedings to discuss what these enhancements might be and to identify the resources needed to accomplish them.

I suspect one significant focal point for an enhancement of the FTC's capacity will be to strengthen its data analytics team. International experience suggests a way forward on this score. One of the most important policy innovations undertaken by the UK's CMA in recent years has been the creation of a Data, Technology and Analytics (DaTA) unit. Formed in 2018, the group now numbers over forty professionals, many with professional training and experience in fields such as computer science and engineering. The CMA formed the DaTA group out of recognition that a major enhancement of its scientific capabilities was necessary to enable the agency to meet the challenges, in its capacity as a competition agency and a consumer protection body, presented by developments in highly dynamic, high technology commercial sectors. It would no longer be possible to rely chiefly, or exclusively, on attorneys and economists to staff relevant projects.

The CMA DaTA team has proved to be an extremely valuable asset during the pandemic. Among other contributions, the DaTA unit played a vital role in the analysis of consumer complaints related to COVID. The unit's analytics group enabled the CMA to identify trends almost in real time and to publish weekly updates about trends in complaints. The results of the data analysis, in turn, enabled the CMA to focus its law enforcement efforts and related publicity work immediately upon areas of greatest urgency and to give valuable guidance (informed by reliable data) to other government bodies. I urge the Subcommittee to encourage the FTC to develop a comparable capability and to urge Congress to fund its development.

Larger questions about configuration of U.S. Consumer Protection System

The remedies issues mentioned at the beginning of my testimony are only one set of developments that, I expect, will force a reconsideration of the institutional arrangements through which the Federal government and its state and local partners implement consumer protection policy. We may see in the next year the adoption of long-awaited national privacy legislation. Should this come to pass, Congress must choose a mechanism for its enforcement. Should it give the new mandate to the FTC, create a standalone Federal privacy agency, or devise other enforcement and policymaking frameworks? Whatever choice is made will have a major impact on the future operations of the FTC.

We also may see the courts revisit the basic question of whether the president may remove the members of the independent Federal regulatory agencies without cause. My own interpretation of recent cases, such as the Supreme Court's decision

in 2020 in *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁸ is that the Court may be minded to come back on the issue of the removal power in future cases and, perhaps, to alter fundamentally a key pillar of the modern regulatory state. There have been rumblings in the lower courts, as well, in the form of opinions that openly express doubts about the soundness of the FTC's administrative adjudication system.¹⁹

All of these developments suggest that we may be on the threshold of a basic reassessment, driven by the rulings of the Federal courts, about the proper structure and allocation of authority to the regulatory bodies on which Congress has relied heavily for over a century to regulate commerce and protect consumers. This seems an increasingly urgent topic for consideration by the Subcommittee and agencies, such as the FTC, subject to its oversight.

FTC Rulemaking Authority

This is an ideal time for the Subcommittee to reflect upon what adjustments it might wish to make, beyond measures already adopted recently in COVID-related legislation, to clarify and augment the FTC's powers to issue trade regulation rules governing consumer protection and competition matters. In hearings and other policy deliberations, the Subcommittee might consider what mix of instruments it wishes the Commission to exercise (and what remedies to apply) in the future: the Magnuson-Moss rulemaking process, more generic Administrative Procedure Act rulemaking authority, or sector-specific grants of rulemaking powers. In doing so, I think it is sensible for the Subcommittee to be guided by the awareness that the Federal judiciary today is unlikely to embrace statutory interpretation approaches that courts have used in the past to infer broad grants of rulemaking authority to the Commission for various purposes.²⁰ In my view, this reassessment grows more urgent in light of the Supreme Court's decision last Friday in the *AMG Capital Management* case, mentioned above.

Interagency Cooperation

The U.S. consumer protection regime is a decentralized system that distributes policymaking and law enforcement power across numerous agencies at the federal, state, and local levels. Federal statutes coexist with myriad state laws mandates, some with powerful enforcement mechanisms.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is disabled (*e.g.*, due to capture, resource austerity, or corruption).²¹ Among public agencies, there is also the possibility that Federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. Congress should use its oversight powers to encourage the FTC and the states to adopt collaborative approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation—to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

For models of successful interagency cooperation, one might study the successful policy integration that has taken place through the work of the United Kingdom Competition Network and the European Competition Network. In both examples one can see the mix of organizational structures and personal leadership that enabled agencies collectively to accomplish policy results that would have been unattainable through the work of single agencies operating in isolation. The United States has no equivalent to these institutions, which have served valuable policy formation and coordination functions abroad. The development by U.S. consumer protection bodies of such networks could provide a useful way to replicate the success achieved in other jurisdictions. Other useful measures would include the creation of a regular program of secondments in which the leading agencies in the United States—federal and state bodies, alike—would swap personnel to build familiarity

¹⁸ 591 U.S. ____ (2020).

¹⁹ *Axon Enterprise v. Federal Trade Commission*, 2021 U.S. App. LEXIS 2374 (9th Cir., Jan. 28, 2021).

²⁰ One case whose analytical foundations might be seen by some judges as worthy of a rethink is *National Petroleum Refiners Ass'n v. Federal Trade Commission*, 482 F.2d 632 (D.C. Cir. 1973).

²¹ David A. Hyman and William E. Kovacic, *State Enforcement in a Polycentric World*, 2019 B.Y.U. L. REV. 1447.

with the partner institutions and help create the trust and understanding that improve cooperation.

The Subcommittee's oversight activities can be a valuable means for guiding the FTC and other consumer protection bodies agencies to cooperate more extensively in ways that pool experience and knowledge and enable Federal and state officials to get the greatest value from their consumer protection expenditures and respond more quickly and effectively to fraud and patterns of misconduct. The Subcommittee might help foster the expansion and formalization of interagency contacts through secondments, the formation of working groups, and the creation of U.S. equivalents of the ECN and the UKCN.

Promoting agency efforts to expand their existing impact evaluation programs—especially common evaluation exercises performed by federal, state, and local agencies, could be one part of a broader effort by Congress to support efforts to evaluate the effects of past antitrust cases—especially those with significance for the digital marketplace. Committee hearings could provide a regular forum in which agency officials, practitioners, and academics examine the effects of completed matters. Committees could cooperate with universities and think tanks to hold programs that study past experience. One step in this direction might be for consumer protection agencies to convene an event that focuses on lessons learned for consumer protection policy from the pandemic experience.

I also would note that during the crisis the FTC has formed closer alliances with its competition and consumer protection agencies overseas. By reason of desperate necessity, the FTC and its foreign counterparts have recognized, in a highly practical way, the benefits that can flow from pooling knowledge and accounting from policy experiments taking place in real time in other jurisdictions. I expect a favorable result of the crisis to be that the habit of deeper cooperation born out of the crisis will persist and improve policymaking in the future.

Senator BLUMENTHAL. Thanks very much, Professor Kovacic.
And now Kevin Rhodes.

**STATEMENT OF KEVIN H. RHODES, SENIOR VICE PRESIDENT
AND DEPUTY GENERAL COUNSEL, 3M COMPANY**

Mr. RHODES. Chair Blumenthal, Ranking Member Blackburn, and Distinguished Members of the Subcommittee, thank you very much for the opportunity to testify today.

3M appreciates your focus on consumer protection, including critical issues of PPE supply chain integrity and public health and safety.

In my role as Senior Vice President and Deputy General Counsel with 3M, I am proud to be a leader of 3M's ongoing efforts to address fraud, counterfeiting, and price gouging of PPE products during the COVID-19 pandemic, most notably 3M's N95 respirators.

Hundreds of 3Mers around the company and across the world have joined together to help stop pandemic profiteers seeking to take advantage of the tremendous demand for our products in unlawful ways.

Our efforts are designed to help healthcare workers, first responders, and others on the front lines of the fight against COVID-19 get the genuine 3M N95 respirators they need and deserve at a fair price.

Our actions against PPE scams are just a part of 3M's overall pandemic response. We are committed to the safety of our employees, healthcare workers, and the public. We are meeting these commitments by responding to the pandemic from all angles.

We have increased our global manufacturing of PPE products to unprecedented levels, making nearly four times as many 3M N95 respirators than before the pandemic. In the U.S. alone, we are now producing more than 95 million N95 respirators every month, thanks to ramped-up production at our facilities in Aberdeen,

South Dakota, and Dowling, Nebraska, and we are partnering with Federal, state, and local governments to help ensure our products are getting to where they are needed the most.

With respect to our efforts to address PPE scams, we have published a wide variety of online resources and tips to help the public spot and avoid fraud, counterfeits, and price gouging.

We have created and staffed hotlines and web intake forms around the world to help the public identify authentic 3M products from 3M authorized distributors and to report cases of suspected wrong-doing. Since the beginning of the pandemic, we have processed more than 13,800 of those reports. We have referred thousands of them to law enforcement and government agencies, and the effectiveness of the investigations and actions those law enforcement authorities and agencies have taken is a key lesson learned in our view.

We've also taken legal action directly against wrong-doers. 3M has filed 33 lawsuits in courts across the country. We have won temporary restraining orders, preliminary injunctions, and final judgments in multiple cases, putting a stop to the defendants' unlawful conduct. In those cases where 3M has recovered monetary damages, we are donating all of those recoveries to COVID-19-related charities.

We're also prioritizing the stopping of online scams, as Chair Blumenthal mentioned in his opening comments. Those have been a key focus of our activities, as well. We have partnered with e-commerce and technology companies to remove tens of thousands of false or deceptive e-commerce listings, social media posts, and websites.

3M's partnerships with law enforcement and Customs authorities have been especially important in addressing the problem of counterfeits. In February, the Department of Homeland Security announced that its special agents had seized 11 million counterfeit masks in operations conducted in five states. That investigation began with a suspected counterfeit report submitted to 3M by a concerned respirator buyer and that example's hardly unique.

Since the beginning of the pandemic raised by law enforcement, seizures by Customs authorities around the world and other actions have removed more than 38 million counterfeit respirators from the market before they can endanger unsuspecting wearers.

3M hopes that by continuing to share our experience, we can help in educating the public and in protecting it from further scams.

In my written testimony, I offer a number of lessons learned and suggestions in that regard, highlighting the effectiveness of private/public partnerships, of consumer education, and the need for pandemic preparedness to include specific plans and dedicated resources for law enforcement and government agencies to respond quickly and effectively to the fraud, counterfeiting, and price gouging that unfortunately does take place when demand for PPE so far exceeds supply.

I thank you again for the opportunity to offer these views today. 3M is very proud of our hard work as a leading supplier of N95 respirators and other PPE that are so important to the fight against COVID-19, and of our commitment to continuing to help

prevent fraud, counterfeiting, and price gouging before it starts and to stop it where it is occurring.

I will be pleased to answer your questions or to supply additional information for the record. Thank you very much.

[The prepared statement of Mr. Rhodes follows:]

PREPARED STATEMENT OF KEVIN H. RHODES, SENIOR VICE PRESIDENT AND DEPUTY
GENERAL COUNSEL, 3M COMPANY

Chair Blumenthal, Ranking Member Blackburn, and Distinguished Members of the Subcommittee on Consumer Protection, Product Safety, and Data Security of the Senate Committee on Commerce, Science, and Transportation, thank you for the opportunity to appear before you today.

Chair Blumenthal, I would especially like to thank you for organizing this critically important hearing and for your tireless championing of consumer protection. Senator Blackburn and Subcommittee Members, your partnership and collaboration with 3M during this pandemic is greatly appreciated, and I thank each of you as well.

3M is grateful for the opportunity to testify on the subject of “Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles.” By way of introduction, my name is Kevin Rhodes, and I am a Senior Vice President and the Deputy General Counsel of 3M Company, based in St. Paul, Minnesota. In this role, I am proud to be a leader of 3M’s ongoing efforts during the COVID–19 pandemic to address fraud, counterfeiting, and price gouging of personal protective equipment, most notably respiratory protection products. Our efforts are designed to help the heroic healthcare workers and first responders, who put their lives on the line for others every day, get the genuine 3M N95 respirators¹ they need and deserve at a fair price.

About 3M

Since its founding in 1902 in northern Minnesota as a small-scale mining venture, 3M has grown into a global, diversified technology company based on science applied to life and bringing innovative new products to the market. 3M’s vision is to create technologies and products that advance every company, enhance every home, and improve every life; and today, some 95,000 3Mers work together to create more than 60,000 3M products that are used in homes, businesses, schools, hospitals, and other industries around the globe.

Since long before the COVID–19 pandemic, 3M has been a leading provider of personal protective equipment (PPE) and medical solutions for medical professionals, workers, and the public. Besides the disposable N95 respirators that are among 3M’s most widely-known personal protective equipment products, 3M is also a leading manufacturer and supplier of powered-air purifying respirators, elastomeric reusable respirators, and self-contained breathing apparatuses. In addition, 3M provides other critical products in support of the world’s pandemic response, including hand sanitizer, single patient use stethoscopes, disinfectants, separation and purification media used in vaccine manufacturing, oxygenator membranes, and disinfecting wipes.

3M’s response to the COVID–19 pandemic

From the outset of the COVID–19 pandemic, 3M has recognized and embraced its responsibility to lead in supporting the public health response. In March of 2020, Mike Roman, 3M’s Chairman of the Board and Chief Executive Officer, made clear that 3M’s most urgent priority is protecting the health and safety of its employees and others:

3M has a unique and critical responsibility in pandemic preparedness and response—a responsibility I and all our people take very seriously. Our most urgent priority is the safety of our employees, healthcare workers and the public.²

¹“N95 respirators” are filtering facepiece respirators approved by the United States National Institute for Occupational Safety and Health (NIOSH) as capable of filtering at least 95 percent of non-oily particles from the air breathed through the respirator when properly selected and worn. See 42 C.F.R. Part 84—Approval of Respiratory Protective Devices.

²“3M CEO on COVID–19 response: We have a unique and critical responsibility,” available at <https://news.3m.com/English/3m-stories/3m-details/2020/3M-CEO-on-COVID-19-response-We-have-a-unique-and-critical-responsibility/default.aspx>.

3M has taken these words to heart. 3Mers across the globe have helped fulfill 3M's unique and critical responsibility by responding to the pandemic from all angles. We have ramped up our United States and global manufacturing of disposable respirators and are making nearly four times as many 3M N95 respirators than before the pandemic. We are helping to ensure those products are getting to where they are needed most by frontline workers, partnering not only with our authorized distributors, but also directly with Federal and state partners, including the Strategic National Stockpile, the Department of Health and Human Services, and the Federal Emergency Management Agency. In addition, we are aggressively targeting fraud, counterfeiting, and price gouging by bad actors seeking to take advantage of the tremendous demand for our products during the pandemic.³

Beginning in January of 2020, as we began to see the challenges that were coming, 3M began surging its production of N95 and other respiratory products to unprecedented levels. We ramped up production to full capacity at our factories making respirators in the United States and around the world—doubling production within two months. By the end of the year, we had manufactured two billion disposable respirators globally—more than three times the number we produced in 2019. 3M also increased our supply of reusable respirators and powered air-purifying respirators, which are often suitable alternatives to disposable N95 or similar respirators.

In the United States, 3M quickly moved to full-capacity production of N95 respirators, bringing surge manufacturing capacity on line for 24/7 production at our facilities in Aberdeen, South Dakota; and Valley, Nebraska.⁴ 3M also invested in capital and resources to increase its United States N95 respirator production, and partnered with the Department of Defense, via contracts awarded under the authority of the Defense Production Act (DPA), to increase 3M's N95 respirator manufacturing capacity in the United States. This increase in 3M's United States production includes a 120,000-square-foot expansion at 3M's manufacturing facility in Aberdeen, South Dakota, where 3M has added hundreds of new jobs since the pandemic began. In the United States alone, 3M is now manufacturing more than 95 million N95 respirators a month—up from 22 million a month prior to the pandemic.

With the global demand for N95 respirators and other PPE products exceeding the supply available from 3M and other manufacturers since early in 2020, wrongdoers have sought to exploit the public health emergency and prey on innocent parties through a variety of unlawful scams, including fraudulent offers of N95 respirators and other products in high demand, counterfeiting, price gouging, and other unfair and deceptive practices—all of which undercut the integrity of the marketplace and constitute an ongoing threat to public health and safety. As explained in more detail below, 3M has launched a global effort to help protect the public against these pandemic profiteers and their unlawful activities. We have created and made available many resources to help purchasers of respirators and the public avoid these unlawful schemes. 3M has established and staffed new hotlines and web intake forms in the United States and around the world to help purchasers and end-users of 3M products identify authentic 3M respirators and ensure products are from 3M authorized distributors. 3M has published on our website the United States list prices for many of the most common models of 3M N95 respirators to help customers identify and avoid inflated prices. We have also filed lawsuits in courts across the country against wrongdoers, terminated 3M distributors for engaging in price gouging or violating 3M policy, and collaborated with technology companies to combat online fraud and deceptive trade practices. Our partnerships with law enforcement and customs agencies around the world, including the United States Department of Homeland Security (DHS) and United States Customs and Border Protection (CBP), have resulted in raids and seizures that have removed tens of millions of counterfeit respirators from the market before they could reach unsuspecting users.

Pandemic profiteers: fraud, counterfeiting, and price gouging

It was not long after the COVID-19 pandemic began that 3M started to receive reports of suspected fraud, counterfeiting, and price gouging connected with our products. 3M moved quickly to form and deploy a dedicated team, including in-house and outside attorneys, government affairs staff, and employees from across

³For more on these and many more 3M actions to lead in the pandemic response, see "A year of helping fight COVID-19," available at <https://news.3m.com/English/3m-stories/3m-details/2021/-A-year-of-helping-fight-COVID-19/default.aspx>.

⁴See "How 3M Plans to Make More than a Billion Masks By End of Year," available at <https://www.bloomberg.com/news/features/2020-03-25/3m-doubled-production-of-n95-face-masks-to-fight-coronavirus>.

the company, working alongside federal, state, and international law enforcement authorities and government officials, to help investigate and take action against those involved in these unlawful and unethical activities.

From the outset, many of the reports we investigated involved fraudulent schemes offering to sell nonexistent quantities of 3M N95 respirators to unsuspecting buyers, including local, state or provincial, and Federal or national governments. Examples include fraudsters claiming to have access to enormous quantities of 3M products—sometimes billions or even trillions of respirators, representing hundreds or thousands of years of 3M’s entire production capacity—when in fact they had no business relationship with 3M and no access to 3M products. These scammers have taken many approaches to try to convince would-be buyers that they have genuine 3M N95 respirators to sell. They have impersonated 3M employees, claimed to have the ability to place orders directly with 3M factories, and represented that they are directly affiliated with 3M as one of our authorized channel partners. Often these fraudsters create fake invoices, purchase orders, letters, or e-mails purporting to be from 3M or its executives, or other forged documents to support their claims of access to 3M and its products.

The targets of these scams are not only private purchasers, but also government procurement officials charged with using public funds to secure PPE supplies for public sector frontline workers. These buyers often have longstanding relationships with 3M authorized distributors and 3M has emphasized that these existing supply chains are the safest way to secure genuine 3M products. 3M has explained that offers of enormous quantities of what are claimed to be 3M respirators from new sellers that no one has ever heard of before, or new companies that were only formed after the pandemic started, or that have no experience in PPE supply, sound too good to be true because they are not true.

The goal of these schemes is to secure payment in advance, before the buyer realizes the product does not exist. Thus, the payment terms usually include up-front deposits, payments into escrow accounts that the purported seller may access, and other schemes designed to allow the fraudster to secure funds in advance and then disappear once the money is received. In addition to 3M’s hotlines offering support to verify whether offers are from legitimate sellers, 3M also has published a list of common schemes that do not match 3M’s business practices to help buyers identify and avoid fraudulent offers.⁵

Typically, these schemes also involve price gouging, with the selling prices of the purported 3M N95 respirators often being many multiples of the prices for authentic 3M respirators from 3M’s authorized distributors. These price gougers often target government procurement officials charged with using precious public funds to secure PPE supplies for public sector healthcare workers and first responders. To help buyers identify and avoid inflated prices, early in the pandemic 3M took the important step of publishing its single-case list prices for the most common 3M N95 respirator models sold in the United States.⁶

As the pandemic progressed, reports of counterfeit respirators increased. Both the number of counterfeit manufacturers and the quantities of counterfeit products they were offering for sale steadily increased as the demand for N95 respirators continued to exceed supply and counterfeiters set up manufacturing operations to capitalize on the opportunity to make and sell fake products. The counterfeit products are often manufactured at scale and for cross-border sales, making it difficult to track the source of products being offered for sale to end-users in the United States or elsewhere. Although some of the counterfeit products may be identified by mistakes in packaging, missing straps, strange odors, blocked valves, and other readily-apparent defects, counterfeiters have become increasingly sophisticated since the pandemic began, making their fake respirators more difficult to distinguish from authentic 3M products. 3M has responded by emphasizing that the best way to avoid counterfeit products is to purchase 3M N95 respirators only from 3M authorized distributors, by posting tips on how to spot counterfeit products on our website, and by publishing counterfeit alerts as we become aware of specific information that will assist buyers and users in identifying and avoiding counterfeits, such as lists of commonly counterfeited product models, product lot codes used by counterfeiters, fake product seals, and other ways to spot counterfeit products.⁷

⁵ See <https://multimedia.3m.com/mws/media/18602210/covid-n95-selling-facts.pdf>.

⁶ See <https://multimedia.3m.com/mws/media/18621790/get-the-facts-n95-respirator-pricing.pdf>.

⁷ See <https://multimedia.3m.com/mws/media/19347480/3m-counterfeit-communication-letter.pdf>; <https://multimedia.3m.com/mws/media/19608420/3m-8210-counterfeit-communication->

The dangers of counterfeit respirators

3M has received questions about the performance of counterfeit respirators. The answer is that the performance of these fake products is unknown, may be highly variable, and cannot be trusted. There is a real danger that they will not provide the level of protection wearers expect from genuine 3M N95 respirators. These counterfeit products have not been NIOSH approved. They are not tested to see if they meet the N95 standard. The people who are making these fakes are not interested in testing them to see if they work. They are not interested in making high quality products. They are interested in nothing more than fraudulent profiteering by making as many as they can as cheaply as possible and passing them off as NIOSH approved, genuine 3M respirators.

Genuine 3M N95 respirators contain advanced filter material and are designed to be tight fitting, forming a seal with the wearer's face, so inhaled air passes through the filter (instead of going around the edges). 3M N95 respirators contain proprietary, advanced electrostatic microfiber media to capture particles. 3M's unique manufacturing process injects an electrostatic charge into the microfibers, which are arranged in an open formation, allowing for easier passage of air while also enhancing the capture of airborne particles. 3M N95 respirators are also designed to seal to the wearer's face—as fit and seal are critical to respirator performance. 3M N95 respirators are tested on an ongoing basis to ensure they meet filtration efficiency requirements and other performance criteria specified in applicable government regulations. 3M has strict quality controls and manufacturing standards to help ensure the consistent high performance and consistent fit of our products.

Counterfeit respirators, on the other hand, are not designed, tested, or approved to ensure they perform as advertised. Counterfeit respirators are made by unknown fraudsters, using unknown processes and materials, with unknown or nonexistent quality controls. They do not come from 3M's supply chain and are not manufactured using 3M's proprietary advanced materials or robust quality controls. There is no telling how an individual counterfeit respirator will perform because counterfeiters have little or no interest in quality control and thus there may be tremendous product-to-product variability in fit, filtering ability, and performance. Counterfeit products never should be trusted to provide respiratory protection for anyone who needs it, let alone frontline workers in the fight against the pandemic.

As the Honorable Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security, said about counterfeit respirators during a press conference announcing the seizure of more than eleven million counterfeits on February 18, 2021, "Not only do they give a false sense of security, but how dangerous is the exposed individual? How dangerous is the individual confronting a potential COVID-19 infection without any protective gear?"⁸

Counterfeiters are criminals. They have no qualms putting fake NIOSH N95 certifications on their products. They have no qualms trying to pass their products off as genuine using fake 3M logos and fake packaging. They have no qualms deceiving frontline workers counting on genuine 3M N95 respirators and do not care whether their products provide those frontline workers with protection or not. That is why 3M has been so active in communicating the dangers of counterfeit respirators. 3M has stressed that avoiding counterfeits starts by knowing who is selling what are claimed to be genuine 3M N95 respirators—in other words, is it really a 3M authorized distributor with access to genuine 3M products? 3M has communicated widely that it stands ready to help answer that most important question. For anyone who has any questions about whether respirators that have been purchased or that are being offered for sale are authentic, 3M has the resources available to assist in authenticating the product, via our anti-fraud hotlines or our [3m.com/covidfraud](https://www.3m.com/covidfraud) website.

3M's global response against respirator fraud, counterfeiting, and price gouging

In March of 2020, 3M launched its global effort against respirator fraud, counterfeiting, and price gouging. 3M did so to help protect healthcare workers, first responders, and others on the front lines of the fight against the COVID-19 pandemic from counterfeit and inferior PPE products, to help reduce the money and time wasted by government and other procurement personnel on fraud and scams, to address exorbitant pricing by those seeking to take advantage of a public health crisis for personal gain, and to make sure that 3M's good name and reputation are not

letter.pdf; <https://multimedia.3m.com/mws/media/18616170/avoiding-counterfeit-respirators.pdf>.

⁸"Feds seize more than 11 million fake N95 masks," available at <https://www.msn.com/en-us/news/us/feds-seize-more-than-11-million-fake-n95-masks/ar-BB1dMdsF?li=BBnb7Kz>.

associated with fraudsters, counterfeiters, or other unscrupulous pandemic profiteers.

Our legal and government affairs functions have joined with hundreds of 3M employees across the company and around the world, as well as more than 30 law firms representing 3M, to protect public health and the PPE supply chains supporting healthcare workers and others responding to the pandemic. We track our progress and the success of our efforts, regularly publishing updates on our website so the public can stay informed and engaged in helping to identify unlawful activities, and to deter bad actors by communicating 3M's sustained and substantial commitment to finding and stopping their misconduct.

The latest update summary from our 3m.com/covidfraud website, showing the results of our efforts to date, is reproduced on the following page:⁹



⁹ See <https://multimedia.3m.com/mws/media/1862180/3m-covid-19-infographic-print-version.pdf>.

As the infographic indicates, 3M's efforts start with creating opportunities for the public to report suspected cases of fraud, counterfeiting, and price gouging. We have created and staffed public hotlines in the United States and elsewhere around the world to help callers identify authentic 3M products, ensure products are from 3M authorized distributors, and report cases of suspected wrongdoing. Our website also includes intake forms so the public can report cases of suspected fraud, counterfeiting, and price gouging. Since the beginning of the pandemic, we have processed more than 13,800 reports of suspected fraud, counterfeiting, and price gouging from our hotlines and web intake forms. Similarly, we have established points of contact for government procurement officials to validate third-party offers and quotes, and have worked with federal, state, and local procurement officials across the country to help determine the validity of PPE offers and proposals.

3M investigates and takes action on these reports in a number of ways. Many are referred to law enforcement or other authorities for investigation and enforcement. We have referred thousands of cases to Federal and state law enforcement, with many leading to criminal or civil enforcement actions. 3M has partnered closely with the United States Department of Justice COVID-19 Hoarding and Price Gouging Task Force (the DOJ Taskforce), a combined effort involving attorneys from Main Justice and participants from U.S. Attorney's offices in every Federal district. We have reached out to state attorneys general offices as well to brief them on our efforts and to establish working relationships for information sharing and case referrals.

The investigatory and enforcement powers of law enforcement have greatly enhanced the ability to take effective action based on reports 3M receives of suspected illegal activities. Price gouging, for example, can be addressed effectively via our close partnerships with the DOJ Taskforce and state attorneys general. 3M has referred numerous reports of suspected price gouging to the DOJ Taskforce and state attorneys general for investigation and potential enforcement.¹⁰

3M also has filed legal actions directly against wrongdoers. 3M has filed 33 lawsuits in Federal courts across the United States and in Canada against defendants engaged in fraud, counterfeiting and price gouging.¹¹ 3M has won 18 temporary restraining orders and 11 preliminary injunctions from Federal judges across the country putting a stop to defendants' unlawful conduct. In 20 of the cases, 3M has reached settlements where the defendants agreed to cease their unlawful activities immediately and permanently, subject to strict verification and disgorgement of ill-gotten profits. In 17 of the cases, 3M has recovered monetary damages through court orders or agreements by the defendants, and 3M is donating all of those recoveries to COVID-19 relief charities.

As an example, it was on April 10, 2020, at the height of the pandemic in New York, that 3M filed its first Federal lawsuit, in the United States District Court for the Southern District of New York against Performance Supply, LLC, a company targeting public officials in a fraud and price gouging scheme. Performance Supply offered to sell a Purchasing Agent at the New York City Office of Citywide Procurement seven million nonexistent 3M N95 respirators for \$45 million, representing a markup 500 percent higher than 3M list prices. Thankfully, New York City officials contacted 3M and we let them know the offer was fake. 3M sued and won a temporary restraining order and a preliminary injunction, putting a prompt end to the scam.¹² We also shared the information we had discovered with law enforcement authorities, who brought criminal charges of conspiring to commit wire fraud, wire fraud, and conspiring to violate the DPA against Ronald Romano, the owner of Performance Supply.¹³

An important element of 3M's enforcement efforts is addressing false or deceptive online business practices. 3M has partnered with some of the largest e-commerce and technology companies in the world to secure the removal of tens of thousands of e-commerce listings with fraudulent or counterfeit product offerings, false or deceptive social media posts, and deceptive Internet addresses seeking to scam unsuspecting buyers.

¹⁰ See, e.g., "New Jersey Man Arrested For \$45 Million Scheme To Defraud And Price Gouge New York City During COVID-19 Pandemic," available at <https://www.justice.gov/usao-sdny/pr/new-jersey-man-arrested-45-million-scheme-defraud-and-price-gouge-new-york-city-during>; "Santa Monica Woman Admits Price Gouging in Sale of Scarce N95 Masks She Sold at Huge Markups over List Price During Pandemic," available at <https://www.justice.gov/usao-cdca/pr/santa-monica-woman-admits-price-gouging-sale-scarce-n95-masks-she-sold-huge-markups>.

¹¹ A list of legal citations to these lawsuits is attached as Appendix A.

¹² See *3M Co. v. Performance Supply, LLC*, 458 F. Supp. 3d 181 (S.D.N.Y. 2020).

¹³ See "A Car Salesman, a Macedonian Ex-Minister and a \$45 Million Mask Scheme," available at <https://www.nytimes.com/2020/05/26/nyregion/coronavirus-fraud-masks-new-york.html>.

A case that illustrates how 3M has collaborated with online retailers to stop scams is *3M Co. v. KM Bros Inc., et al.*, No. 2:20-cv-05049 MWF (JCx) (C.D. Cal. 2020). This case involved sellers on Amazon of fake, defective, and damaged respirators under the 3M name and logo, at prices more than 20 times 3M list prices. When buyers complained that they had received far fewer items than ordered, that the items appeared not to be 3M products, and that the products were damaged and in plastic bags rather than regular packaging, Amazon blocked the sellers' accounts and 3M filed suit.¹⁴ A settlement including a Consent Judgment and Permanent Injunction put an end to the scam and disgorged the Defendants' profits in the amount of \$192,000, which 3M donated to Direct Relief's COVID-19 Fund for Community Health.¹⁵

3M's partnerships with law enforcement and customs authorities around the world have been particularly important in addressing the problem of counterfeit respirators. This collaboration has helped prevent tens of millions of counterfeit respirators from reaching frontline workers in the United States and elsewhere. In the United States, 3M actively shares information and case referrals involving counterfeiting with DHS, through Homeland Security Investigations (HSI) and the National Intellectual Property Rights Center (IPR Center), and with CBP. An example of this close collaboration is a recent investigation that HSI and the IPR Center launched after 3M contacted them and shared information that had come in through our fraud reporting process. 3M was contacted by a healthcare organization that had read a counterfeit alert 3M posted on its website and realized that the respirators it had purchased for its doctors and nurses had lot codes 3M identified as being used by counterfeiters. The HSI/IPR Center investigation identified the source of the counterfeit products and culminated in the announcement, on February 17, 2021, that HSI special agents had executed multiple criminal search warrants and had seized 11 million counterfeit masks in operations conducted in five states.¹⁶ That matter is hardly unique: since the beginning of the pandemic, raids by law enforcement and seizures by customs authorities around the world have removed more than 38 million counterfeit respirators from the market before they could endanger unsuspecting wearers.

As 3M's N95 respirator manufacturing capacity in the United States and elsewhere has increased, the gap between supply and demand has narrowed, and with that narrowing we have seen a gradual decrease in the number of reports we have received of unethical and unlawful business practices related to 3M N95 respirators. The volume of reports also has decreased as 3M has widely publicized its anti-fraud and anti-counterfeiting efforts, both to alert potential targets as to the nature and risks of these schemes so they can avoid becoming victims, and to deter would-be fraudsters by making clear 3M's resolve to find and stop their unlawful behavior.¹⁷ Even with this decrease in the volume of reports to our hotlines and website, 3M's commitment to helping prevent fraud, counterfeiting, and price gouging before it starts and to stop it where it is occurring remains unwavering, and 3M will continue these efforts for as long as they are needed to support those serving so bravely on the front lines of the COVID-19 response.

Lessons learned and suggestions for consideration

In January 2021, 3M published a white paper, entitled "*Preparing Nations and Protecting Lives: Pandemic Preparedness for Citizens and Economies*,"¹⁸ setting forth a series of policy recommendations to strengthen pandemic preparedness and response. The white paper explains how policymakers can help proactively combat fraud and counterfeit PPE activity by taking steps to avert PPE demand spikes. The recommendations include establishing robust stockpile programs, supporting resilient PPE supply chains, and minimizing trade restrictions to promote global access to an array of PPE products.

In addition, 3M has learned a number of lessons from its experience addressing fraud, counterfeiting and price gouging during the COVID-19 pandemic, and respectfully offers the following insights for consideration by policymakers:

¹⁴ See *3M Co. v. KM Bros. Inc., et al.*, No. 2:20-cv-05049 MWF (JCx), 2020 WL 8676137 (C.D. Cal. 2020).

¹⁵ See "3M Settles N95 Price-Gouging Claims with Amazon Seller," available at <https://news.bloomberglaw.com/ip-law/3m-settles-n95-price-gouging-claims-with-amazon-seller>.

¹⁶ See "DHS prevents millions of counterfeit N95 masks from reaching hospital workers, first responders," available at <https://www.ice.gov/news/releases/dhs-prevents-millions-counterfeit-n95-masks-reaching-hospital-workers-first>.

¹⁷ A list of Internet links to press coverage of 3M's efforts to address fraud, counterfeiting, and price gouging is attached as Appendix B.

¹⁸ https://www.3m.com/3M/en_US/worker-health-safety-us/epidemic-preparedness-and-stockpiling/.

- Even with more robust and secure domestic PPE supply chains, as well as government stockpiles, in a future pandemic the PPE marketplace may struggle to keep up with dramatic spikes in demand, and this will create an opportunity for unscrupulous actors seeking to take advantage of a public health crisis for personal gain. Thus, pandemic preparedness planning should include specific plans and dedicated resources for federal, state, and local governments to respond quickly against fraud, counterfeiting, and price gouging. The DOJ Task Force is an example of rapid and effective mobilization of Federal resources against these unlawful activities. Federal agencies, such as the Federal Trade Commission (FTC), also can play an important role by enforcing existing laws and regulations against fraud, counterfeiting, and price gouging, seeking all available relief to stop and deter these bad actors.
- Close public-private coordination among law enforcement, government agencies, and suppliers of PPE that is subject to fraud, counterfeiting, and price gouging, can be particularly effective in stopping unlawful actors. As I have described, 3M's partnership with Federal and state law enforcement and agencies has greatly enhanced the ability to take effective action based on reports 3M receives of suspected illegal activities. Such partnerships that have been effective during the COVID-19 pandemic can serve as a model for securing PPE pandemic response supply chains in the future.
- With respect to counterfeit PPE, much of the counterfeiting appears to be perpetrated by manufacturers producing counterfeit products at scale for export. Once such products enter the United States supply chain, they can be difficult to identify, track, and remove from the marketplace before they get into the hands of healthcare workers and other end users. The most effective way to stop such counterfeits is before they enter the domestic supply chain. The cross-border trade in counterfeit PPE requires multilateral solutions supported with American leadership.
- Public education is important so that potential targets of scams—not only private purchasers, but also government procurement officials charged with using public funds to secure PPE supplies for public sector frontline workers—can identify and avoid being victimized by fraud, counterfeiting, or price gouging. Government agencies, such as the FTC, can play an important role in alerting the public to the threats of fraud and counterfeit PPE.
- In terms of Federal government procurement of PPE supplies, more centralized procurement for Federal agencies could help ensure distribution of supply is appropriately prioritized and could lessen the risks of agencies reaching out to the secondary market to fill urgent orders (*e.g.*, rather than have agencies individually compete for scarce supplies, identify a single agency to serve as “consolidator” of orders across agencies, working to secure PPE from trusted suppliers).

* * *

Chair Blumenthal, Ranking Member Blackburn, and Distinguished Members of the Subcommittee, I thank you again for the opportunity to offer these views on the subject of “Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles.” 3M is proud of our hard work to fulfill our unique and critical responsibility in pandemic preparedness and response as a leading supplier of N95 respirators and other PPE that are so important to the fight against the COVID-19 pandemic, as well as our efforts to address the reports of fraud, counterfeiting, and price gouging that have arisen in connection with these products during the pandemic. 3M very much appreciates the interest and engagement by Members of this Subcommittee and their staffs on these critical topics of PPE supply chain integrity and public health and safety. 3M remains committed to addressing this unethical and unlawful activity and to continuing to work with members of the Subcommittee, their staffs, and other stakeholders to stop and prevent it.

I will be pleased to answer any questions or to supply additional information for the record.

APPENDIX A

3M lawsuits alleging COVID-19 related fraud, counterfeiting, and price gouging.

1. *3M Co. v. Shopify Inc.*, No. cv-20-28883 (Can. Ont. Sup. Ct. Apr. 8, 2020)
2. *3M Co. v. John Doe*, No. DC-20-05549 (Dall. Cnty. 193rd Jud. Dist. Apr. 10, 2020)
3. *3M Co. v. Performance Supply, LLC*, No. 1:20-cv-02949 (S.D.N.Y. Apr. 10, 2020)
4. *3M Co. v. RX2LIVE, LLC*, No. 1:20-cv-00263 (E.D. Cal. Apr. 10, 2020)
5. *3M Co. v. Geftico, LLC*, No. 6:20-cv-00648 (M.D. Fla. Apr. 14, 2020)
6. *3M Co. v. Hulomil, LLC*, No. 3:20-cv-00394 (W.D. Wis. Apr. 28, 2020)
7. *3M Co. v. 1 Ignite Capital, LLC, et al.*, No. 4:20-cv-00225 (N.D. Fla. Apr. 30, 2020)
8. *3M Co. v. King Law Center, Chartered*, No. 6:20-cv-00760 (M.D. Fla. Apr. 30, 2020)
9. *3M Co. v. TAC2 Global LLC*, No. 8:20-cv-01003 (M.D. Fla. Apr. 30, 2020)
10. *3M Co. v. Zachary Puznak, et al.*, No. 1:20-cv-01287 (S.D. Ind. Apr. 30, 2020)
11. *3M Co. v. Zhiyu Pu, et al.*, No. cv-20-28903 (Can. Ont. Sup. Ct. May 11, 2020)
12. *3M Co. v. Burris Wollsieffer, et al.*, No. 2:20-cv-00336 (D. Utah May 29, 2020)
13. *3M Co. v. Matthew Starsiak, et al.*, No. 20-cv-01314 (D. Minn. June 5, 2020)
14. *3M Co. v. Preventative Wellness Consultants LLC*, No. 2:20-cv-02932 (S.D. Ohio June 5, 2020)
15. *3M Co. v. KM Bros. Inc., et al.*, No. 2:20-cv-05049 (C.D. Cal. Jun. 8, 2020)
16. *3M Co. v. Legacy Med. Supplies, LLC, et al.*, No. 20-cv-01371 (D. Minn. June 15, 2020)
17. *3M Co. v. Nexus Med. LLC, et al.*, No. 1:20-cv-00697 (W.D. Tex. June 30, 2020)
18. *3M Co. v. Aime LLC, et al.*, No. 2:20-cv-01096 (W.D. Wash. July 15, 2020)
19. *3M Co. v. G7 Env't LLC, et al.*, No. 20-cv-08892 (C.D. Cal. Sept. 28, 2020)
20. *3M Co. v. Am. Dental Equip. LLC*, No. 5:20-cv-02128 (C.D. Cal. Oct. 9, 2020)
21. *3M Co. v. Premium Contractor Solution, LLC*, No. 3:20-cv-00443 (S.D. Ohio Oct. 29, 2020)
22. *3M Co. v. Dreside, Navitelia Indus. Inc.*, No. 20-cv-24489 (S.D. Fla. Oct. 30, 2020)
23. *3M Co. v. Addian, Inc., et al.*, No. 20-cv-4515 (N.D. Ga. Nov. 4, 2020)
24. *3M Co. v. Cmty. Attire, Inc.*, No. 20-cv-021250 (C.D. Cal. Nov. 6, 2020)
25. *3M Co. v. Individuals, P'ships, and Unincorporated Ass'ns*, No. 20-cv-02348 (D. Minn. Nov. 17, 2020)
26. *3M Co. v. The Perfect Part Inc., et al.*, No. 20-cv-10540 (C.D. Cal. Nov. 18, 2020)
27. *3M Co. v. Paylessbeauty*, No. 20-cv-10536 (C.D. Cal. Nov. 18, 2020)
28. *3M Co. v. Moonlight Med. Supplies & Equip. LLC, et al.*, No. 20-cv-3664 (N.D. Tex. Dec. 17, 2020)
29. *3M Co. v. Nationwide Source, Inc.*, No. 20-cv-02694 (D. Minn. Dec. 30, 2020)
30. *3M Co. v. SLH Med. Supplies Inc., et al.*, No. 21-cv-40024 (D. Mass. Feb. 25, 2021)
31. *3M Co. v. CovCare Inc., et al.*, No. 21-cv-01644 (E.D.N.Y. Mar. 26, 2021)
32. *3M Co. v. MM Med. Supply, LLC*, No. 21-cv-00771 (M.D. Fla. Mar. 31, 2021)
33. *3M Co. v. Ugly Juice, LLC, et al.*, No. 3:21-cv-02338 (N.D. Cal. Mar. 31, 2021)

APPENDIX B

Press coverage of 3M's efforts to address fraud, counterfeiting, and price gouging.

National Law Review: Respirator Mask Price Gouging and Trademark Infringement? Not on 3M's Watch <https://www.natlawreview.com/article/respirator-mask-price-gouging-and-trademark-infringement-not-3m-s-watch-0>

Law 360: Facing COVID 19 scams, companies turn to trademark law https://www.law360.com/technology/articles/1321684/facing-covid-19-scams-companies-turn-to-trademark-law?nl_pk=d6fd733f-adac-44fb-b79e-ee82f582357c&utm_source=newsletter&utm_medium=e-mail&utm_campaign=technology

Law 360: 3M Sues Amazon Seller Over Fake N95 Masks *3M Sues Amazon Seller Over Fake N95 Masks*

Law 360: 3M Wins Restraining Order In Price-Gouging Case: <https://www.law360.com/lifesciences/articles/1267281>

Bloomberg Law: 3M gets more settlements in campaign against mask price-gouging <https://news.bloomberglaw.com/ip-law/3m-gets-more-settlements-in-campaign-against-mask-price-gouging>

Miami Herald 'Maker of essentially N95 masks says it's targeting Florida's fraudsters and profiteers' <https://www.miamiherald.com/news/politics-government/state-politics/article242081256.html>

Wall Street Journal: 3M Sues Mask Seller for Alleged Price-gouging trademark infringement <https://www.wsj.com/articles/3m-sues-mask-seller-for-alleged-gouging-trademark-infringement-11586529025>

Wall Street Journal: 3M files lawsuit against merchant selling masks on Amazon for 18 times list price <https://www.wsj.com/articles/3m-files-lawsuit-against-merchant-selling-masks-on-amazon-for-18-times-list-price-11591642637>

CNN: 3M sues over another company's marked-up offer to New York City of N95 masks <https://www.cnn.com/2020/04/10/politics/3m-sues-new-york-city-n95-masks/index.html>

Washington Post: Used car salesman tried to scam New York out of 45 million N95s <https://www.washingtonpost.com/nation/2020/05/27/used-car-salesman-tried-scam-new-york-out-45-million-n95-masks-he-didnt-have-feds-say/>

New York Times: Bethany Frankel's Dark Journey to Find N95 masks <https://www.nytimes.com/2020/05/21/technology/bethenny-frankel-medical-masks-coronavirus.html>

New York Times: Company Questions Deal by 'Shark Tank' Star to Sell N95 Masks to Florida <https://www.nytimes.com/2020/04/22/us/daymond-john-n95-masks-florida-3m.html>

Good morning America: 3M Warns of counterfeit N95 masks: <https://www.goodmorningamerica.com/news/video/warning-counterfeit-face-masks-71837474>

Fox Business News: 3M lawsuit alleges price gouging <https://www.foxbusiness.com/money/3m-lawsuit-mask-price-gouging-ny>

Fox 3M sues KM brothers and preventative wellness over PPE fraud <https://www.foxbusiness.com/markets/3m-lawsuits-km-brothers-preventative-wellness>

The Hill: 3M claims distributor tried to sell masks to NYC officials <https://thehill.com/homenews/news/492261-3m-claims-distributor-tried-to-sell-masks-to-nyc-officials-for-six-times-price>

The Verge: 3M sues Amazon storefront that allegedly sold fake N95 masks for \$23 apiece <https://www.theverge.com/2020/6/9/21285364/amazon-marketplace-mask-price-gouging-n95-3m-ppe>

Pioneer Press: 3M alleges price gouging in legal action against Canadian company <https://www.twincities.com/2020/04/21/3m-alleges-price-gouging-in-legal-action-against-canadian-company-selling-n95-masks/>

Associated Press: 3M files 18 lawsuits against mask profiteers <https://apnews.com/article/f6f7ca233d85ef59cc89396b1e0779ba>

The Guardian: 45M deal for NHS masks collapses among claims <https://www.theguardian.com/society/2020/nov/03/45m-deal-for-nhs-masks-collapses-amid-claims>

Globe and Mail: Giant 3M launches lawsuits in Ontario against PPE fraud: <https://www.theglobeandmail.com/business/article-us-giant-3m-launches-lawsuits-in-ontario-several-us-states-to/>

Star Tribune: 3M gains another victory in effort to thwart N95 price gouging fraud <https://m.startribune.com/3m-gains-another-victory-in-efforts-to-thwart-n95-price-gouging-fraud/572182922/>

WCCO/CBS: 3M fighting to keep counterfeit N95s off the frontline <https://minnesota.cbslocal.com/video/5303990-3m-fighting-to-keep-counterfeit-masks-off-the-frontline/>

DHS Press Release/Story <https://www.ice.gov/news/releases/dhs-prevents-millions-counterfeit-n95-masks-reaching-hospital-workers-first>

Associated Press *US Government Seizes More than 10 million fake 3M brand N95s*

The Hill <https://thehill.com/policy/national-security/539322-federal-agents-seize-more-than-11-million-fake-n95-masks>

Wall Street Journal <https://www.wsj.com/articles/u-s-agents-seize-10-million-counterfeit-n95-face-masks-11613603061>

CNBC *DHS seizes 11 million counterfeit 3M N95 masks, more raids to come*

CBS Evening News featuring video with 3M VP and General Counsel Kevin Rhodes—<https://www.cbsnews.com/news/n95-masks-counterfeit-homeland-security/>

The Guardian <https://www.theguardian.com/world/2021/feb/17/fake-n95-masks-coronavirus-usa>

CBS: <https://minnesota.cbslocal.com/2021/02/15/not-a-problem-that-is-going-away-3m-fighting-to-keep-counterfeit-n95-masks-off-the-frontline/>

Law 360: WB Mason preyed on buyers with fake 3M masks <https://www.law360.com/articles/1356806/wb-mason-preyed-on-buyers-with-fake-3m-masks-suit-says>

Law 360: 3M makes deal with ex marine over massive N95 scam <https://www.law360.com/articles/1323511/3m-makes-deal-with-ex-marine-over-massive-n95-mask-scam>

Wall Street Journal: 3M Sues Mask Seller for Alleged Gouging Trademark Infringement

CNN: 3M Sues In New York City Over Price Gouging of N95 Masks

CNBC: 3m Sues New Jersey Company for Alleged Price Gouging Of Masks

New York Times: 3M Sues Distributor for Alleged Price Gouging of N95 Respirators in New York

New York Daily News: Lawsuit by 3M accuses NJ business of massive price-gouging scam, peddling protective N95 masks at staggering 600 percent markup

Reuters: 3M Sues New Jersey Distributor Over Alleged Price Gouging of N95 Respirators in NYC

The Hill: 3M claims distributor tried to sell masks to NYC officials for six times the price

Star Tribune: 3M suit: Distributor tried to sell N95 masks to NYC for 600 percent above list price

FOX10 News: 3M sues over another company's marked-up offer to New York City of N95 masks

Star Tribune: 3M suit: Distributor tried to sell N95 masks to NYC for 600 percent above list price

Bloomberg Law: 3M Sues Unauthorized Vendor for NYC N95 Mask Price-Gouging

Daily Beast: New Jersey Company Tried to Sell New York Masks at 500 percent Markup

The Street: Lawsuit Charges New Jersey Company with Price Gouging N95 Masks

Channel News Asia: 3M sues distributor for alleged price gouging of N95 respirators in New York

Yahoo Finance: 3M sues Performance Supply alleging illegal price gouging of N95 face masks

MSN: 3M sues New Jersey company for alleged price gouging of masks to NYC officials

NBC New York: NJ Company Allegedly Tried to Sell Masks to NYC at 600 percent Markup, Suit Says

Financial Post: 3M Sues for Alleged Price Gouging in New York

FinanzNachrichten.de: 3M Sues Performance Supply Over N95 Mask Price Gouging

FOX10 News: 3M sues over another company's marked-up offer to New York City of N95 masks

Bloomberg Law: 3M Sues Unauthorized Vendor for NYC N95 Mask Price-Gouging

Florida Post: 3M sues New Jersey company for alleged price gouging of masks to NYC officials

Senator BLUMENTHAL. Thank you, Mr. Rhodes.
And now Cynthia Alexander remotely. Thank you.

**STATEMENT OF CYNTHIA ALEXANDER, ASSISTANT ATTORNEY
GENERAL, CONSUMER PROTECTION DIVISION,
WASHINGTON ATTORNEY GENERAL'S OFFICE**

Ms. ALEXANDER. Thank you, Chair Blumenthal and Ranking Member Blackburn and distinguished members of the Committee, for this opportunity to testify about COVID scams and how we can work together to protect consumers from fraud.

I'm an Assistant Attorney General in the Consumer Protection Division of the Washington State Attorney General's Office, and here in Washington State, our courts are fond of repeating a quote from the 1914 House Conference Report on the FTC Act regarding unfair business practices and the quote is, "There is no limit to human inventiveness in this field."

I think it's fair to say more than a hundred years on this observation is still on point. It certainly is in our state.

In Washington, as in many other states, the Consumer Protection Division of the Attorney General's Office houses a Consumer Resource Center that receives complaints from consumers about businesses that operate in Washington and offers a voluntary complaint resolution process.

In the early months of the pandemic last year, we began to see our complaint volume double. A significant portion of the complaints we received related to price gouging or failure to refund fees paid for travel or events or memberships that were affected by COVID restrictions, but I'm going to focus today on a few of the COVID-related scams we've seen in Washington.

One area of particular concern for our office has been the marketing of unsubstantiated COVID treatments. We investigated a number of individuals and businesses engaged in this conduct and we used a combination of enforcement tools, including cease and desist notices from the Attorney General, warning letters and lawsuits in our efforts to stop this conduct and protect our consumers in Washington.

For example, early in the pandemic, a Washington company began promoting a virus-destroying drink to consumers. The company's chief research director said in an e-mail sent to Washingtonians, "I think this drink is so incredibly promising for protection from this pandemic that I'm giving it to my pregnant wife and 19-

month-old daughter daily. So be sure to click the link below to get the details.”

We also received complaints about an allergy clinic that was advertising treatments for COVID-19 and when our investigator called to ask what treatments they were offering, they said immune system boosting.

These two matters we resolved with a cease and desist letter in one case and a warning letter in another case, but we did file a lawsuit against an individual who announced on Facebook that he had developed a COVID-19 vaccine and offered to vaccinate consumers for \$400 each, and in the course of the investigation, we learned he admitted that he had injected about 30 consumers with this product. So the Attorney General filed a lawsuit against him in Washington Superior Court that resulted in a consent decree that prohibits this kind of conduct and required him to provide full restitution to consumers for the amounts they paid as well as pay civil penalties.

Now that COVID vaccines have become available, we’re seeing an increasing number of vaccine-related scams. For example, we’ve become aware of blank or fraudulently completed vaccine cards bearing the CDC logo being offered for sale on some online platforms and so earlier this month, 46 state attorneys generals signed a letter to companies with major online platforms expressing these concerns and requesting that the companies take immediate action to monitor their platforms for these fake vaccine cards, to promptly take down any ads or links for them, and to preserve all their records.

We’ve also become aware of COVID-19 vaccine survey scams in which consumers who have been vaccinated receive a text or an e-mail asking them to complete a survey about the vaccine they just received and typically the consumers are then offered a free reward but asked to pay a nominal shipping fee and then they’re billed for the fee but never receive an award.

And then most recently, we’ve heard about portable COVID testing operations in our community that aren’t endorsed by local or state health departments. These operations have apparently set up testing tables in neighborhoods and parks and it’s been observed by local health officials that the testers may be collecting and holding personal information insecurely, falsely claiming to be with public health, and despite offering free testing, the fine print in their documents that indicate that consumers could be billed.

So these are just a few examples of the types of COVID schemes we’ve seen and so combining consumer fraud requires vigilance and persistence and partnership and collaboration with other Federal and state enforcement agencies.

So I want to take just a second to say one important tool for us is our collaboration with the FTC and because of that, the importance of that partnership, many of the states are very interested in the FTC’s 13B authority to obtain equitable monetary relief.

Washington joined 28 other states and the District of Columbia in filing an amicus brief in the AMG case because our enforcement efforts are very much fortified by having a strong Federal partner in the FTC and we benefit from the FTC’s independent authority to obtain redress for consumers.

It's a critical supplement to the states' efforts because the FTC can obtain restitution for consumers for unlawful activity that spans multiple states.

So thank you for the opportunity to testify about these important issues, and I'd be happy to answer your questions.

[The prepared statement of Ms. Alexander follows:]

PREPARED STATEMENT OF CYNTHIA L. ALEXANDER, J.D., PH.D., CONSUMER PROTECTION DIVISION, WASHINGTON ATTORNEY GENERAL'S OFFICE

Chair Blumenthal, Ranking Member Blackburn, and distinguished members of the subcommittee, I am pleased to testify before you today to discuss protecting consumers from COVID-19-related scams.¹

As the 1914 House Conference Report on the Federal Trade Commission Act put it in reference to unfair business practices, "[t]here is no limit to human inventiveness in this field."² Our Washington courts have frequently repeated this quote in their decisions interpreting Washington's Consumer Protection Act,³ and, more than 100 years later, the COVID-19 pandemic has underscored how incontrovertible this observation remains.

In Washington, as in many states, the Consumer Protection Division of the Attorney General's Office houses a Consumer Resource Center that receives complaints from consumers about businesses that operate in Washington, and offers a voluntary complaint resolution process. Before the COVID pandemic, our office typically received approximately 17,000 to 18,000 consumer complaints each year. In 2020, the number of consumer complaints we received increased by 50 percent. Indeed, in the early months of the pandemic, our complaint volume doubled. In response to this spike in complaint volume, the Attorney General initiated new processes to ensure that COVID-19-related complaints were reviewed immediately, and, where appropriate, acted upon as quickly as possible.

A significant portion of the COVID-19-related complaints we received related to price gouging or failure to refund fees paid for travel, events, or memberships affected by COVID restrictions, but I will focus my testimony today on COVID-19-related scams we have seen in Washington.

One area of particular concern for our office has been the marketing of unsubstantiated COVID-19 treatments. We have investigated a number of individuals and businesses engaging in this conduct, and used a combination of enforcement tools, including cease and desist notices, warning letters, and court filings in our efforts to protect Washington consumers.

For example, early in the pandemic, a Washington company began promoting a "virus destroying drink" to consumers. The company's Chief Research Director stated in an e-mail sent to Washington consumers "I think this drink is so incredibly promising for protection from this pandemic that I'm giving it to my pregnant wife and 19-month-old daughter daily . . . so be sure to click the link below to get the details." The Attorney General sent a cease and desist notice to the company explaining that misrepresenting the health benefits of a product may violate Washington's Consumer Protection Act and that the Attorney General would hold those who deceive the public with unproven or false statements regarding the effectiveness of COVID-19 treatments or preventative measure accountable during the emergency. The company discontinued its marketing and agreed with us that "any and all confusion around COVID-19 must be avoided."

We also received complaints about an allergy clinic that advertised testing and treatments for COVID-19 on its website and on postcards sent to Washington consumers. Alongside these offers, the clinic identified "tips to help strengthen your immune system," including various vitamins and supplements. We had an investigator call the clinic to inquire about the types of COVID-19 treatments offered, and the company representative who answered the phone responded that the clinic offered immune system boosting. We sent a warning letter to the clinic that explained that advertisements may violate our Consumer Protection Act if they represent that a product or service yields a health benefit without competent and reliable scientific evidence to substantiate those claims. The clinic stopped advertising COVID-19 treatment after receiving the letter.

¹Any opinions expressed in this written statement are mine and do not necessarily reflect those of the Washington Attorney General's Office.

²H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

³Wash. Rev. Code § 19.86.

We initiated an investigation into an individual who announced on Facebook that he had developed a COVID-19 vaccine and offered to vaccinate consumers for \$400 each. In the course of the investigation, he admitted that he had injected approximately 30 consumer with his product. The Attorney General filed a lawsuit against him in Washington Superior Court that resulted in a consent decree with injunctive terms enjoining him from marketing or selling any substance or product represented to have health benefits without sufficient scientific evidence to substantiate the claims. He was also required to provide full restitution to consumers for amounts they paid for the vaccine and pay civil penalties.

Another category of COVID-19-related complaints we received, especially early in the pandemic, involved businesses offering personal protective equipment for sale, but failing to deliver the products to consumers. In some cases, the businesses credibly explained that supply chain disruptions were preventing them from fulfilling orders in a timely manner. For example, an online seller of N95 masks explained, in response to a cease and desist notice we sent, that it relied on drop shipping rather than physical inventory, and was caught off guard when the extreme surge in demand for N95 masks caused its supplier to be unable to fulfill its orders, and, in turn, its credit card payment processor to freeze its accounts. The company provided instructions to the Washington consumers who complained to request chargebacks to their credit cards.

Now that COVID-19 vaccines have become available, we are seeing an increasing number of vaccine-related scams. For example, we have become aware of blank or fraudulently completed vaccine cards bearing the Centers for Disease Control and Prevention logo being offered for sale on a number of online platforms. On April 1, 2021, 46 state Attorneys General signed a letter to Twitter, Shopify, and eBay expressing concern about the use of their platforms for the marketing and sale of fake COVID vaccine cards. The letter requested that the companies take immediate action to (1) monitor their platforms for ads or links marketing, selling, or otherwise indicating the availability of blank or fraudulently completed vaccine cards; (2) promptly take down ads or links identified through that monitoring; and (3) preserve records pertaining to any such ads or links. Each company responded with their commitment to prevent blank or fraudulently completed vaccine cards from being marketed or sold on their platforms.

We have also become aware of COVID-19 vaccine survey scams in which consumers who have been vaccinated receive a text or e-mail asking them to complete a survey about the vaccine they received. The consumers are offered a free reward but asked to pay a nominal “shipping” fee. They are billed for the fee but never receive the reward. For example, a Washington consumer received a survey about the Moderna vaccine after he received that type of vaccine. The consumer was offered entry into an Apple iPad giveaway for a shipping payment of \$19.99. The consumer was actually charged \$39.99 and ended up having to cancel his credit card.

Most recently, we have heard about portable COVID-19 testing operations not endorsed by local or state health departments. These operations have apparently set up testing tables in neighborhoods and parks, and even gone door-to-door to consumer homes. Our local public health officials have observed that the testers are not using appropriate personal protective equipment such as masks, face shields or gloves to protect consumers, are collecting and holding personal information insecurely, are falsely claiming to be “with public health,” and, despite signs offering free testing, use paperwork indicating in fine print that consumers could be billed.

Combatting consumer fraud requires vigilance and persistence. I expect that we will continue to see new COVID-19-related scams in Washington as the pandemic enters the next phase, and we will continue to use all of the tools at our disposal to protect our state’s consumers.

Because the subcommittee will address, in addition to COVID-19 scams, the FTC’s threatened Section 13(b) consumer redress authority in light of the Supreme Court’s ruling in *AMG Capital Management, LLC v. FTC*,⁴ I will briefly mention the importance of the restitution remedy for our state enforcement efforts.

The Washington Consumer Protection Act confers broad equitable power on our trial courts to fashion appropriate equitable remedies, including authorizing restitution of “moneys or property . . . which may have been acquired by means of any act . . . prohibited or declared to be unlawful” by the Act.⁵ Washington case law provides that restitution may be measured the defendant’s unlawful gain.⁶ Thus,

⁴No. 19-508, 2021 WL 1566607 (U.S. Apr. 22, 2021).

⁵Wash. Rev. Stat. 19.86.080(2).

⁶*See, e.g., State v. LG Electronics, Inc.*, 185 Wash. App. 123, 144 n.33, 340 P.3d 915 (2014), *aff’d*, 186 Wash.2d 1, 375 P.3d 636 (2016).

restitution “not only restores the property to the party but insures future compliance where it is assured a wrongdoer is compelled to restore illegal gains.”⁷

Washington joined 28 other states and the District of Columbia in filing an amicus curiae brief in the *AMG Capital Management* case. The brief explained the states’ interest in the FTC’s authority to seek restitution under Section 13(b) of the Federal Trade Commission Act. The States and the District of Columbia explained that the states’ enforcement efforts are fortified by having a strong Federal partner in the FTC. Although each state authorizes its attorney general or other state agency to seek restitution to remedy anticompetitive, unfair, or deceptive practices, the states benefit from the FTC’s independent authority to investigate and redress violations of Federal law. The FTC’s authority to seek restitution is a critical supplement to the states’ efforts because it is able to efficiently obtain redress for consumers affected by unlawful activity that spans multiple states. As the amicus brief explained, without the FTC acting to obtain restitution for consumers nationwide, every state touched by an incident of cross-border wrongdoing would need to file suit or risk leaving victims uncompensated and wrongdoers inadequately deterred.

The combined efforts of Federal and state regulators create a powerful deterrent effect. Restitution deters unlawful conduct because individuals and businesses are more likely to comply with the law if they face the possibility of being compelled to return their illegal gains.

Thank you for the opportunity to testify about these important issues, and I would be happy to answer your questions.

Senator BLUMENTHAL. Thanks very much, Ms. Alexander.

And now to Bonnie Patten of Truth in Advertising. Thank you for being here.

**STATEMENT OF BONNIE PATTEN, CEO,
TRUTH IN ADVERTISING**

Ms. PATTEN. Chairman Blumenthal, Ranking Member Blackburn, Members of the Subcommittee, on behalf of Truth in Advertising, I welcome the opportunity to appear before you to highlight deceptive marketing schemes that have arisen during this pandemic and to sound the alarm that the worst is ahead of us as the FTC is now powerless to claw back ill-gotten gains from wrong-doers under Section 13(b) of the FTC Act.

Tina.org is a nonpartisan/nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud.

The list of deceptively marketed products and services exploiting this pandemic that Truth in Advertising is tracking is extensive. CBD products marketed to military veterans as a coronavirus treatment, wellness centers targeting first responders with IV vitamin drips to protect against COVID-19, Amazon and eBay sellers falsely claiming that their PPE is FDA-approved, and sham wellness kits targeting seniors.

The number of scams has been so prolific that the FDA and FTC have had to issue more than 350 warnings pertaining to fraudulent coronavirus tests, treatments, and vaccines.

Unfortunately, the deception does not stop with outrageous health claims. Many are exploiting the economic desperation wrought by this pandemic. Multilevel marketing companies claiming that people can earn full-time pay working part time, lending companies deceptively using the CARES Act to exploit debt-ridden college students, vaccine survey scams stealing personal information and money, and imposter scams where fraudsters contact

⁷ *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 82 Wash.2d 265, 277, 510 P.2d 233 (1973)

grieving families under the auspices of the Funeral Assistance Program to steal personal data.

To make matters worse, the FTC has lost a mainstay of its enforcement authority, the ability to make victims whole under Section 13(b). We must not lose sight of the fact that AMG directly impacts more than 4.5 million struggling Americans in all 50 states.

This decision permits loan shark AMG to pocket \$1.3 billion that it stole from constituents in your communities. These victims needed money to pay their rent, to put food on their table, and now they're left with nothing pursuant to this decision, and the victims of AMG are not alone.

Another 2.7 million consumers illegally enrolled in credit monitoring services will not see a penny of the \$5.3 million ordered in restitution in the credit bureau case.

Likewise, consumers who were charged hundreds of millions of dollars as a result of Abbvie's use of sham litigation to illegally maintain monopoly will not see any refunds. In fact, in the Abbvie trial court decision which awarded the FTC \$448 million, the judge stated that if equitable relief was not permitted in 13B cases, "this interpretation would eviscerate the FTC Act."

That's just three cases. The FTC has approximately 75 13B cases currently pending with more than \$2 billion in exposure, including the antitrust case against Facebook. Unless Congress acts to fix 13B, many of these cases will simply disappear and our senior citizens, our military veterans, struggling parents, and honest business owners will likely pay the price.

During these unprecedented times, it is imperative that the FTC not only quickly stop deceptive marketing as soon as possible but also expeditiously return ill-gotten gains to victims. At present, the FTC simply cannot do that and as a result, your constituents and the honest businesses in your communities will suffer the consequences. Congress must provide a broad and permanent 13B fix.

Thank you and I look forward to answering your questions.

[The prepared statement of Ms. Patten follows:]

PREPARED STATEMENT OF TRUTH IN ADVERTISING, INC.

I. Introduction

Chairman Blumenthal, Ranking Member Blackburn, and Members of the Subcommittee, on behalf of Truth in Advertising (TINA.org), I welcome the opportunity to appear before you to highlight fraudulent and deceptive marketing schemes that have arisen during this unprecedented crisis, and to sound the alarm that the worst is yet to come as the Federal Trade Commission is now powerless to claw back ill-gotten gains from wrongdoers under Section 13(b) of the FTC Act.¹

¹See *AMG Capital Mgmt., LLC, et al., v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf. Moreover, it is important to note that even the most rigorous of laws are of little value if the agency responsible for enforcing them does not have the means or resources to properly police the marketplace. Given the FTC's limited resources, its current ability to oversee a multitrillion-dollar marketplace and protect more than 320 million consumers is clearly hampered. And while Congress recently appropriated additional funds to the FTC, the Commission still remains significantly under-resourced and over-leveraged, as Acting Chairwoman Rebecca Slaughter noted in her April 20, 2021 testimony before the United States Senate Committee on Commerce, Science, and Transportation Hearing on Strengthening the FTC's Authority to Protect Consumers. As she noted, "[e]ven before the recent merger wave, we were averaging twice as many annual merger filings as we had been ten years ago, while our employee count remained flat. In fact, we had 50 percent more employees at the beginning of the Reagan administration as we do today. And our filing rates keep going up. On the consumer protection side, there is similar growth in both

Continued

Strengthening the Federal Trade Commission’s Authority to Protect Consumers: Hearing Before the Comm. on Commerce, Science, and Transp., 117th Cong. 2–3 (2021) (statement of Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm.), https://www.ftc.gov/system/files/documents/public_statements/1589184/opening_statement_april_20_senate_oversight_hearing_420_final.pdf. In short, unless more funding is allocated, it is impractical to think that the FTC can do more.

My organization, TINA.org, is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; we work with businesses and government agencies on behalf of consumers to effectively prevent and stop deception in our economy.

The central premise of modern consumer protection laws is that marketplace dishonesty causes harm to consumers and businesses alike; and, if left unchecked, such behavior impairs the efficient allocation of resources in our economy.² There can be no doubt that the ongoing pandemic has exacerbated the ever-present dangers of deceptive and unfair acts and practices in the marketplace. TINA.org has heard from countless consumers—senior citizens, military veterans and struggling parents—whose experiences illustrate the fact that deceptive marketing is putting the health, financial well-being and safety of our most susceptible populations at risk. And compounding these issues is the fact that communities of color and lower income communities have been disproportionately impacted by fraudulent marketing and misinformation concerning COVID–19.³

The list of deceptively marketed products and services exploiting this pandemic is extensive. CBD products marketed to military veterans as a coronavirus treatment;⁴ bleach advertised as a liquid cure-all;⁵ wellness centers targeting first responders with IV vitamin drips to protect against COVID–19;⁶ Amazon and eBay sellers falsely claiming that their personal protective equipment (PPE) is FDA ap-

breadth and depth of problems in the markets, especially digital markets, that require enforcement. But our ability to keep up with this volume of work against large, sophisticated companies without substantial increases in resources will be limited.⁷

²Jeff Sovern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, St. John’s Legal Studies Research Paper No. 21–0001 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765745.

³See, e.g., Ryan Zamarripa and Lorena Roque, *Latinos Face Disproportionate Health and Economic Impacts From COVID–19*, Center for American Progress (Mar. 5, 2021), <https://www.americanprogress.org/issues/economy/reports/2021/03/05/496733/latinos-face-disproportionate-health-economic-impacts-covid-19/>; Poll: 61 percent of U.S. households with children report facing serious financial problems during the coronavirus outbreak, Harvard T.H. Chan School of Public Health (Sept. 30, 2020), <https://www.hsph.harvard.edu/news/press-releases/poll-61-of-u-s-households-with-children-report-facing-serious-financial-problems-during-the-coronavirus-outbreak/> (“Many of these problems are concentrated among Black and Latino households with children, households with children that have annual incomes below \$100,000, and households with children that have experienced job or wage losses since the start of the outbreak.”); Margery Austin Turner and Monique King-Viehland, *Economic Hardships from COVID–19 Are Hitting Black and Latinx People Hardest. Here Are Five Actions Local Leaders Can Take*, Urban Institute (Aug. 12, 2020), <https://www.urban.org/urban-wire/economic-hardships-covid-19-are-hitting-black-and-latinx-people-hardest-here-are-five-actions-local-leaders-can-take>; Brandi Collins-Dexter, *Canaries in the Coal Mine: COVID–19 Misinformation and Black Communities*, Shorenstein Center on Media, Politics and Public Policy, John F. Kennedy School of Government, Harvard University (June 24, 2020), <https://shorensteincenter.org/canaries-in-the-coal-mine/> (“Even as Black people are disproportionately dying from the virus due to systemic racism, harmful inaccuracies about how to keep from contracting COVID–19, how to treat it, and where it comes from are metastasizing in Black online spaces, putting people at even greater risk.”).

⁴Fed. Food & Drug Admin. and Fed. Trade Comm’n Warning Letter to Patriot Supreme (Oct. 16, 2020), https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

⁵Press Release, The U.S. Dep’t of Justice, Justice Dep’t Seeks to End Illegal Online Sale of Industrial Bleach Marketed as “Miracle” Treatment for COVID–19 (Apr. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>; Fed. Food & Drug Admin. Warning Letter to Genesis 2 Church (Apr. 8, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/genesis-2-church-606459-04082020>.

⁶*IV Therapies and COVID–19: The Drip, Drip, Drip of Deceptive Claims*, Truth in Advertising, Inc., June 3, 2020, <https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

proved;⁷ scammers simply failing to deliver paid-for PPE;⁸ hand sanitizers marketed as providing 24-hour protection against COVID-19;⁹ alleged immunity-boosting supplements targeted at children;¹⁰ risky colloidal silver solutions advertised as having the ability to kill the virus from within;¹¹ toothpastes and teeth-whitening products claiming to prevent COVID-19;¹² and sham wellness kits targeting seniors.¹³ The number of scams has been so prolific that the FDA and the FTC have had to issue numerous warnings pertaining to fraudulent coronavirus tests, treatments and vaccines.¹⁴

Unfortunately, the deception does not stop with outrageous health claims; many are also exploiting the economic desperation wrought by this pandemic: multilevel marketing companies claiming people can earn full-time pay working part-time;¹⁵ lending companies deceptively using the CARES Act to exploit college students;¹⁶ investment scams claiming to have patented COVID cures;¹⁷ financial entities pretending to be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed;¹⁸ vaccine survey scams stealing personal information and

⁷ *Face Mask Sellers on eBay Falsely Claim Products Are 'FDA Approved'*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>. It is often the case that products listed for sale in online marketplaces are deceptively advertised. When presented with such findings, companies typically point the finger at third-party vendors, deny liability, and use Section 230 of the Communications Decency Act as a shield. Removing the 230 shield from online commercial speech would allow the FTC to hold third-party vendor sites accountable.

⁸ Press Release, The U.S. Dep't of Justice, Michigan Man Charged With COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

⁹ *Prompted by TINA.org, Hand Sanitizer Maker Removes COVID-19 Claims*, Truth In Advertising, Inc., May 20, 2020, <https://www.truthinadvertising.org/prompted-tina-org-hand-sanitizer-maker-removes-covid19-claims/>; *CATrends: Hand Sanitizers Marketed to Prevent Disease*, Truth In Advertising, Inc., Apr. 9, 2020, <https://www.truthinadvertising.org/catrends-hand-sanitizers-marketed-to-prevent-disease/>.

¹⁰ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020, <https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>.

¹¹ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020, <https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

¹² Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

¹³ Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

¹⁴ *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, U.S. Food & Drug Admin., www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments (last visited Apr. 23, 2021).

¹⁵ *How MLMs Exploit Consumers During A Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>. MLM companies and their distributors are also taking advantage of the pandemic to make inappropriate health claims. *Mixed Messaging in the MLM Industry Regarding Coronavirus Claims*, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

¹⁶ Fed. Trade Comm'n Warning Letter to Frank Financial Aid (Nov. 10, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

¹⁷ Press Release, Fed. Trade Comm'n, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

¹⁸ Fed. Trade Comm'n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), <https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor-financial.pdf>; Fed. Trade Comm'n Warning Letter to sbadisasterloan.org (June 22, 2020), https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sbadisasterloan.org_.pdf.

money;¹⁹ and imposter scams where fraudsters contact grieving families under the auspices of the FEMA Funeral Assistance Program to steal personal data.²⁰

And, to make matters worse, the agency primarily charged with policing these deceptive acts, the FTC, has now lost a mainstay of its enforcement authority—the ability to make victims whole under Section 13(b) of the FTC Act.²¹ Because Section 13(b) does not specifically mention the right to equitable relief when a permanent injunction is issued, the Supreme Court has held in *AMG Capital Management, LLC, et al. v. Federal Trade Commission* that the FTC may not seek restitution or disgorgement in any case brought under Section 13(b).²²

It is important to remember the facts of *AMG* and appreciate the devastating impact this decision will have on the company's victims. *AMG* was a payday lending scheme that extracted money from people in desperate circumstances.²³ In its appeal, the company did not dispute that it violated the law. Instead, it argued that the \$1.3 billion it stole should be its to keep and the Supreme Court has agreed with *AMG*. The Supreme Court has held that this legislative body fully endorsed the notion that wrongdoers should pocket the money they've illegally taken when it drafted 13(b).²⁴

Because the Supreme Court has ruled in *AMG*'s favor, there is an urgent need for this Congress to empower the FTC to be able to seek equitable relief under Section 13(b). If Congress fails to act, then the deceptive marketing practices I have enumerated will only multiply. Allowing wrongdoers an absolute right to retain funds under Section 13(b) is going to make consumers and our economy more vulnerable to harm, especially during these unprecedented times.

Moreover, if Congress truly wants to eradicate the deception that is plaguing our economy, it must add to the FTC's toolkit by permitting penalty authority over first-time offenders; independent litigation authority to obtain civil penalties; a civil penalty fund for victims; as well as enhancement of some tools that the FTC already has at its disposal, including Administrative Procedure Act (APA) rulemaking authority, mandating that funeral homes disclose their pricing lists on their websites, requiring companies that use negative-option offers to simplify cancellations and provide clearer renewal information, and exclude the protection of commercial speech from Section 230 of the Communications Decency Act of 1996.²⁵

At present, first-time offenders find it economically advantageous to ignore initial FTC orders and settlements.²⁶ Only when the calculus changes such that it becomes economically disadvantageous to engage in deceptive marketing and fraud from the outset will there be an impetus for all to champion truth in advertising.

II. Truth in Advertising, Inc.

Truth in Advertising (TINA.org) is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

¹⁹ *Watch Out for New Vaccine Survey Scams*, AARP, <https://states.aarp.org/montana/vaccinesurveyscams> (last visited Apr. 23, 2021).

²⁰ Funeral Assistance FAQ, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

²¹ 15 U.S.C. § 53.

²² See *AMG Capital Mgmt., LLC, et al., v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

²³ Press Release, The U.S. Dep't of Justice, Scott Tucker Sentenced To More Than 16 Years in Prison for Running \$3.5 Billion Unlawful Internet Payday Lending Enterprise (Jan. 5, 2018), <https://www.justice.gov/usao-sdny/pr/scott-tucker-sentenced-more-16-years-prison-running-35-billion-unlawful-internet-payday> ("For more than 15 years, [AMG's] Scott Tucker . . . made billions of dollars exploiting struggling, everyday Americans through payday loans carrying interest rates as high as 1,000 percent.")

²⁴ See *AMG Capital Mgmt., LLC, et al., v. Fed. Trade Comm'n*, No. 19-508, slip op. at 14 (U.S. Apr. 22, 2021) ("We must conclude, however, that § 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief."), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

²⁵ 47 U.S.C. § 230.

²⁶ Funeral Assistance FAQ, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

At the center of TINA.org’s efforts is its website, www.tina.org, which aims to reboot the consumer movement for the 21st century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad,²⁷ and pillows and essential oils falsely marketed as able to treat chronic disease.²⁸ The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates, and, when appropriate, takes up with businesses and regulatory authorities. The website is a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud. TINA.org regularly draws on this expertise to advocate for consumer interests before the FTC and other governmental bodies and appear as *amicus curiae* in cases raising important questions of consumer protection law.²⁹

Since its inception, TINA.org has filed more than 200 legal actions, published more than 1,000 ad alerts, written over 800 news articles, and tracked more than 2,000 Federal class actions alleging deceptive marketing. Notably, since 2015, state and Federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

III. Fraud, deception and scams during the COVID-19 crisis

During this pandemic, consumers nationwide have been inundated with deceptive marketing campaigns seeking to exploit and capitalize on the global public-health crisis.³⁰ While some scams deplete bank accounts and retirement savings, others have drastic consequences for consumers’ health and safety. Undoubtedly the COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, which authorizes the FTC to seek civil monetary penalties for deceptive COVID-19 health claims and government benefit scams during the pandemic, will help to bring select wrongdoers to justice.³¹ But, the Act is severely limited in time and scope—failing to capture broad-based economic scams, among other things.

a. Deceptive health claims

Deceptive advertising peddling unapproved treatments, cures, and preventatives for a virus that has killed more than a half million people in the United States³² flooded the internet. The number of scams has been so prolific that the FDA and the FTC have had to issue numerous warnings pertaining to fraudulent coronavirus tests, treatments and vaccines.³³ Not only do many of the deceptive ads target particularly susceptible populations, including parents of young children, first responders, military veterans, senior citizens and communities of color, many also promote products that are inherently dangerous—some can cause severe health consequences while others are advertised as negating the need to follow standard COVID-19 pre-

²⁷ Sprinter Summary of Action, <https://www.truthinadvertising.org/sprinter-summary-of-action/> (last visited Feb. 1, 2021).

²⁸ MyPillow Summary of Action, <https://www.truthinadvertising.org/mypillow-summary-of-action/> (last visited Feb. 1, 2021); doTerra Summary of Action, <https://www.truthinadvertising.org/doterra-summary-action/> (last visited Feb. 1, 2021); Young Living Summary of Action, <https://www.truthinadvertising.org/young-living-summary-action/> (last visited Feb. 1, 2021).

²⁹ For example, TINA.org participated as *amicus* in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, No. 19–508 (U.S. Dec. 7, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf. TINA.org also filed an *amicus* brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm’n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17–3745), <https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen-Amici-Curiae-brief.pdf>.

³⁰ FTC COVID-19 and Stimulus Reports, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map>.

³¹ COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

³² *Coronavirus Cases Are Rising Again*. See *How Your State is Doing*, NPR, Apr. 22, 2021, <https://www.npr.org/sections/health-shots/2020/09/01/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>.

³³ *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, U.S. Food & Drug Admin., www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments (last visited Apr. 23, 2021).

vention and treatment recommendations, thereby increasing the risk that consumers contract and spread COVID-19 or fail to obtain medically necessary treatment.

Since the initial coronavirus outbreak, TINA.org has invested considerable resources to investigate and track such scams.³⁴ In February 2020, TINA.org wrote about an ingestible silver solution falsely marketed as able to kill the coronavirus from within. Not only was the treatment claim false, but the marketers also failed to disclose the possible risks of consuming silver, which include cancer and birth defects.³⁵ A few months later, TINA.org outed more than 40 wellness centers across the country deceptively promoting intravenous supplement/vitamin therapies as a way to prevent and treat COVID-19, several of which specifically targeted first responders.³⁶ Following this investigation, TINA.org exposed a multilevel marketing company misleadingly marketing supplements as able to boost children’s immune systems and keep them “virus free,” at a time when parents across the country were grappling with whether or not to send their children back to school.³⁷

TINA.org has also tracked reports of industrial bleach advertised under the name “Miracle Mineral Solution” as a treatment for COVID-19,³⁸ accounts of CBD products marketed to military veterans as a coronavirus treatment,³⁹ and Department of Justice cases and civil lawsuits regarding toothpastes and teeth-whitening products claiming to prevent COVID-19.⁴⁰

It is critical to note that while silver shards suspended in liquid, bleach, CBD, and toothpaste may sound like suspect COVID-19 treatments and cure-alls, one must remember that our country—and the world—is living through a time of unprecedented uncertainty and fear, one that has prompted panic, heightened stress and anxiety levels, and exacerbated mental health issues.⁴¹ Moreover, as a result of historic and systemic racism, among other things, communities of color are vulnerable targets for fraud and deceptive marketing during this pandemic.⁴² Consequently, consumers, desperate to care for themselves and their loved ones, are

³⁴ *A Growing List of Coronavirus Scams*, Truth In Advertising, Inc., Mar. 16, 2020, <https://www.truthinadvertising.org/a-growing-list-of-coronavirus-scams/>.

³⁵ *Jim Bakker Show Claims Silver Solution Supplement Kills Coronavirus*, Truth In Advertising, Inc., Feb. 19, 2020, <https://www.truthinadvertising.org/the-jim-bakker-show-claims-silver-solution-supplement-kills-coronavirus/>.

³⁶ *IV Therapies and COVID-19: The Drip, Drip, Drip of Deceptive Claims*, Truth In Advertising, Inc., June 3, 2020, <https://www.truthinadvertising.org/iv-therapies-and-covid-19-the-drip-drip-drip-of-deceptive-claims/>.

³⁷ *TINA.org Finds Plexus Deceptively Marketing Supplements for Kids*, Truth In Advertising, Inc., Aug. 12, 2020, <https://www.truthinadvertising.org/tina-org-finds-plexus-deceptively-marketing-supplements-for-kids/>. Several other MLM companies and their distributors have touted their products as a way to prevent getting COVID-19. See, e.g., Herbalife Summary of Action, <https://www.truthinadvertising.org/herbalife-2020-summary-of-action/> (last visited Feb. 1, 2021) and *Mixed Messaging in the MLM Industry Regarding Coronavirus Claims*, Truth In Advertising, Inc., Apr. 14, 2020, <https://www.truthinadvertising.org/mixed-messaging-in-the-mlm-industry-regarding-coronavirus-claims/>.

³⁸ Press Release, The U.S. Dep’t of Justice, Justice Dep’t Seeks to End Illegal Online Sale of Indus. Bleach Marketed as “Miracle” Treatment for COVID-19 (Apr. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-seeks-end-illegal-online-sale-industrial-bleach-marketed-miracle-treatment>.

³⁹ Fed. Food & Drug Admin. and Fed. Trade Comm’n Warning Letter to Patriot Supreme (Oct. 16, 2020), https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-for_our_vets_llc.pdf.

⁴⁰ Press Release, New York State Attorney General, Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments (Mar. 12, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments>; *Snow Teeth Whitening*, Truth In Advertising, Inc., <https://www.truthinadvertising.org/snow-teeth-whitening/> (last visited Feb. 1, 2021).

⁴¹ *Emotional Well-Being and Coping During COVID-19*, Univ. of California Weill Institute for Neurosciences Dept. of Psychiatry and Behavioral Sciences, <https://psychiatry.ucsf.edu/coping-resources/covid19> (last visited Feb. 1, 2021); Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, Henry J. Kaiser Family Foundation, Aug. 21, 2020, <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>; Bilal Javed et al., *The Coronavirus (COVID-19) Pandemic’s Impact on Mental Health*, Int. J. Health Plann Mgmt., June 22, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7361582/>.

⁴² Brandi Collins-Dexter, *Canaries in the Coal Mine: COVID-19 Misinformation and Black Communities*, Harvard Kennedy School Shorenstein Center on Media, Politics and Public Policy (2020), <https://shorensteincenter.org/wp-content/uploads/2020/06/Canaries-in-the-Coal-Mine-Shorenstein-Center-June-2020.pdf>. (“Even as Black people are disproportionately dying from the virus due to systemic racism, harmful inaccuracies about how to keep from contracting COVID-19, how to treat it, and where it comes from are metastasizing in Black online spaces, putting people at even greater risk.”)

more susceptible to the compelling and persuasive marketing tactics used to sell these bogus products.

The pandemic has also spurred ads deceptively promoting products aimed at protecting consumers from the virus. TINA.org stopped the maker of alcohol-free hand sanitizers from deceptively claiming that its products “kill” the coronavirus for up to 24 hours.⁴³ Consumers have also complained of scammers advertising and selling—but never delivering—N95 masks and other PPE.⁴⁴ And a TINA.org investigation revealed more than two dozen eBay sellers falsely claiming their face masks were “FDA approved” or illegally using the FDA’s logo on product packaging or other marketing to boost sales.⁴⁵ There have also been numerous reports of schemes targeting older Americans, including the offering of sham “COVID Wellness Kits” containing hand sanitizer and/or face masks to Medicare beneficiaries in order to steal their Medicare numbers and other personal identifying information.⁴⁶

These deceptive advertising tactics not only scam consumers out of their hard-earned money, but may leave consumers unnecessarily vulnerable to the COVID-19 virus. In short, the surge in exploitative health schemes employed during this pandemic has risked, and continues to risk, the health and safety of consumers across the country.

b. Fraudulent economic claims and imposter scams

Unfortunately, pandemic-related deception does not stop with outrageous health claims; many are also exploiting the economic desperation brought on by this pandemic. TINA.org has exposed—in news stories,⁴⁷ regulatory complaints⁴⁸ and a warning letter⁴⁹—numerous MLM companies taking advantage of the pandemic to promote what they claim to be lucrative business opportunities despite the fact that most people who get involved in multilevel marketing make little to no money.⁵⁰

TINA.org also sounded the alarm regarding investment news publisher Agora, Inc. for exploiting financial uncertainties during the pandemic to lure consumers—predominantly senior citizens—into pricey newsletter subscriptions with automatic renewals.⁵¹ There have also been reports of lending companies deceptively using the CARES Act to exploit debt-laden college students;⁵² financial entities pretending to

⁴³TINA.org’s Letter to Everest Microbial Defense, https://www.truthinadvertising.org/wp-content/uploads/2020/05/4_30_20-TINA-warning-ltr-to-Everest-Microbial-Defense_Redacted.pdf.

⁴⁴Press Release, The U.S. Dep’t of Justice, Michigan Man Charged with COVID-19-Related Wire Fraud Scheme (Apr. 28, 2020), <https://www.justice.gov/usao-ndca/pr/michigan-man-charged-covid-19-related-wire-fraud-scheme>.

⁴⁵Face Mask Sellers on eBay Falsely Claim Products Are ‘FDA Approved’, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/> (last visited Feb. 1, 2021).

⁴⁶Katherine Skiba, *Pandemic Scammers Target Older Americans on Medicare*, AARP, July 8, 2020, <https://www.aarp.org/money/scams-fraud/info-2020/medicare-scams-coronavirus.html>.

⁴⁷MLMs Continue to Break the Law Despite FTC Warning, Truth In Advertising, Inc., Dec. 15, 2020, <https://www.truthinadvertising.org/mlms-continue-to-break-the-law-despite-ftc-warning/>.

⁴⁸Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021).

⁴⁹Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021).

⁵⁰*How MLMs Exploit Consumers During a Pandemic*, Truth In Advertising, Inc., Apr. 27, 2020, <https://www.truthinadvertising.org/how-mlms-exploit-consumers-during-a-pandemic/>; Market America Summary of Action, <https://www.truthinadvertising.org/market-america-summary-action/> (last visited Feb. 1, 2021); Beautycounter Summary of Action, <https://www.truthinadvertising.org/beautycounter-summary-action/> (last visited Feb. 1, 2021). See also Press Release, Fed. Trade Comm’n, FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus (Apr. 24, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health>; Press Release, Fed. Trade Comm’n, FTC Sends Second Round of Warning Letters to Multi-Level Marketers Regarding Coronavirus Related Health and Earnings Claims (June 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/second-round-warning-letters-to-mlms-regarding-coronavirus>.

⁵¹*Agora Coronavirus E-mails*, Truth In Advertising, Inc., Mar. 27, 2020, <https://www.truthinadvertising.org/agora-coronavirus-e-mails/>. See also, *Fed. Trade Comm’n v. Agora Financial, LLC*, No. 19-cv-3100 (D. Md.), <https://www.ftc.gov/enforcement/cases-proceedings/182-3116/agora-financial-llc>.

⁵²Fed. Trade Comm’n Warning Letter to Frank Financial Aid (Nov. 10, 2020), https://www.ftc.gov/system/files/warning-letters/covid-19-letter_to_frank.pdf.

be SBA-authorized lenders to lure in small businesses struggling to keep their workers employed;⁵³ and investment scams claiming to have patented COVID cures.⁵⁴

As with the onslaught of deceptive health claims, marketers making unsubstantiated financial claims have similarly targeted vulnerable populations including retirees, students in debt, and small businesses struggling to stay afloat during this pandemic. There have also been reports of vaccine survey scams stealing personal identifying information and money,⁵⁵ and impost scams where fraudsters contact grieving families under the auspices of the FEMA Funeral Assistance Program to steal personal data.⁵⁶

IV. The need for equitable relief under section 13(b) of the FTC Act

During these extraordinary times, it is imperative that the FTC not only stop deceptive marketing as quickly as possible but also expeditiously return ill-gotten gains to victims and honest businesses struggling to make ends meet. At present, the Commission lacks authority to accomplish these twin objectives.

In 1973, Congress, realizing that the FTC's slow-moving administrative regime did not protect consumers from imminent harm and deception, added Section 13(b) to the FTC Act to provide the Agency with a fast and effective means to halt illegal conduct.⁵⁷ Section 13(b) provides, in pertinent part, that the FTC "may seek, and after proper proof, the court may issue, a permanent injunction."⁵⁸ Though the statute does not specifically reference equitable relief, up until the Supreme Court's ruling in *AMG* last week, the majority of circuit courts to consider the issue (including the Seventh Circuit 30 years ago) had held that Section 13(b) implicitly authorized a wide range of equitable remedies, including restitution, rescission and disgorgement.⁵⁹

The FTC brought its first case for a 13(b) permanent injunction in 1979. Thereafter, 13(b) became a mainstay of the FTC's enforcement program with dozens of cases brought under this section each year—among them Volkswagen,⁶⁰ Herbalife,⁶¹ DeVry University,⁶² Office Depot⁶³ and Uber.⁶⁴ In fact, from 2016 to 2020, the FTC

⁵³ Fed. Trade Comm'n and Small Bus. Admin. Warning Letter to TF Group, Inc. d/b/a Taycor Financial (June 22, 2020), <https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-taycor-financial.pdf>, https://www.ftc.gov/system/files/warning-letters/sba-covid-19-letter-sba-disasterloan.org_.pdf.

⁵⁴ Press Release, The U.S. Dep't of Justice, Southland Man Arrested on Federal Charges Alleging Fraudulent Investment Scheme Featuring Bogus Claims of COVID-19 Cure (Mar. 25, 2020), <https://www.justice.gov/usao-cdca/pr/southland-man-arrested-federal-charges-alleging-fraudulent-investment-scheme-featuring>.

⁵⁵ Watch Out for New Vaccine Survey Scams, AARP, <https://states.aarp.org/montana/vaccinesurveyscams> (last visited Apr. 23, 2021).

⁵⁶ Funeral Assistance FAQ, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance/faq#scams> (last visited Apr. 23, 2021); Michelle Singletary, A New FEMA Program Offers Up to \$9,000 to Help with COVID-19 Funerals. Scammers See an Opportunity, Apr. 16, 2021, <https://www.washingtonpost.com/business/2021/04/16/fema-covid-funeral-program-fraud-faq/>.

⁵⁷ See *Fed. Trade Comm'n v. Shire*, 917 F.3d 147, 155 (3d Cir. 2019), <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>. ("Section 13(b) thus empowers the FTC to speedily address ongoing or impending illegal conduct, rather than wait for an administrative proceeding to conclude.")

⁵⁸ 15 U.S.C. § 53.

⁵⁹ After *Credit Bureau*, the Third Circuit held that Section 13(b) of the FTC Act does not permit equitable relief. See *Fed. Trade Comm'n v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020), <https://www2.ca3.uscourts.gov/opinarch/182621p.pdf>. ("If Congress contemplated the FTC could sue for disgorgement under Section 13(b), it probably would not have required the FTC to show an imminent or ongoing violation. That requirement suggests Section 13(b) does not empower district courts to order disgorgement.")

⁶⁰ Press Release, Fed. Trade Comm'n, Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁶¹ Press Release, Fed. Trade Comm'n, Herbalife Will Restructure Its Multi-level Marketing Operations and Pay \$200 Million For Consumer Redress to Settle FTC Charges (July 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/herbalife-will-restructure-its-multi-level-marketing-operations>.

⁶² Lesley Fair, *FTC Case Against DeVry Yields \$100 Million Settlement*, Fed. Trade Comm'n, <https://www.ftc.gov/news-events/blogs/business-blog/2016/12/ftc-case-against-devry-yields-100-million-settlement>.

⁶³ Press Release, Fed. Trade Comm'n, FTC Sending More Than \$34 Million in Refunds to Office Depot Customers (Feb. 20, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-sending-more-34-million-refunds-office-depot-customers>.

⁶⁴ Press Release, Fed. Trade Comm'n, FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement (July 16, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement>.

returned approximately \$1.1 billion to consumers using 13(b).⁶⁵ But now that the Supreme Court has held that 13(b) permits wrongdoers the right to pocket the monies they have stolen.⁶⁶ As such, the FTC will no longer be able to make victims of fraud and deception whole using 13(b).

Consequently, as the coronavirus pandemic continues to ravage our nation, the FTC will be powerless to provide consumers and honest businesses with swift and equitable remedies and wrongdoers will no doubt be emboldened to exploit this national crisis for their own financial gains. Moreover, the Supreme Court decision in AMG's favor will have dramatic and dire consequences for the dozens of Section 13(b) cases the FTC currently has pending.⁶⁷ The FTC's docket currently includes its antitrust complaint against Facebook,⁶⁸ pyramid scheme cases against Neora⁶⁹ and Success By Health,⁷⁰ its case against the makers of the deceptively marketed memory supplement Prevacen,⁷¹ and the action it filed against a house-flipping scam, which includes real estate celebrities Dean Graziosi and Scott Yancey as defendants.⁷² In all of these 13(b) cases the FTC is now foreclosed from seeking monetary relief, even if it prevails.

And to make matters worse, in 2019, the Third Circuit Court of Appeals ruled in *FTC v. Shire ViroPharma, Inc.* that the FTC cannot seek equitable relief under Section 13(b) if the alleged violation occurred in the past and the defendant was not "violating" or "about to violate" the law.⁷³ As a result, wrongdoers that line their pockets with money they have illegally obtained can now sail off into the sunset with immunity just as long as they retire their scams before the FTC catches up with them.

In order to effectively police wrongdoers and protect consumers and honest businesses, legislative action must be immediately taken to give the FTC the authority it needs to obtain monetary remedies for past acts as well as present ones. The glaring reality is that until Congress acts, wrongdoers will be free to steal, lie and cheat their way to riches and they will have an absolute right to retain all funds they steal from their victims. Every day that goes by without a 13(b) legislative fix will undoubtedly negatively impact our economy and have a devastating impact on U.S. consumers.

V. Equipping the FTC with independent penalty authority

The common thread that runs through all scams is the wrongdoers' desire for financial gain. While the COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act authorizes the FTC to seek civil monetary penalties for first-time violations, it is limited in time and only addresses deceptive COVID-19 health claims and government benefit scams.⁷⁴ The Act fails to cover frauds and deceptions that take advantage of the economic devastation wrought by this pandemic such as work-from-home scams, phony job offers, pyramid schemes, and investment

⁶⁵ Recent FTC Cases Resulting in Refunds, <https://www.ftc.gov/enforcement/cases-proceedings/refunds> (last visited Feb. 1, 2021).

⁶⁶ See *AMG Capital Mgmt., LLC, et al., v. Fed. Trade Comm'n*, No. 19-508, slip op. (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

⁶⁷ As of mid-2020, the FTC was a party to 56 Section 13(b) cases pending in Federal district court. Brief for the Federal Trade Commission, *AMG Capital Mgmt. LLC, et al., v. Fed. Trade Comm'n*, No. 19-508 (U.S. Nov. 30, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162011/20201130120930570_19-508bs.pdf.

⁶⁸ *Fed. Trade Comm'n v. Facebook, Inc.*, No. 19-10134 (D.D.C.), <https://www.ftc.gov/enforcement/cases-proceedings/19-10134/facebook-inc-ftc-v>.

⁶⁹ Press Release, Fed. Trade Comm'n, FTC Sues Multi-Level Marketer Neora, formerly known as Nerium, Alleging it Operates as an Illegal Pyramid Scheme (Nov. 1, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-sues-multi-level-marketer-neora-formerly-known-nerium>.

⁷⁰ Press Release, Fed. Trade Comm'n, FTC Acts to Shut Down 'Success by Health' Instant Coffee Pyramid Scheme (Jan. 16, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-acts-shut-down-success-health-instant-coffee-pyramid-scheme>.

⁷¹ Press Release, Fed. Trade Comm'n, FTC, New York State Charge the Marketers of Prevacen With Making Deceptive Memory, Cognitive Improvement Claims (Jan. 9, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-new-york-state-charge-marketers-prevacen-making-deceptive>.

⁷² Press Release, Fed. Trade Comm'n, FTC Seeks to Add Real Estate Inv. Celebrities Dean Graziosi and Scott Yancey as Defendants in Real Estate Training Case (Aug. 31, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-seeks-add-real-estate-investment-celebrities-dean-graziosi>.

⁷³ *Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>.

⁷⁴ COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

scams.⁷⁵ Equipping the FTC with broad independent penalty authority would serve as a valuable deterrent against deliberate, egregious violators that are using this pandemic to take advantage of some of the most vulnerable populations in our society.

The FTC has nationwide jurisdiction and an unparalleled view of the landscape. It maintains data on millions of consumer complaints and has unique statutory authority to operate across national borders.⁷⁶ Even with its finite resources, the FTC is able to undertake investigations and develop facts necessary to prove cases against sophisticated corporate wrongdoers for large illegalities. But this is where the agency's efficacy ends. The FTC's ability to hold offenders accountable for their transgressions is sorely lacking.

Time and again, the FTC is forced to bring a second action against a lawbreaker because the company found it economically advantageous to ignore the initial consent agreement⁷⁷ or closing letter.⁷⁸ Not only does this waste the FTC's limited resources but it ensures that illegal behavior continues to exploit consumers for longer than is necessary. Until the FTC has broad, generic authority to turn on the penalty switch in appropriate cases, companies will find it highly profitable to flout FTC laws.

Further, penalties are a vital necessity in cases in which the precise economic harm to consumers is difficult to measure. For example, penalty authority could have a major impact on social media influencers, who are promoting false and dubious products and services during this pandemic and frequently do not disclose their material connections to the brands they promote.⁷⁹ TINA.org's investigations of the

⁷⁵See Emma Fletcher, *Income Scams: Big Promises, Big Losses*, Consumer Protection Data Spotlight, Dec. 10, 2020, <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/12/income-scams-big-promises-big-losses>.

⁷⁶Since January 2020, the FTC has received more than 450,000 pandemic-related consumer reports. See *FTC COVID-19 and Stimulus Reports*, Consumer Sentinel Network Reports, <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/COVID-19andStimulusReports/Map> (last visited Apr. 23, 2021).

⁷⁷Facebook entered into a consent agreement with the FTC in 2012 requiring the social media platform to stop its illegal practice of disclosing unauthorized private, identifying user information. See Decision and Order, *In the Matter of Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>. Unable to penalize Facebook for its transgressions, the FTC only obtained a promise that Facebook would abide by the law going forward. As this reprimand was effectively toothless, Facebook reverted to its deceptive privacy practices, requiring the FTC to file a complaint in Federal court in 2019 to hold the platform accountable yet again for its failure to follow the law and protect consumers' privacy. See Complaint for Civil Penalties, Injunction, and Other Relief, *U.S.A. v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), available at https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf. Only at this point, was the FTC able to punish Facebook with a \$5 billion penalty. Had the FTC been able to penalize Facebook initially, it is likely that consumer privacy rights would have been better protected years earlier and Facebook less likely to flout the law. See also Strengthening the Federal Trade Commission's Authority to Protect Consumers: Hearing Before the Comm. on Commerce, Science, and Transp., 117th Cong. 1–2 (2021) (statement of Rohit Chopra, Comm'n, Fed. Trade Comm.), https://www.ftc.gov/system/files/documents/public_statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf. (“[Google]’s repeated law violations over the last decade were frequently met with favorable treatment from the FTC. . . . While the FTC is quick to bring down the hammer on small businesses, companies like Google know that the FTC is simply not serious about holding them accountable. Congress and Commissioners must turn the page on the FTC’s perceived powerlessness.”)

⁷⁸In June 2018, the FTC sent a closing letter to Williams-Sonoma following an investigation into the company's marketing of certain Chinese-made products as “Crafted in America.” Fed. Trade Comm'n Closing Letter to Williams-Sonoma, Inc. (June 13, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf. The FTC did not pursue its investigation due to the company's corrective actions and assurances that it was an isolated error. This representation was false. Between April and May 2019, TINA.org collected more than 800 examples of products that were marketed as made in the USA but were either imported or made with imported materials. (Examples collected were drawn from seven of Williams-Sonoma's sites—Williams-Sonoma, Williams-Sonoma Home, Rejuvenation, Pottery Barn, PBteen, Pottery Barn Kids and West Elm.) As a result of these findings, the FTC filed an administrative action against Williams-Sonoma, which settled the charges for \$1 million. Decision, *In the Matter of Williams-Sonoma, Inc.*, No. C-4724 (F.T.C. July 13, 2020), <https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf>. See also, TINA.org's Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims, https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rule-making-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

⁷⁹Laura Bradley, *How Influencers Are Milking the Coronavirus for Clout—and Money*, Daily Beast, Mar. 22, 2020 (updated June 23, 2020), <https://www.thedailybeast.com/how-influencers-are-milking-the-coronavirus-for-clout-and-money>.

Kardashians,⁸⁰ Ciroc,⁸¹ and influencers on Instagram who received FTC warning letters⁸² are illustrative of the problem. Additionally, Senator Blumenthal's efforts to curb dangerous and predatory social media marketing targeting children, such as ads promoting detox teas, would benefit from broad FTC penalty authority.⁸³ If companies and influencers were exposed to monetary penalties each time a promotional post failed to adequately disclose the material connection at issue, social media marketers would be less likely to deceive consumers, many of whom are children and young adults.⁸⁴

Additionally, even where civil penalties are available for knowing violations of trade regulation rules, the Commission is hamstrung in its efforts to pursue wrongdoers.⁸⁵ The requirement that the FTC refer a complaint for penalties to the Attorney General only leads to harmful delays and a misallocation of scarce resources. The current inefficient outsourcing of authority should be eliminated and the FTC authorized to independently litigate civil penalties.

VI. The need for a civil penalty fund

The benefits of imposing penalties do not need to stop at deterring wrongdoers from repeating illegal acts. If authorized, the FTC could use penalty funds to make consumers who have been economically harmed monetarily whole again.

At present, FTC redress is limited to the amount of money it can obtain directly from the wrongdoer(s). But because many defendants have the means and inclination to dissipate assets through lavish spending, bankruptcy protection, hiding funds in inaccessible accounts/locations, or are otherwise insolvent, it is often the case that consumers who have a right to redress receive pennies on the dollar, if they receive anything.⁸⁶ It is for this exact reason that other Federal agencies use collected penalty funds to compensate victims, including the Consumer Financial Protection Bureau's Civil Penalty Fund⁸⁷ and the SEC's Fair Fund.⁸⁸

For the sake of providing complete and timely consumer redress, particularly now when many in our country are in an economic freefall and consumers do not have the luxury of time, the FTC should be authorized to establish such a consumer reim-

⁸⁰ Kardashian/Jenner *et al.*, Summary of Action, <https://www.truthinadvertising.org/kardashian-summary-action/> (last visited Feb. 1, 2021).

⁸¹ Ciroc Summary of Action, <https://www.truthinadvertising.org/ciroc-summary-action/> (last visited Feb. 1, 2021).

⁸² Instagram Influencers Summary of Action, <https://www.truthinadvertising.org/influencers-ftc-complaint-summary-action/> (last visited Feb. 1, 2021).

⁸³ Letter from Sen. Richard Blumenthal to the Honorable Joseph Simons, Chairman, Fed. Trade Comm. (June 4, 2019), <https://twitter.com/SenBlumenthal/status/1136059843285061632>.

⁸⁴ Of course, any such legislation should give the FTC discretion so that nano-influencers and micro-influencers with smaller followings are not treated the same as sophisticated, career influencers who know their legal responsibilities.

⁸⁵ See 15 U.S.C. Sec. 45(m)(1)(A).

⁸⁶ See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Carey G. Howe, Anna C. Howe, Shunmin Hsu, Ruddy Palacios, and Oliver Pomazi, *Fed. Trade Comm'n v. Arete Financial Group, et al.*, No. 19-cv-2109 (C.D. Cal. Sept. 9, 2020), https://www.ftc.gov/system/files/documents/cases/145_order_for_perm_inj_as_to_arete_defs_anna_howe_2020-09-10.pdf (monetary judgment of \$43.3 million partially suspended upon surrender of at least \$835,000 and additional assets). See also, Press Release, Operators of Student Debt Relief Scheme Agrees to Pay at Least \$835,000 to Settle FTC Allegations (Sept. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/operators-student-debt-relief-scheme-agree-pay-least-835000>; Redacted Stipulated Order for Permanent Injunction and Monetary Judgment as to Defendants Mark Gelvan, Outreach Calling, Inc., Outsource 3000, Inc., and Production Consulting Corp., *Fed. Trade Comm'n v. Outreach Calling Inc., et al.*, No. 20-cv-7505 (S.D.N.Y. Oct. 26, 2020), https://www.ftc.gov/system/files/documents/cases/de_42_-_redacted_order_as_to_gelvan_and_corporations_entered.pdf (monetary judgment of \$56,023,481, which is partially suspended based on inability to pay.). See also, Press Release, FTC Joins Four States in Action to Shut Down Alleged Sham Charity Funding Operation That Bilked Millions from Consumers (Sept. 16, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-joins-four-states-to-shut-down-alleged-sham-charity-operation>; Stipulated Order for Permanent Injunction and Monetary Judgment Against Vemma Nutrition Co. Vemma International Holdings, Inc. and Benson K. Boreyko, *Fed. Trade Comm'n v. Vemma*, No. 15-cv-1578 (D. Ariz. Dec. 20, 2016), https://www.ftc.gov/system/files/documents/cases/161222_vemma_273-stipulated_final_order_redacted.pdf (\$238 million judgment partially suspended upon payment of \$470,136). See also, Press Release, Vemma Agrees to Ban on Pyramid Scheme Practices to Settle FTC Charges (Dec. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/12/vemma-agrees-ban-pyramid-scheme-practices-settle-ftc-charges>.

⁸⁷ Civil Penalty Fund, Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/> (last visited Feb. 1, 2021).

⁸⁸ 15 U.S.C. § 7246.

bursement fund, rather than being required to arbitrarily deposit penalties in the U.S. Treasury, as is the current practice.⁸⁹

VII. Additional considerations to better protect consumers during the pandemic

TINA.org would also like to highlight areas of law that may be strengthened to better protect consumers during this pandemic.

a. APA rulemaking authority

The FTC's Section 19 rulemaking authority is seriously hindered by unnecessary roadblocks and hurdles imposed by the Magnuson-Moss Warranty Federal Trade Commission Improvements Act.⁹⁰ As Jessica Rich, former Director of the FTC's Bureau of Consumer Protection, noted in testimony focused on safeguarding American consumers during this pandemic before the House Subcommittee on Consumer Protection and Commerce, "the rulemaking process set forth in Section 19 is highly complex and elongated . . . As a result, most rulemakings under these procedures have taken many years—nine in the case of both the Credit Practices and Used Car Rules. . . ." ⁹¹

Further, Commissioner Rohit Chopra has noted that establishing FTC rules through APA rulemaking authority would be much more efficient, and would be more effective than litigating multiple cases on a similar subject matter. "For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation."⁹² At the same time, APA rulemaking authority would enable the Commission to "establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it."⁹³

In short, the unnecessary hurdles imposed by Magnuson-Moss on the FTC's rulemaking ability should be eliminated and the FTC should be allowed to use the Administrative Procedure Act more broadly to establish necessary rules.

b. Require funeral homes to disclose their pricing online

More than 565,000 individuals in the United States have died of COVID-19.⁹⁴ And the overwhelming grief of family members forced to lay their loved ones to rest during this pandemic is exacerbated by the fact that funeral service providers are not required to post their price lists on their websites. Funeral service providers who advertise online should be required by law to post their price lists on their websites in order to conform to consumers' shopping behavior and allow consumers to meaningfully price-shop from the comfort of their own homes before committing to a purchase during such a difficult time.⁹⁵

Not only are transactions in the funeral industry inherently fraught with emotion and stress, they are also ones with which consumers tend to have little experience or familiarity and ones that require making important and costly decisions under tight time constraints. Moreover, such a law would also allow the FTC to more easily review funeral homes' sales and business practices without imposing any significant burden on the funeral service providers.⁹⁶

⁸⁹ See, e.g., Press Release, Fed. Trade Comm'n, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-brings-first-ever-cases-under-bots-act>.

⁹⁰ Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-2312 (2012)).

⁹¹ Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic: Hearing Before Subcomm. on Consumer Protection and Commerce of the Comm. on Energy and Commerce, 117th Cong. 6 (2021) (statement of Jessica L. Rich, Distinguished Fellow, Inst. of Technology Law and Policy, Georgetown University Law Center), <https://docs.house.gov/meetings/IF/IF17/20210204/111139/HHRG-117-IF17-Wstate-RichJ-20210204.pdf>.

⁹² Comment of Fed. Trade Comm'n Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf.

⁹³ *Id.*

⁹⁴ Coronavirus Cases Are Rising Again. See *How Your State is Doing*, NPR, Apr. 22, 2021, <https://www.npr.org/sections/health-shots/2020/09/01/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>.

⁹⁵ Such a rule would also align with stay-at-home recommendations during the COVID-19 outbreak. See also TINA.org's Funeral Rule Comment, <https://www.truthinadvertising.org/wp-content/uploads/2020/06/TINA-Funeral-Rule-Comment.pdf>.

⁹⁶ See FTC's Media Resources for the Funeral Rule, <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> (last visited Feb. 1, 2021).

c. Require companies that use negative-option offers to simplify cancelation and provide clearer renewal information

As U.S. consumers shelter at home during this pandemic, many are turning to online shopping for their purchasing needs—from PPE to toilet paper to grocery items and medication. Inevitably, some are also unintentionally enrolling in unwanted negative-option offers that siphon money off of already strained budgets.⁹⁷ Unfortunately, deceptive negative-option offers have become a multibillion-dollar industry. On a regular basis, consumers find that they have been charged for long-forgotten subscriptions,⁹⁸ or that they are unable to cancel a trial before being charged. Indeed, losses relating to such offers in just 14 cases the FTC pursued over the past decade have totaled more than \$1 billion.⁹⁹

Companies that use negative-option offers should be required to (1) permit consumer cancelation of negation options in an easy and specific manner—at minimum, if the subscription was entered into online, then it should be able to be canceled online,¹⁰⁰ (2) provide timely reminders to consumers before recurring charges are initiated,¹⁰¹ and (3) notify consumers of any material changes to the terms of a subscription and provide an opportunity to cancel the subscription before the terms go into effect.¹⁰²

Moreover, legislation that prohibits marketers from surreptitiously tying “free” trial offers to future, ongoing charges would be beneficial. TINA.org continually receives complaints from consumers who report being charged repeatedly after signing up for what they thought was a free trial offer.¹⁰³ Unless further action is taken to protect consumers, the trend of consumers being unwittingly trapped in deceptive trial offers and automatically renewing subscriptions will only grow.

d. Exclude Section 230 of the Communications Decency Act protection for commercial speech

When Section 230 of the Communications Decency Act was enacted in 1996, neither Google nor Facebook existed and Amazon had just arrived on the scene as an online bookseller. The law was enacted to protect young Internet service providers at a time when the Internet was just beginning to gain popularity;¹⁰⁴ protecting

⁹⁷ Consumer complaints (very often from senior citizens) concerning negative-option offers are one of the most common types of complaints that TINA.org receives. Consumers generally complain about unwittingly being enrolled in a negative-option plan and then finding it impossible to cancel the subscription.

⁹⁸ This issue is likely exacerbated, in part, by increasing rates of digitization: without a physical item, like a book, arriving in the mail, or paying by writing a check, the only indication a consumer may have of a long-forgotten, converted subscription is an ambiguously labelled, recurring charge on their credit card. See Sophia Wang, *One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation*, 26 Cornell J. L. & Pub. Pol’y 197, 200 (Fall 2016).

⁹⁹ See *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements*, Better Business Bureau, 2 (Dec. 2018), <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>.

¹⁰⁰ ROSCA mandates only that, for goods and services offered on the internet, there be “simple mechanisms for a consumer to stop recurring charges,” but provides no specifics and no requirement that cancelation be online. See 15 U.S.C. § 8403(3).

¹⁰¹ When consumers relinquish control, they incur the additional burden of tracking their various subscriptions. If a consumer forgets about an expiring trial or a recurring charge, it can result in an inefficient allocation of consumer resources. Indeed, 48 percent of consumers have had a free trial convert to a paid subscription without realizing it. See Brady Porche, *Poll: Recurring charges are easy to start, hard to get out of*, Creditcards.com (Aug. 22, 2017), <https://www.creditcards.com/credit-card-news/autopay-poll.php>.

¹⁰² See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

¹⁰³ Between 2015 and 2017, consumer complaints about free trials more than doubled in the U.S. Over that same span, the Better Business Bureau identified nearly 37,000 complaints—the average loss being \$186. The FBI’s Internet Crime Complaint Center also recorded a rise in complaints about free trial offers between 2015 and 2017, with losses totaling more than \$15 million over that time span. Corresponding with this consumer dissatisfaction, more than 100 Federal class actions have been filed on behalf of U.S. consumers complaining about various negative option terms and conditions since 2014. And during this same time period, the FTC has brought 23 cases under ROSCA and pursued at least 5 cases against payment processors linked to deceptive negative option and free trial offers. See TINA.org’s Comment to the FTC regarding Negative Option Offer Rule, https://www.truthinadvertising.org/wp-content/uploads/2019/12/12_2_19-comment-to-FTC-re-NOO-Rule.pdf.

¹⁰⁴ U.S. Dep’t of Justice, *Section 230—Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations* (June 2020), <https://www.justice.gov/file/1286331/download>.

multibillion-dollar companies from liability for deceptive marketing statements made about products sold on their websites and from which they profit was not on the agenda.

However, fast-forward 25 years, and that is exactly what Amazon, Google and others argue—that Section 230 shields them from liability for the deceptive marketing statements that lure consumers to purchase bogus products sold on their websites by third parties and from which these shopping platforms turn a handsome profit. Such unfettered impunity has led to widespread deceptive marketing issues online, issues that will continue to multiply at an unprecedented rate as consumers pivot to online shopping as a result of the COVID-19 pandemic.¹⁰⁵

By way of example, a TINA.org investigation found that Amazon actively promotes and profits from more than 100 deceptively marketed brain supplements primarily sold to senior citizens on its website.¹⁰⁶ Amazon is not just turning a blind eye to claims that these unproven products improve memory, among other purported health benefits, it is actively promoting these claims by independently publishing its own marketing content to amplify the deceptive marketing messages of third-parties.¹⁰⁷

Similarly, a TINA.org investigation found that eBay was promoting more than two dozen eBay sellers spanning 45 listings that falsely claimed their face masks were “FDA approved” and/or illegally used the FDA’s logo to boost sales of their products.¹⁰⁸ eBay was not only allowing the sale of these falsely marketed face masks, it was also giving some items greater exposure by listing them as “sponsored” or “promoted products” in exchange for a fee.

To date, online department stores like Amazon and eBay have largely succeeded in fending off all attempts to hold them accountable for false and deceptive commercial speech on their websites using Section 230 as their impenetrable defense shield.¹⁰⁹ Removing this bulwark from online commercial speech would allow the FTC to hold online stores to the same legal standards as brick and mortar stores, and ensure that online websites are held accountable for the deceptive marketing they promote and profit from.

VIII. Conclusion

Deceptive marketing and similar forms of commercial dishonesty are a scourge of the American economy, inflicting billions of dollars in losses to cheated consumers and distorting the efficient allocation of resources, rewarding those who hone ingenious frauds and punishing honest competitors. Many of the deceptive marketing schemes and frauds exploiting the COVID-19 pandemic go well beyond inflicting economic injuries—they result in physical harm and, in some instances, even death. Consumers are foregoing appropriate preventative measures and medically advantageous treatments for useless products that are falsely marketed. At this juncture, there is a real risk that the deceptive marketing practices enumerated today will only multiply as the agency primarily charged with policing these deceptive acts and practices, the FTC, lacks the necessary authority to claw back ill-gotten gains, punish egregious wrongdoers and fully reimburse victims of fraud.

TINA.org looks forward to working with the Subcommittee and Congress to address the issues articulated above, and I would be happy to answer your questions.

¹⁰⁵ United Nations Conference on Trade Dev., *COVID-19 has changed online shopping forever, survey shows* (Oct. 8, 2020), <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>; Press Release, Research and Mkts., *COVID-19 Impact on e-Commerce & Online Payments Worldwide, 2020—Online Shopper Penetration Increases During the Pandemic* (May 29, 2020), <https://www.globenewswire.com/news-release/2020/05/29/2040716/0/en/COVID-19-Impact-on-e-Commerce-Online-Payments-Worldwide-2020-Online-Shopper-Penetration-Increases-During-the-Pandemic.html>.

¹⁰⁶ *How Amazon Promotes, Profits from Deceptively Marketed Brain Supplements*, Truth In Advertising, Inc., Jan. 16, 2020, <https://www.truthinadvertising.org/how-amazon-promotes-profits-from-deceptively-marketed-brain-supplements/>.

¹⁰⁷ Deceptive health claims are given increased visibility on the website through sponsored search results, designations such as “Amazon’s Choice” and “Editorial recommendations,” star ratings, and other Amazon-specific marketing materials. Amazon also plays an important role in the processing of many of these deceptively marketed brain supplements, collecting customer shipping information, fulfilling orders and even gift-wrapping some items when requested.

¹⁰⁸ *Face Mask Sellers on eBay Falsely Claim Products are ‘FDA Approved’*, Truth In Advertising, Inc., May 13, 2020, <https://www.truthinadvertising.org/face-mask-sellers-on-ebay-falsely-claim-products-are-fda-approved/>.

¹⁰⁹ A push has begun to remove certain elements of Section 230 protection from online commercial speech. For example, the Country of Origin Labeling Online Act, or COOL Act (S. 3707), which sought to require clear disclosure of seller location and country-of-origin labeling for products advertised online, was introduced in the 116th Congress.

Senator BLUMENTHAL. Thank you very much, Ms. Patten. Thank you for that excellent description of the explosion that we're seeing in frauds and the vulnerability and lack of enforcement that will result from the 13B decision by the Supreme Court which could eviscerate large areas of enforcement and that challenge to us in Congress has been highlighted by Mr. Kaufman and Mr. Kovacic, as well, and certainly it ought to be at the top of our priorities as we consider this crisis.

Ironically, the increasing hope resulting from the vaccines has only accelerated the frauds that we're seeing. In fact, swindlers have stolen money from senior citizens by promising them at-home vaccinations. There have been pitches to schedule vaccination appointments and checkups. Committing identity theft and counterfeit vaccination cards and fake negative results of tests are increasing online.

So the challenge is not diminishing with our ability to potentially conquer the pandemic through increased vaccinations and you mentioned, Ms. Patten, the 350 warnings that the FTC has directed to companies to remove deceptive claims.

Mr. Kaufman, let's be very blunt. These warnings are just a slap on the wrist. So far the FTC has brought only one case under the COVID-19 Consumer Protection Act, and I hope that will be a start in increasing vigor by the FTC.

I agree totally that we need to increase the resources available to the FTC, as Mr. Kovacic has emphasized. The President is apparently going to seek an \$80 billion increase for the IRS. I would suggest something comparable for the FTC in the way of resources.

But what plans does the FTC have to use increased penalties and criminal referrals?

Mr. KAUFMAN. Thank you for the question, Senator.

We have more cases in the pipeline that will be utilizing the new civil penalty authority that Congress has given us. We think it's a very important tool that we definitely will be utilizing.

I also do want to mention that the 350 companies that received warning letters, we're watching them closely to make sure that they don't recur and if they do, we will also be bringing law enforcement against them, as well.

Senator BLUMENTHAL. But if those warning letters and the scrutiny are just the cost of doing business, it won't be a deterrent to them. Criminal referrals and increased penalties are what will put them out of business.

Mr. KAUFMAN. I do agree. Increased criminal referral is something we do. We have a unit at the FTC, the Criminal Liaison Unit, that works with criminal law enforcement throughout the country to get them interested in our cases and that's something that we can and should do more of.

Senator BLUMENTHAL. Let me turn to the social media platforms. We've all seen the fake cures, the fake PPE, now fake vaccination cards.

Right now for these platforms, there's no cost to inaction. They seem to pay attention only when Congress or the state AGs thoroughly kick them in the butt and often it takes multiple kicks in the butt.

Let me ask Ms. Patten and Mr. Kovacic. What changes should we make in the Section 230 immunity that right now these platforms enjoy?

Ms. PATTEN. Well, I think that 230 definitely needs some fixing. Tina.org's position is that platforms that profit from the goods and services that they are deceptively marketing should not be able to hide behind that 230 immunity, such that the fix that's needed is that if it deals with commercial speech in which a platform is making money that they should not be able to use 230 at all.

Senator BLUMENTHAL. Professor Kovacic?

Mr. KOVACIC. Thank you, Mr. Chairman.

I don't know if it's simply in the context of Section 230, but I think it's appropriate through perhaps a variety of different legal steps to bring responsibility to bear on the intermediaries who are aware or should be aware of the falsity of claims that are being made to exercise care in denying the use of their platforms to those who make these kinds of claims.

I'm not sure if 230 is the only specific vehicle to use. I haven't spent much of my work studying that carefully, but I can think of other legal concepts and principles where we bring responsibility to bear on third parties who know or should know that the conduct taking place through the medium or vehicle that they control is fraudulent and situating responsibility with the individual or institution that's in a position to control the behavior that's aware that there's serious harm that can flow from the behavior, I think it's entirely appropriate, and I expect that you and your colleagues will be looking at a number of different ways in which this kind of responsibility can be brought to bear on a variety of different actors, including information platforms.

Senator BLUMENTHAL. Thanks, Professor Kovacic.

Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman.

I find it so interesting Section 230 comes up in so many different arenas. So thank you all for that.

Mr. Rhodes, I want to come to you first. I appreciate your comment about pandemic profiteers and thought that was an artful term and really a very fitting way to kind of couch some of what we've seen taking place online, and we know this wasn't—pardon me—our first pandemic. It will not be the last, and so education, consumer education is a big part of this responsibility.

So I wish you would talk for just a minute about how you all as a corporate entity—pardon me—view your responsibility to educate people on how to detect something that is an actual real item, authentic, and something that's a fake. Mr. Rhodes, yes, thank you.

Mr. RHODES. Thank you very much for the question, Ranking Member Blackburn.

So early on in the pandemic, our Chairman of the Board and CEO Mike Roman said 3M has a unique responsibility to respond to the pandemic from all angles as a leading supplier of personal protective equipment, including N95 respirators.

We have taken that responsibility and those words to heart and that includes helping to do what we can to ensure that brave front-line workers get genuine products at a fair price and part of that is educating, you know, both the public and procurement officials

as to what we're seeing in the marketplace, what we're going after by way of frauds and scams and counterfeits and the like.

So, you know, part of our activities have involved not only putting information on our website. We posted tips on how to spot fraudulent offers. You know, typically characterized by get the money upfront and then disappear before the buyer realizes there's no product. Those involve upfront payments, payments into escrow that the seller pays into and the—I'm sorry—the buyer pays into and the seller can access, and other—

Senator BLACKBURN. OK. So, sir, I want to interrupt you right there. So you are conducting education to both the individual consumer and also to purchasing agents, is that correct?

Mr. RHODES. That's correct.

Senator BLACKBURN. OK.

Mr. RHODES. We have—

Senator BLACKBURN. All right. Let me move on. My time—yes. My time is limited. I want to move on.

OK. So, Mr. Kaufman, when you all are trying to go through your enforcement, what kind of participation are you getting from the online marketplace, from vendors that have third parties that are selling?

Mr. KAUFMAN. So the answer would be twofold. When we see bad claims, in addition to reaching out to the party that's involved in the bad claims, we are also contacting the platforms to make sure that they're aware that there's bad activity on their platform.

Senator BLACKBURN. And do they respond appropriately?

Mr. KAUFMAN. They have responded appropriately, but I wish they would respond more without being invited to respond by the FTC.

Senator BLACKBURN. OK. Do they come to you with due diligence or information on their own? We think we have someone who needs to be investigated.

Mr. KAUFMAN. We get occasional referrals from platforms and from companies, as well.

Senator BLACKBURN. OK. All right. And, Professor Kovacic, I want to come to you on this. I know you're going to tell me you need more budget and staff. That's going to be a part of your answer. And Mr. Kaufman, to you.

When we look at what the FTC is doing, one of the things that we have discussed for a couple of years now is the need to scale enforcement. So as you look at this, other than budget and agents, what kind of authorities do you need? Mr. Kaufman, you first, and then Professor Kovacic.

Mr. KAUFMAN. So certainly the most pressing issue right now is restoring our 13B authority.

Senator BLACKBURN. OK.

Mr. KAUFMAN. Without that, that authority is a huge, huge blow to the FTC, and there are other areas. We can definitely use civil penalty authority. Most notably, data security and privacy violations, to be able to penalize first-time privacy violators would be a huge benefit for consumers and for the agency.

Senator BLACKBURN. OK. Professor?

Mr. KOVACIC. I would echo Daniel's comments, put those on my list, as well.

I'd simply add I would like to see the development of a comprehensive strategy that brings together the full community of law enforcement authorities to decide in a more collective way what are we doing now and what do we have to do to be more effective. I think that would be very profitable. A way to make sure we got the full value for the additional expenditures.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thanks, Senator Blackburn.

Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much. Thank you to all our witnesses. Welcome to Mr. Rhodes from 3M, a company in my home state, and good to see you again, Mr. Rhodes. Thank you to the Chairman and to the Ranking Member for holding this really important hearing. It couldn't come at a more important time, as you point out with the Supreme Court decision with 13B.

Mr. Kaufman, in your testimony you highlight that the FTC has sent out more than 350 warning letters directing companies to remove deceptive claims from fake coronavirus treatments to ads for products that were never delivered.

How do these companies react to these warning tools and why is 13B so important?

Mr. KAUFMAN. So the companies, to their credit, to the extent that we want to give them credit, have been very responsive. The response has been overwhelmingly positive and within 48 hours the claims are removed. So it has been highly successful from that perspective.

But in terms of 13B, there is a lot of litigation we have ongoing that relies solely upon 13B for monetary relief. So rather than getting millions and millions or tens of millions of dollars for consumers, we will be stuck getting nothing if there's no congressional fix to 13B.

Senator KLOBUCHAR. And do you have any sense of how much money could be at stake, a range? I know you can't put an exact dollar figure.

Mr. KAUFMAN. So, well, for the past 5 years, we've given back \$11 billion with a B back to consumers. So I would estimate it's certainly hundreds of millions per year. That seems to be a fairly conservative estimate.

Senator KLOBUCHAR. Mm-hmm. And that's going forward, of course, too, not just going back.

Mr. KAUFMAN. Correct.

Senator KLOBUCHAR. And because of the pandemic and some of this fraud that's going on that we've identified, is it possible you'd even have more than usual?

Mr. KAUFMAN. It is certainly possible. We are always looking for the cases that cause the most harm to consumers.

Senator KLOBUCHAR. OK. Very good. And, Professor Kovacic, thank you for joining us again.

You recommend a significant increase in the FTC budget in your testimony. I agree with that. You know, Senator Grassley and I have this bill, the Merger Filing Fee Modernization Act, which time

has come. It would not be everything. A lot of what you're talking about, I think could be long in the appropriations process, but what this would do would increase the budget of each of the FTC and the Antitrust Division by \$67.5 million and it's paid for actually in this case not by taxpayer money but by an increase merger filing fee on the biggest deal. It actually helps some of the smaller deals.

And I call for even more, of course, of \$300 million increase to the FTC budget in the appropriations process, but you go even farther. Could you talk about why this is so important at this moment of time not just from the pandemic fraud cases you're seeing but also from what you're seeing with those antitrust cases?

I think it's so important that the FTC under Chairman Simon brought the Facebook case, but I bet that you could use nearly all the personnel in the FTC to work on those cases and then we'd have no one left for anything else. So could you talk about the importance of this increase in budget?

Mr. KOVACIC. Yes. Thank you, Senator Klobuchar.

I'm thinking from my perspective as someone who started his career at the FTC in the 1970s and I have watched since the efforts of our public institutions to do expansive ambitious things with modest resources, and I think as a starting point as a nation, we have to realize that if we want the equivalent of superior results, we've been talking for the last couple of years about the equivalent of a public policy moon shot, to put competition law in a much different place, consumer protection in a much different place.

We look at our experience that with NASA, that was expensive but it was worth it, arguably, and I think to have the conversation that says it is worth it for our Nation to spend what it takes not just in aggregate numbers but to recruit and retain the personnel that we're going to need to drive these programs home successfully.

Senator KLOBUCHAR. Thank you.

Mr. KOVACIC. And I think if we're not willing to spend more and suppose we don't triple the agency's budget, if we don't take the steps that you have suggested, step by step, I think we're going to find ourselves in a chronic position that we do in public policy where we have grand policy aspirations and we scratch our heads and say why isn't it working?

Senator KLOBUCHAR. OK.

Mr. KOVACIC. In part, it's not working because we're not willing to pay for it.

Senator KLOBUCHAR. Thank you. Mr. Rhodes, hometown company. In your testimony, you note that 3M partnered with the U.S. Department of Homeland Security to help seize approximately 11 million counterfeit 3M N95 masks and in January 3M helped Minnesota avoid buying nearly 500,000 counterfeit N95 masks from a fraudulent vendor.

Can you speak to the important role of public/private partnerships in combating fraud?

Mr. RHODES. Yes, thank you for the question, Senator Klobuchar.

That has been an integral part of our efforts from the beginning in processing those 13,800 reports. Forming close partnerships with law enforcement and with agencies has really allowed us to extend beyond what we can do with our civil litigation authority and the opening comments I thought were spot on that the criminal en-

forcement really helps to make the difference to stop the bad actors and so that's been a critical part of our efforts from beginning last March when we sent a letter to the Department of Justice, to the National Association of Attorney Generals, the National Governors Association, reaching out.

We conducted briefings, formed working relationships with the DOJ Task Force, with Department of Homeland Security, Homeland Security Investigations and their National IPR Center, as well as Customs and Border Protection, and those have really been among the most effective steps that we've been able to take.

Senator KLOBUCHAR. Thank you. Thank you.

And just last, I'll just put this one on the record since my colleagues are waiting to ask questions, but, Ms. Patten, thank you for your work and I will say Senator Luján and I have done a letter after a hearing that he conducted on misinformation on vaccines and I'll follow up with you on this but just some astounding findings that maybe if we could take 12 accounts down or get the social media companies to do it, we would be in a lot better place.

So thank you.

Senator BLUMENTHAL. Thanks, Senator Klobuchar, and thanks for your very thoughtful book which deals with many of these topics.

Senator KLOBUCHAR. Thank you.

Senator BLUMENTHAL. Senator Thune.

**STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman.

Mr. Kaufman, following the enactment of the TRACE Act in December 2019, the FTC's seen a drop in robocall complaints.

Could you elaborate on some of the FTC's recent robocall enforcement actions?

Mr. KAUFMAN. Sure. We are engaging quite a lot with the FTC and with DOJ on a number of robocall issues. We've got several cases in litigation and we have a lot of cases in the pipeline that will be challenging that robocall conduct. So it's an area we are very actively involved in.

Senator THUNE. Could you speak to the FTC's efforts on engaging on that issue with industry initiatives, like the Robocall Traceback Group, and whether this public/private partnership has been successful in identifying illegal robocallers?

Mr. KAUFMAN. Absolutely. It's been a very successful partnership. It's been a robust source of leads and helpful information to allow us to build successful law enforcement actions. So it's highly successful.

Senator THUNE. OK. Good. Justice Breyer's opinion last week regarding the FTC's authority to seek equitable relief cited the Safe Data Act which is comprehensive privacy legislation I've sponsored with Senators Wicker, Fischer, and Blackburn as an example of Congress considering providing for a fix to the gap in the FTC's 13B authority.

Mr. Kaufman, in your view, would this particular provision be helpful to the FTC after the Supreme Court's unanimous ruling

that the FTC could no longer secure consumer redress in Federal courts under the FTC's 13B authority?

Mr. KAUFMAN. Absolutely. We really do appreciate the inclusion of 13B reform in the Safe Data Act and very much are very supportive and think it's a very important thing for Congress to take up.

Senator THUNE. Mr. Rhodes, I appreciate all the work that 3M has done throughout the pandemic to increase its production of PPE, to support individuals and frontline workers.

In fact, last November I had the opportunity to visit 3M's manufacturing facility in Aberdeen, South Dakota, and see the expansion of 3M's N95 mask production lines. At the same time you were increasing your manufacturing capabilities, scammers were trying to exploit the pandemic by offering a number of fraudulent products.

What steps did 3M take to combat fraudulent activity during the pandemic, and can you talk about your partnership with law enforcement officials when identifying fraud?

Mr. RHODES. Yes, thank you for the question, Senator Thune.

So our efforts to address the pandemic really started with getting information out there. We established our website, our fraud hotlines to both allow customers to verify the offers of product were authentic and from authorized 3M distributors.

We put online information about how to spot fraud in all of its forms, how to spot counterfeits. We published the list prices for our commonly sold N95 respirators so that customers could identify and avoid inflated pricing.

At the same time, once we established intakes for reports of suspected fraud, we reached out, as I mentioned, to the Department of Justice, to state AGs' offices, to DHS, to CBP, to the FBI, and started a process of sharing information, of referring reports. We've referred thousands of reports which has really extended the reach and effectiveness of our actions.

We've also brought our own actions in 33 lawsuits in courts across the country and we've been very successful in stopping the unlawful activity and we've donated all of our recoveries in those cases, monetary recoveries to COVID-19-related charities.

We've also partnered with online retailers, Internet companies to take down tens of thousands of false or deceptive product listings, social media posts, websites, and so it's been really a case of addressing fraud, price gouging, and counterfeiting from all angles.

Senator THUNE. Mr. Kaufman, there have been a number of discussions around vaccine passports since the Biden Administration took office. Vaccination is key to ending this pandemic, but the idea that a vaccine passport or lack thereof could be used to track or restrict Americans' movement is concerning.

I understand several technology companies have been working to develop visual tools or passports which may be appealing to consumers as they seek ways to facilitate their return to normal activities and while convenient to the consumer, I am concerned about the privacy and security of that health data that the consumer may opt to provide these companies.

Has the FTC taken steps to conduct oversight of the privacy implications of digital vaccine passports?

Mr. KAUFMAN. At the moment, we have not done anything publicly about it, but it is an issue that we are very concerned about. Obviously there are enormous implications involving vaccines and privacy issues.

We've also been active in a lot of other health privacy areas. We brought a recent case flow involving an online telehealth app that collected a lot of information from hundreds of millions of people. So the issue of health and apps is an area we're very focused on and I think you raise a very important issue that we will be looking at.

Senator THUNE. OK. Good. I'm glad you're going to be looking at it.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thanks, Senator Thune.

And now Senator Markey.

**STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS**

Senator MARKEY. Thank you very much, Mr. Chairman. Thank you for holding this very important hearing.

A year ago, I sent a letter to the Federal Trade Commission urging it to develop and implement a comprehensive plan to stop bad actors from preying on innocent consumers with COVID-related scams and price gouging.

Since then, the Commission has taken a number of important steps to stop this type of behavior, including issuing warning letters and charging a scammer who deceptively marketed a fake COVID treatment, but there is so much more that needs to be done.

The Commission also needs to address consumer protection threats that have indirectly arisen as a result of the pandemic. Specifically, we need to stop websites that are taking advantage of kids who are online and on their devices more than ever during the period of distance learning.

I recently sent a letter to the Federal Trade Commission urging it to investigate whether Google violated Section 5 of the Federal Trade Commission Act by misleadingly marketing children's apps as compliant with the Children's Online Privacy Protection Act, a law which I authored, despite evidence that many of those apps appear to illegally track children and share their personal information without consent.

Mr. Kaufman, as children's time online skyrockets during this pandemic, is the Federal Trade Commission committed to cracking down on platforms that are unfairly manipulating kids and deceiving parents while they do it?

Mr. KAUFMAN. Absolutely. I agree very much with you. What has happened from the pandemic, everybody has gone online and privacy and security issues have really been magnified by the movement of everything online.

So we are very familiar with your letter. I can't comment on a specific investigation but issues of children's privacy are very important to myself, to my bureau, and to our Acting Chairman.

Senator MARKEY. OK. Great. Thank you.

Last week, the Supreme Court stripped the Federal Trade Commission of its ability to obtain monetary relief for victims of scams under Section 13(b) of the Federal Trade Commission Act. Under this ruling, the Federal Trade Commission will operate without its primary tool for compensating cheated consumers.

The Supreme Court's decision was nothing short of a gut punch to the Federal Trade Commission and to the consumers which it serves.

I look forward to working with Chair Cantwell and Subcommittee Chair Blumenthal and all of my colleagues on this committee to quickly enact legislation that restores the Federal Trade Commission's rightful authority under Section 13(b) but until Congress acts, it is imperative that the Federal Trade Commission uses its full authority to deter bad actors from engaging in illegal activity. We need to stop these scams before they happen.

Federal Trade Commissioner Chopra has proposed that one way the Federal Trade Commission can deter harmful behavior is by using the Commission's Penalty Offense Authority. Under the Federal Trade Commission Act, if the Commission formally condemns a particular illegal practice in one case, other companies then who knowingly engage in the same practice can face big fines.

As an example, when a company recently posted fake positive reviews that tricked consumers into buying its products, the Federal Trade Commission issued an Order condemning that practice. Using its Penalty Offense Authority, the FTC could potentially now issue serious fines against any company that knowingly defies the Federal Trade Commission by posting fake reviews for their own products.

In other words, using Penalty Offense Authority, the Federal Trade Commission could potentially put whole industries on notice and hit companies where it hurts if they scam consumers.

Mr. Kaufman, what are your thoughts on this approach, and is the Federal Trade Commission currently inventorying existing Orders to see if it can use them to collect civil penalties from scam artists who are operating today?

Mr. KAUFMAN. The Penalty Offense Authority is one of the additional tools that we are very closely looking at to make sure we can do everything we can in our power to protect consumers, despite the loss of 13B.

One issue I have with that authority is that it gives you penalties. You know, at the FTC, one of our first priorities, we want to stop the bad conduct and get money back to consumers. Penalty Authority doesn't allow us to do that, but it is a good alternative, given the unfortunate decision of the Supreme Court last week.

Senator MARKEY. Thank you, Mr. Kaufman.

Mr. Kaufman, again, I just wish that the FTC now would use the penumbra of the authority of the Federal Trade Commission Act to protect consumers wherever possible while simultaneously I realize that it's imperative that we pass legislation for more power of the FTC to ensure that it can get money back for consumers who have been bilked, and I'm looking forward to working with Chairman Blumenthal and Chair Maria Cantwell in order to accomplish that goal.

Thank you.

Senator BLUMENTHAL. Thanks, Senator Markey. Thanks for those excellent comments.

And now Senator Luján. We may be having technical difficulties with Senator Luján.

While we're waiting, let me ask a question. I think it's pretty clear from the testimony that we've heard today and everything we know about the FTC that the Supreme Court decision really is an existential threat to the FTC and to consumers and if we do nothing else in this subcommittee, we need to reauthorize the FTC's authority to protect consumers and put money back in their pockets. That's essentially what 13B enables the FTC to do, put money back into consumers' pockets for their losses.

The money that results from penalties goes to the Federal Government, not to consumers. It's a deterrent. It's a good means of punishment, but consumers see none of it.

Let me ask Assistant Attorney General Alexander because you are doing what I did for 20 years as Attorney General of the State of Connecticut, which is to put money back in consumers' pockets.

Could the state attorneys general fill some of the gap left by the Supreme Court's decision in restricting FTC authority to provide restitution if the FTC were to share more of its cases, to refer more of them, and perhaps even for you to seek criminal penalties if the FTC fails to do so?

Ms. ALEXANDER. Thank you for the question, Senator.

Yes, I mean, the states do have restitution authority. Our state in Washington, our courts give us very broad equitable restitution—give the courts very broad equitable authority to provide restitution to consumers, but I will say that, you know, without the FTC being able to seek that form of relief, you know, the states sort of become the primary source of restitution and while we devote considerable effort to consumer protection, the states can't do everything and, you know, in some cases, the FTC Act is broader than a state's consumer protection act and reaches farther, reaches into professions that some states' consumer protections acts don't cover.

You know, the presence of a lot of regulators pursuing restitution allows every regulator to focus their efforts on different schemes, you know, and broaden the range of conduct that can be investigated and prosecuted and, you know, the combined efforts of the Federal Government, the FTC, and the states create a powerful deterrent effect, and when there's one less regulator with the authority to deprive wrong-doers of the fruits of their illegal conduct, that deterrent effectiveness is necessarily weakened.

I know you asked about criminal prosecution. I'm a civil attorney and I can't really speak to that specifically. So I'm going to leave that question maybe to my FTC colleagues.

Senator BLUMENTHAL. Let me ask you, Ms. Patten. You raised the issue of independent litigating authority. How important could that be to the FTC?

Ms. PATTEN. I think it's vitally important to the FTC. When harm is done and consumers need help, time is of the essence. The FTC should not have to ask permission to go in and deal with harmful conduct and they need to get that money to consumers as

quickly as possible and without independent authority that cannot happen.

Senator BLUMENTHAL. You know, your organization is in the business of educating and it does extraordinary work in raising warnings to consumers and making sure they know about these scams. Why is education not enough?

Ms. PATTEN. Education is not enough because our 320 million consumers in the United States are continually scammed and they need to be made whole and education doesn't do that. So without 13B and without a functioning FTC, that's not going to happen.

Senator BLUMENTHAL. And part of education is to lead consumers to report wrongs against them—

Ms. PATTEN. Yes.

Senator BLUMENTHAL.—which enables the FTC and state law enforcers to take action to stop the scammers, correct?

Ms. PATTEN. That's correct. The Consumer Sentinel Network that the FTC relies on all the time is based on consumer complaints.

Senator BLUMENTHAL. You know, one may wonder, given all that's been said about 13B authority, who's against restoring it and why.

Ms. PATTEN. Criminals.

Senator BLUMENTHAL. Criminals, scammers, the payday lenders who exploit working families, the for-profit colleges that prey on veterans, the fake vaccine card perpetrators or the other kinds of con artists that prey on seniors, and, without trying to disparage anyone unfairly, the Chamber of Commerce has said in a letter to the Committee, in fact just before last week's FTC oversight hearing, that it opposes any action on 13B.

I recognize that Acting Chair Slaughter and Commissioner Phillips disagreed with the Chamber of Commerce in their testimony, but, regrettably, they were provided with that letter just minutes before their testimony.

I would be interested to know, Mr. Kaufman, whether you have a further rebuttal to the Chamber of Commerce.

Mr. KAUFMAN. Absolutely. I could spend, unfortunately, far too long with my rebuttal to that letter. I strongly disagree with their propositions.

At the outset, they're fundamentally saying that we should not be able to get money from companies unless they engage in egregious fraud. So unless we meet that standard of egregious fraud, we shouldn't be able to get money back from consumers, and I think that is just bad policy.

The issue when consumers are deceived is not what was the intent of betrayal? What was the mental state of the company that engaged in the bad conduct? Who should bear that burden? The company that deceived consumers or consumers who relied upon that company and made a deceptive purchase. It is consumers who should get their money back, irrespective of the mental state of the advertisers.

So I could not disagree more with so many of the propositions in the Chamber's letter.

Senator BLUMENTHAL. And one might ask what is non-egregious fraud? Garden variety exploitation of seniors or veterans or COVID sufferers?

Mr. KAUFMAN. Absolutely. In the advertising area, that is an area where we think it would be particularly challenging. If there is a bad study that a company's relying on, can you say that it was fraudulent for them to rely upon that study? It creates very challenging litigation issues.

I've litigated health claims for about 7 years at the FTC. I've seen firsthand how challenging it is to bring these cases but then to increase the burden and require some showing of intent on behalf of the company would be unacceptable.

Senator BLUMENTHAL. In effect, what the Chamber of Commerce wants to do is convert 13B into a criminal statute.

Mr. KAUFMAN. I haven't thought about it from that perspective, but I agree with your commentary.

Senator BLUMENTHAL. Requiring mens rea or criminal intent for there to be a violation which is unheard of in prior consumer protection jurisprudence. If that were the case, state attorneys general would be straitjacketed in everything they did and the FTC would be severely undermined.

Let me turn to Senator Luján. I'm told he is available. Senator Luján?

**STATEMENT OF HON. BEN RAY LUJÁN,
U.S. SENATOR FROM NEW MEXICO**

Senator LUJÁN. Thank you so much, Chairman. I very much appreciate your leadership and this important hearing that we're having today.

I also want to recognize Ranking Member Blackburn for calling this hearing to explore actions we can take to stop COVID-19-related scams.

It's critical to understand how we best protect our communities in times of crisis and I look forward to working together on this topic.

Even as the FTC tackles this unprecedented crisis of fraud and abuse against all Americans, we still don't understand the full scale of this crisis. That's why as a House member, I introduced the bipartisan Protecting Indian Tribes from Scams Act to better understand the scope of scams targeting tribes and tribal members and to create a roadmap for Congress to put an end to these schemes. The House passed this bill last year but we still have more work to do.

Mr. Kaufman, can I get a commitment from you to work with me on this issue?

Mr. KAUFMAN. Absolutely. We'd be very happy to do so.

Senator LUJÁN. And last year, I introduced the Stopping COVID Scams Act so the FTC could go after scammers quickly and decisively. I'm glad the parts of that bill were incorporated into Consolidated Appropriations Act in December.

Critically, the FTC now has civil penalty authority and I was glad to see that the Commission brought its first action seeking monetary penalties under its new authority and targeting deceptive COVID-19 marketing of Vitamin D and zinc products.

We can't just give scammers a slap on the wrist, especially when people's lives and livelihoods are on the line.

Mr. Kaufman, should Congress expand the FTC's present Civil Penalty Authority to make it permanent and increase its scope beyond the COVID-19 health crisis?

Mr. KAUFMAN. So I do think there are areas where the FTC could definitely use Civil Penalty Authority. Data security and privacy first-time violations are an area where I do think Civil Penalty Authority is appropriate. I'd be glad to discuss with your office other areas where it might be suitable for the FTC to have Civil Penalty Authority against first-time violators.

Senator LUJÁN. Appreciate that. Mr. Kaufman, as we recently explored in the hearing in the Communications Subcommittee, misleading and contradictory information about the coronavirus on social media platforms and broadcast media has done real harm. Fake claims have gotten in the way of public health professionals trying to do their job and protect our communities.

That is why last week Senator Klobuchar and I requested information from Jack Dorsey and Mark Zuckerberg about why they have failed to take action against a small group of 12 accounts responsible for up to 65 percent of anti-vaccine content on their platforms.

Many of these accounts turned their lies into profit by selling supplements, books, and other miracle cures. This needs to stop.

So my question actually is to Ms. Patten. Do you have any recommendations on steps Congress can take to ensure online platforms address misinformation super spreaders?

Ms. PATTEN. Well, I think the very first thing Congress needs to do is fix 13B. After that, I think that broad civil penalty authority to the FTC would go a long way in deterring these platforms and social media companies to do the right thing, and I think that a civil penalty fund that could reimburse victims of these frauds that you're talking about would also be appropriate.

Senator LUJÁN. Mr. Kaufman, do you have a response to that?

Mr. KAUFMAN. Yes. I definitely agree strongly on the civil penalty fund. It's a tool that other agencies have where civil penalties can go to the agency to disburse money to consumers that were harmed. So I think that would be—and again I'm speaking for myself and not for the Commission. But I do know the Acting Chair is very interested in that, as well, but a civil penalty fund would be a highly effective tool for the agency and for consumers.

Senator LUJÁN. And in New Mexico, we started seeing COVID-19 scams as early as last March. They tried to scare seniors that they would lose their social security payments and it wasn't true. They tried to sell miracle cures. They were lies. Especially in rural communities, many of these scammers reached their targets not over the Internet but on the telephone. Robocalls aren't just a nuisance, they are used to take advantage of elderly and vulnerable populations when they're most at risk.

I'm encouraged that the FTC is taking action against companies that enable those calls, including voice over Internet protocol providers. However, it looks like the number of illegal calls are on the rise once again.

Mr. Kaufman, what additional tools does the FTC need to fight illegal robocalls?

Mr. KAUFMAN. A lot of the challenges in fighting robocalls are technological and we are coordinating closely with the FCC and we do have a lot of cases in the pipeline on robocall issues, but on the other issues you raised, I think education is a very important part of the FTC's mission and it's important that we not just put information on our website but that we're reaching out to consumers, to different communities, to share the information about hang up the phone when you get a robocall.

So one thing we've done is we've mailed postcards to hundreds of thousands of consumers who are in neighborhoods which have low Internet access. So we've appeared on a lot of radio shows in order to get the message out to consumers that might not go to our website to find the information.

Senator LUJÁN. Thank you, Mr. Chairman. I yield back.

Senator BLUMENTHAL. Thanks a lot, Senator Luján.

A couple of final questions. I appreciated the Acting Chair's announcement about the Consumer Community Advocate Center. I hope you're familiar with it. We all recognize that fraud actually exploits the most vulnerable in hard-to-reach communities.

I'm hoping that the FTC can partner with leaders in local communities, faith leaders, senior citizens leaders and advocates.

What is the plan for getting the center started, the Community Advocate Center?

Mr. KAUFMAN. So the Community Advocate Center, we announced it about a month ago, it's a way for legal service organizations to file complaints with the FTC on behalf of their clients and get advice back about what their clients should do.

We kicked it off a month ago. We've already signed up 30 different organizations and we have support from a lot of national organizations, as well. So it is just starting up and we think it has a lot of promise to get us information about frauds that are targeting low-income communities who may be less likely to report to the FTC or to other law enforcement agencies.

Senator BLUMENTHAL. Thank you. And finally the Funeral Rule, the Commission requested last summer comments on changes to the Funeral Rule.

Does the Commission intend to make changes to that rule?

Mr. KAUFMAN. I can say the rule review is still underway and we are looking closely at the comments and more will be coming in the future.

Senator BLUMENTHAL. Thank you.

I want to just close by thanking all of the witnesses for this excellent testimony. It's been a great start to our subcommittee's series of hearings. I hope we will explore more of the COVID scams that we're seeing multiplying and exploding literally every day. I think education, Ms. Patten, is a very important component here.

As you've described so eloquently, there are enforcement actions that need to be taken as a deterrent, as a source of restitution, and as a punishment, and I'm hoping that the FTC will play an increasingly vigorous role with additional resources that are absolutely necessary and as to the tech platforms, we need to make

them accountable for enabling these kinds of scams, and thoughtful revision to Section 230 is key to that effort.

Thank you to Ms. Alexander, Mr. Rhodes, Professor Kovacic, and to Mr. Kaufman, and Ms. Patten. Really appreciate your being here, and thanks to my colleagues, especially Senator Blackburn.

The hearing record will remain open for two weeks. Any Senators who'd like to submit questions for the record should do so by May 4. We ask that your responses be returned to the Committee as quickly as possible and in no case later than two weeks after you receive these questions.

That concludes today's hearing. Thank you all.

[Whereupon, at 11:39 a.m., the hearing was concluded.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO DANIEL KAUFMAN

Prevalence and availability of fraudulent cures and treatments. The Federal Trade Commission (FTC) has sent nearly 400 warning letters to companies and individuals who claim their products treat or prevent COVID-19, forcing many of these scam artists to take down their false claims. The FTC has done a commendable job in this massive undertaking despite limited resources.

Unfortunately, several COVID-19 profiteers—including including some of the biggest sellers of fake COVID-19 “treatments” and “cures”—continue to spread their false health claims and rake-in millions of dollars selling their products. For example, Joseph Mercola continues to peddle false claims on social media and in his new book (which is now a best seller on Amazon.com) that vitamin C, D, Zinc and Selenium can treat and prevent COVID-19, and he sells these same products on Amazon.com under the “Amazon Choice” label. He continues to do so despite a warning letter from the Food and Drug Administration (FDA). Some of his dangerous COVID-19 treatment claims are even hosted on the National Institutes of Health’s (NIH) National Library of Medicine.

Question 1. What specific, additional resources and authorities does the FTC need to enhance its enforcement efforts to protect the public during this pandemic?

Answer. The most critical issue affecting the FTC’s ability to fulfill our enforcement mission is the recent loss of a pillar of our statutory authority. On April 22, 2021, the U.S. Supreme Court held that the FTC cannot seek equitable monetary relief under Section 13(b) of the Federal Trade Commission Act,¹ reversing four decades of case law that the Commission has used to provide billions of dollars of refunds to harmed consumers. Accordingly, the Commission has requested that Congress amend Section 13(b) to provide the FTC with the ability to seek monetary relief under that authority.² I join that request.

While it is critical that the FTC step up its enforcement against pandemic-related scams, so too must major tech platforms. Unfortunately, many of the largest platforms use Section 230 of the Communications Decency Act as a shield against taking responsibility for fraud happening on their platform, an advantage brick-and-mortar retailers do not enjoy. I am grateful that Congress is looking at Section 230 reform and happy to provide assistance.

Question 2. How does your agency coordinate with other Federal agencies, such as the FDA and NIH, to track dangerous COVID-19 health claims and issue warning letters to fraudsters?

Answer. FTC staff communicate and coordinate regularly with our state and Federal law enforcement partners to enhance our efforts to protect consumers against COVID-19 scams.

With regard to our Federal partners, the FTC—along with representatives of other agencies including CFPB, CBP, EPA, FBI, FDA, ICE, and USPIS—participates in a Department of Justice-led inter-agency working group to share intelligence about emerging COVID-19 scams and to de-conflict targets. Separately, FTC staff consult with FDA staff on a near-daily basis to share investigative information and coordinate work with regard to warning letters sent jointly by the two agencies to entities peddling products or services claimed to prevent, treat, or cure coronavirus disease. Agency staff also work closely with Federal partners on consumer and business education outreach through a variety of methods and projects, such as joint webinars on false COVID-19 advertising claims, posting of FTC

¹See *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S.Ct. 1341 (2021).

²See Press Release, FTC Testifies Before Congress on its Work to Protect Consumers from COVID-19 Scams and Threats to its Ability to Return Money to Victims of Illegal Conduct, Apr. 20, 2021, www.ftc.gov/news-events/press-releases/2021/04/ftc-testifies-congress-its-work-protect-consumers-covid-19-scams.

COVID-19 resources on the HHS's website for older adults, and drafting of relevant FAQs for the COVID-19 resources page on [usa.gov](https://www.usa.gov).

FTC staff has also communicated with staff in offices of state Attorneys General to discuss consumer fraud related to the COVID-19 pandemic, during calls coordinated by the National Association of Attorneys General. During these calls, which also involved enforcers from other Federal agencies, we have exchanged information about scams encountered, provided updates on formal law enforcement actions, and informed state enforcers when the FTC has issued new or updated consumer education guidance materials that they can share with their constituents. FTC staff also closely coordinates COVID-19 outreach efforts and anti-fraud messaging with NAAG, including radio media tours, blog posts, infographics, and social media campaigns.

The FTC commonly refers investigative leads to other Federal or state enforcers as circumstances warrant, for instance, to another Federal agency with direct regulatory responsibilities over the product in question, or to a state Attorney General's office if the product in question appears to be advertised or available to a limited geographic market. We also regularly receive and investigate referrals from other law enforcement agencies.

We will continue to coordinate and cooperate with our state and Federal enforcer partners to maximize the impact of our efforts to combat fraud related to the COVID-19 pandemic. To date we have issued more than 400 warning letters in this area, including nearly 130 issued jointly with FDA.

Threats to Section 13(b) authority. Until the Supreme Court's ruling on April 22, the single strongest tool in the Commission's tool box was Section 13(b) of the FTC Act, which as Chairwoman Slaughter explained, "allows the agency to return money to wronged consumers and put law-breakers on the hook for the costs of their illegal conduct." It will be nearly impossible now to return money to consumers now.

Question. Let's say a consumer was scammed today and loses their whole livelihood. If that scammer fights you at every step under Section 19, what is that process and how long from now will consumers get their money back? And how much would it cost for the FTC to pursue that case?

Answer. Because the Supreme Court ruled in *AMG* that courts can no longer award the Commission monetary relief under Section 13(b) of the Act, the Commission's ability to provide redress to consumers who lose money to scammers is significantly impaired. Post *AMG*, the Commission can now only obtain redress for scammed consumers through Section 19 of the Act. If the scam did not involve violation of a Commission rule, the Section 19 process is time consuming and resource intensive.

For scams that do not involve rule violations, the process to obtain monetary relief would be as follows if the defendant fights every step of the way:

1. The Commission authorizes staff ("complaint counsel") to initiate an administrative action under Section 5(b) of the Act.³
2. If complaint counsel prevails at the administrative hearing, the defendant appeals to the Commission.
3. If complaint counsel prevails on the appeal before the full Commission, the order becomes a final Commission cease and desist order. The defendant then appeals the ruling to a U.S. Circuit Court of Appeals of the defendant's choosing.
4. If the Commission prevails in the Circuit Court of Appeals, the defendant petitions for Supreme Court review.
5. If the Supreme Court hears the case and rules in favor of the Commission or denies review, the first phase of the process is complete, resulting in a final administrative cease and desist order against the defendant.
6. Once the final administrative order is obtained, the Commission then commences the second phase by filing an action for monetary relief in U.S. District Court under Section 19(a)(2) of the FTC Act. To obtain monetary relief, the Commission must prove that the defendant engaged in unlawful conduct that a reasonable person would have known to be "dishonest or fraudulent."⁴
7. If the Commission prevails in district court, the defendant appeals the monetary relief judgment to the U.S. Circuit Court of Appeals.
8. If the Commission prevails in the Circuit Court of Appeals, the defendant petitions the Supreme Court review.

³ 15 U.S.C. § 45(b).

⁴ *Id.* § 57b (a)(2).

9. If the Supreme Court hears the case and rules in favor of the Commission or denies review, the second phase of the process is complete, resulting in a final judgment against the defendant for monetary relief.
10. The Commission collects on the judgment.
11. The Commission distributes refund checks to consumers who lost money to the scam.

In essence, the process for obtaining monetary relief under Section 19(a)(2) is a bifurcated one, with liability adjudicated in the Section 5(b) administrative proceeding and monetary relief determined in the Section 19(a)(2) district court proceeding. Because the Commission must litigate two consecutive proceedings to obtain monetary relief via Section 19(a)(2), the process involves far more time and resources than the pre-*AMG* process of obtaining monetary and injunctive relief in a single proceeding brought under Section 13(b).

Unsurprisingly, this process takes a long time. The Commission's past experience using this pathway indicates that consumers can expect that it will take about a decade from the filing of an administrative complaint for the Commission to provide refunds to harmed consumers. For example, in the Commission's action against Figgie International, Figgie fought at every step of the way. The Commission filed its administrative complaint in May 1983. After twelve years of litigation, the Commission finally was able to distribute refunds to consumers in June 1995.⁵ Even in cases where defendants have not fought at every step, it took more than seven years for the Commission to provide refunds to consumers using the Section 19(a)(2) pathway.⁶

Moreover, the inefficiencies of Section 19(a)(2) are exacerbated in cases in which preliminary injunctive relief is necessary. In cases involving hardcore frauds and scams, the Commission typically seeks an *ex parte* temporary restraining order that imposes an asset freeze, puts corporate defendants under the control of a court-appointed receiver, and grants the Commission access to business premises to secure documents and evidence. Such extraordinary preliminary relief is necessary because defendants in hardcore fraud cases often dissipate assets or destroy evidence when they learn that the FTC has brought an enforcement action against them. Prior to *AMG*, the Commission sought such *ex parte* relief concurrently with its action for monetary and permanent injunctive relief under Section 13(b). Post *AMG*, however, courts may still be able to award *ex parte* preliminary relief under the preliminary injunction provision of Section 13(b), but such relief will be to maintain the status quo pending resolution of the Commission's administrative complaint and to preserve the district court's ability to award monetary relief in a subsequent Section 19 action for monetary relief. Thus, in cases in which preliminary relief is warranted, the bifurcated process in a typical Section 19(a)(2) case will be *trifurcated*: (1) the Commission will first institute a proceeding for preliminary relief in Federal district court under Section 13(b) in which the Commission will have to establish, and the district court will have to assess, the Commission's likelihood of success on the merits as a predicate to granting preliminary relief; (2) the Commission will next file and litigate the merits of its complaint in an administrative proceeding; and (3) the Commission will then return to Federal district court after completion of its administrative litigation to seek monetary relief under Section 19(a)(2). This trifurcated process will be highly inefficient—the Commission and defendants will

⁵ See *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994); *In re Figgie Int'l, Inc.* 107 F.T.C. 313 (1986) (complaint filed May 17, 1983), *aff'd sub nom Figgie Int'l v. FTC*, 817 F.2d 102 (4th Cir. 1987); Press Release, Federal Trade Commission, *Figgie International, Inc.* (June 9, 1995), <https://www.ftc.gov/news-events/press-releases/1995/06/figgie-international-inc>.

⁶ In the Commission's action against Telebrands Corporation for making false and deceptive weight loss claims, seven years elapsed between the start of administrative proceedings and the Commission's distribution of \$7 million in refunds to harmed consumers. *In re Telebrands Corp.*, Docket No. 9313, 2003 WL 22319292 (F.T.C. Sept. 30, 2003), *aff'd sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); Press Release, Federal Trade Commission, *FTC to Send Refund Checks to Consumers Who Bought Bogus "Ab Force" Weight Loss Devices* (Nov. 18, 2010), <https://www.ftc.gov/news-events/press-releases/2010/11/ftc-send-refund-checks-consumers-who-bought-bogus-ab-force-weight>. The process was "faster" because Telebrands agreed to a \$7 million settlement during the pendency of the Section 19(a)(2) district court proceeding. Press Release, Federal Trade Commission, *Marketers of Ab Force Weight Loss Device Agree to Pay \$7 Million for Consumer Redress* (Jan. 14, 2009), <https://www.ftc.gov/news-events/press-releases/2009/01/marketers-ab-force-weight-loss-device-agree-pay-7-million>. It took ten years for the Commission to obtain monetary relief against Koskot Interplanetary, an unlawful multi-level marketing scheme. See *FTC v. Turner*, No. 79-474-Orl-Civ-R, 1982 WL 1947 (Dec. 29, 1982); *In re Koskot Interplanetary*, 86 F.T.C. 1106 (1975) (complaint filed May 24, 1972), *aff'd sub nom Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978).

be mired in years of litigation, consumers will have to endure even longer waits to get refunds, and a district court judge will spend years overseeing an asset freeze, receivership, and preliminary injunction for a case in which the merits will be litigated in a separate administrative forum. Given that the court would be asked to order an asset freeze and monitor it for several years while the matter proceeds through other fora, and given the risk the case may not make it back to the court issuing the asset freeze, many courts might not issue such an order in the first place.

It is difficult to assess how much additional money the Commission will have to spend pursuing monetary relief under the Section 19(a)(2) pathway. Nonetheless, because the process is far more consuming than Section 13(b) pathway the Commission used prior to *AMG*, litigating cases under the Section 19(a)(2) pathway will tax the Commission's resources. Commission staff on those cases will be mired in years of litigation, which will prevent those same staffers from being able to bring new enforcement cases. As a result, the opportunity cost is significant. The inefficient process set forth in Section 19(a)(2) will result in the Commission bringing fewer enforcement actions than it did prior to *AMG*.

In Section 19 cases that do involve the violation of a Commission rule governing unfair or deceptive conduct,⁷ the Commission can still proceed directly to Federal court, but even those actions will not yield the same results that the Commission has historically obtained under Section 13(b) due to Section 19's three-year statute of limitations. Unlike Section 13(b), which has no statutory time bar, Section 19's three-year limitations period will limit the number of consumers who are eligible for redress through a Section 19 action. Many Commission actions involve schemes that have been operating for many years, primarily because it takes several years for such schemes to generate a sufficient volume of complaints to justify the Commission's use of its limited resources to commence an investigation. As a result, by the time the Commission commences and completes its investigation and files suit, multiple years may have elapsed from the time the unlawful conduct first began. In such cases, consumers who were victimized more recently will receive redress, whereas consumers who had the misfortune of being victimized in the early days of the scheme will be left out in the cold due to Section 19's three-year limitations period.

Counterfeit good commercial activity. Online retail platforms have dealt with a barrage of fraudulent goods—such as personal protective equipment, vaccines, vaccine cards, and others—throughout the COVID-19 pandemic. While the FDA, Centers for Disease Control, and other agencies shared information to help consumers identify and avoid fake products, online retail marketplaces are also responsible for detecting and removing such content from their sites.

Question 1. What role have online retailers played in identifying and ending counterfeit good commercial activity?

Answer. FTC staff regularly engages with social media and sales platforms regarding products and advertising claims of concern. We currently send copies of our health claims warning letters to platforms where deceptive claims are disseminated or the products in question are sold. In other instances, we have proactively reached out to marketplace platforms regarding particular products or product categories of concern. Although we have found the platforms can be responsive to these concerns, online retail platforms must do much more to combat problematic claims and conduct in their marketplace, including the harmful sale of counterfeit and other fake goods. Over the last year, the Commission has seen a surge in complaints about scams and frauds proliferating online, particularly on ecommerce platforms. As discussed above, ending the scourge of fraudulent claims may require Congress revisiting Section 230 of the Communications Decency Act.

In terms of the specific issue of counterfeit and pirated goods, other agencies, including the Department of Commerce, Department of Homeland Security, and U.S. Trade Representative, have studied the problem closely and have additional expertise and knowledge to answer this question.

Question 2. What recommendations do you have for Congress regarding ways to address counterfeit good commercial activity on online platforms and marketplaces?

Answer. As the FTC's complaint data shows, fraud in the online marketplace has skyrocketed over the last year. Legal requirements to verify the identities of third-party sellers, and to verify the authenticity of sellers' goods before they are sold or

⁷For example, the recently enacted COVID-19 Consumer Protection Act treats deceptive acts or practices associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 as rule violations that the Commission can directly enforce in Federal court under Section 19(a)(1). Pub. L. No. 116-260, Title XIV, § 1401(c)(1)

shipped by the online retailer, may help address the problem of counterfeits and other scams. But ultimately, rooting out fraud may require revisiting the special legal immunities platforms claim under Section 230 of the Communications Decency Act, an advantage that brick-and-mortar businesses do not enjoy. In addition, as noted in response to Question 1, above, other agencies have studied this issue and have provided specific recommendations to address counterfeit and pirated goods online. See, e.g., *Khttps://www.dhs.gov/publication/combating-trafficking-counterfeit-and-pirated-goods*; *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/ustr-releases-2020-review-notorious-markets-counterfeiting-and-piracy*. FTC staff has provided technical assistance on bills intended to implement some of these recommendations.

Question 3. When the FTC secures civil penalties under the COVID–19 Consumer Protection Act, will the Commission provide financial relief to consumers, such as refunds for scams and deceptive products?

Answer. The CCPA provides both for compensatory relief through Section 19 of the FTC Act, and civil penalties through Section 5(m) of the Act. The Commission always strives to return compensatory funds to consumers, and those obtained through the CCPA will be no different. In addition, the CCPA allows the Commission to seek civil penalties, which can help deter fraud in the first instances. In many cases, the Commission intends to seek both compensatory funds and civil penalties.

Criminal referrals on fraud and scams. Mr. Kovacic mentions in his prepared remarks that the “only way to deter the most serious fraudulent schemes we have observed is to subject violators to criminal punishment.” We need to use the prospect of time in jail to deal with some of these worst offenders of our consumer protection law.

Question 1. How many criminal referrals has the FTC sent to the Department of Justice (DOJ) and state law enforcement regarding pandemic fraud?

Answer. The FTC launched the Criminal Liaison Unit (“CLU”) in 2003. From 2003 through May 2020, prosecutors have relied on FTC information and support to charge 1,050 defendants. During the coronavirus pandemic, the Commission has referred six matters involving pandemic fraud to our criminal partners. Over the coming years, we intend to step up the referral volume significantly.

Question 2. What are the nature of these violations, is it small scams, or is the FTC willing to refer large companies and prominent figures to the DOJ?

Answer. The FTC refers cases to criminal authorities that require the deterrence provided by prosecution, and that our prosecutorial partners will take. For criminal prosecution, prosecutors will usually need to prove fraud (e.g., mail or wire fraud) and are always interested in intent. The better the facts show the violative conduct was intentional, the more likely the case will be taken. Assuming the requisite facts are present, the size of the company only makes the case more attractive to criminal prosecutors.

Question 3. Mr. Kovacic shared some ideas for making referrals more effective and frequent. What do we need to do to expand the FTC’s Criminal Liaison Unit, to make sure the FTC keeps making these referrals?

Answer. As the numbers bear out, the Commission’s criminal referral process is extremely strong, and has continued to get stronger over the years. The FTC is able to refer all appropriate cases and, unlike when the CLU program first began, we now have prosecutors fighting over our largest cases.

Question 4. From your experience at the FTC, what are the hurdles the Commission encounters in referring crimes and seeing cases filed against the worst offenders?

Answer. The Commission’s Criminal Liaison Unit has been a resounding success. Initially, it was difficult to get criminal prosecutors to take our cases, presumably because prosecutors were unfamiliar with the agency and reluctant to take cases in which sentencing had historically been light (i.e., most sentences for consumer fraud were measured in months, not years). Through years of hard work, both predicates have changed. We are now well known among the criminal prosecution community, having established close relationships across the country; and sentences in our largest cases are now measured in decades, not months. We still have trouble successfully referring smaller cases that cause significant harm to a smaller number of people—but we are now working more closely with state and local prosecutors to address these cases.

Chamber of Commerce response to 13(b). A few minutes before the Commerce Committee’s April 20, 2021, hearing, Strengthening the Federal Trade Commission’s

Authority to Protect Consumers, the Chamber of Commerce sent a letter to the Committee criticizing the FTC's use of 13(b).

Question. Now that you have had a chance to read the letter, is there anything else you want to address about the Chamber of Commerce's criticism of the FTC and its stance on Section 13(b)?

Answer. As then Acting Chairwoman Slaughter noted in her letter last month to the Senate Committee on Commerce, Science, and Transportation,⁸ the Chamber's position, which is based on numerous misstatements and faulty premises, would harm consumers and honest competitors. I join the Commission in urging Congress to restore the FTC's ability to use Section 13(b) of the FTC Act to return money to consumers and clarify that the FTC can use Section 13(b) to enjoin past conduct that is reasonably likely to recur.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO
WILLIAM E. KOVACIC

Criminal referrals on fraud and scams. Mr. Kovacic mentions in his prepared remarks that the "only way to deter the most serious fraudulent schemes we have observed is to subject violators to criminal punishment." We need to use the prospect of time in jail to deal with some of these worst offenders of our consumer protection law.

Question 1. How many criminal referrals has the FTC sent to the Department of Justice (DOJ) and state law enforcement regarding pandemic fraud?

Answer. I do not know how many referrals the FTC has made. I expect that the Bureau of Consumer Protection can provide the number of referrals by year going back to the creation of the Criminal Liaison Unit.

Question 2. What are the nature of these violations, is it small scams, or is the FTC willing to refer large companies and prominent figures to the DOJ?

Answer. I do not know what types of matters the FTC has referred to DOJ for possible criminal prosecution in the time since I left the Commission in 2011. I expect that the Bureau of Consumer Protection has compiled a data set that lists all referrals and identifies the alleged wrongdoers and the severity of the alleged offense.

Question 3. Mr. Kovacic shared some ideas for making referrals more effective and frequent. What do we need to do to expand the FTC's Criminal Liaison Unit, to make sure the FTC keeps making these referrals?

Answer. The primary limitation upon the effectiveness of the FTC's Criminal Liaison Unit (CLU) mechanism is funding. A properly resourced CLU would have a minimum of five fulltime professionals supported by two administrative staff. This level of staffing would enable the CLU to work with the Bureau of Consumer Protection to identify matters for referral to the DOJ, to build effective working relationships with DOJ, to assist DOJ in the evaluation and preparation of cases, to maintain complete data sets regarding the history and results of referrals, to establish closer relationships with Federal prosecutors outside DOJ (*e.g.*, the postal system inspectors), and to form partnerships with criminal prosecutors at the state level.

Question 4. From your experience at the FTC, what are the hurdles the Commission encounters in referring crimes and seeing cases filed against the worst offenders?

Answer. I see two important obstacles. The first is the limitation on funding discussed immediately above. The second is the challenge of persuading the DOJ and other criminal prosecution offices to assign a higher priority to serious consumer fraud amid numerous other demands upon their resources. The criminal enforcement offices at the federal, state, and local levels are pressed to address a multitude of grave offenses, and the FTC's referrals are competing for attention with numerous other forms of serious misconduct.

One potential solution to the second obstacle would be for the President to undertake a "whole of government" approach, similar to President Biden's initiative on competition, for consumer fraud. Such an initiative would seek to create a forum to raise awareness across public agencies about the seriousness of consumer fraud and to engage agencies beyond the FTC to use their powers to detect and prosecute

⁸Letter from Acting Chairwoman Slaughter to the Senate Committee on Commerce, Science, and Transportation Regarding Section 13(b) of the Federal Trade Commission Act, <https://www.ftc.gov/public-statements/2021/05/letter-acting-chairwoman-slaughter-senate-committee-commerce-science>

consumer fraud. The FTC would play a central role in the work of this whole of government initiative.

Chamber of Commerce response to 13(b). A few minutes before the Commerce Committee's April 20, 2021, hearing, Strengthening the Federal Trade Commission's Authority to Protect Consumers, the Chamber of Commerce sent a letter to the Committee criticizing the FTC's use of 13(b).

Question. Now that you have had a chance to read the letter, is there anything else you want to address about the Chamber of Commerce's criticism of the FTC and its use of 13(b)?

Answer. The Chamber of Commerce (the Chamber) letter fails to recognize the importance of restitution and disgorgement to the effective implementation of the FTC's anti-fraud program. Cease and desist orders are valuable—indeed, necessary—remedies, yet forward looking injunctions by themselves have feeble deterrent value.

The Chamber's letter does not persuade me that the Commission has sought equitable monetary remedies in inappropriate cases involving allegations of consumer fraud. To my mind, the FTC has used a highly disciplined approach to ensure that it seeks equitable monetary remedies in deserving cases.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RICHARD BLUMENTHAL TO
KEVIN H. RHODES

Risks of enforcement limitations after 13(b). I commend 3M for spending the money and time bringing counterfeiters and fraudsters to court. Fortunately, 3M won disgorgement in these court cases, and donated the counterfeiter's profits. Regrettably, now the FTC cannot do that.

Question. Why was disgorgement important in 3M's efforts to stop and deter those exploiting consumers and healthcare workers?

Answer. 3M has now filed 36 lawsuits in Federal courts across the United States and in Canada against defendants engaged in fraud, counterfeiting and price gouging in connection with purported 3M respiratory protection products. In those actions, 3M's primary goal is to secure injunctive relief and judgments that put a stop to the defendants' unlawful conduct. In addition, 3M has obtained disgorgement of the defendants' ill-gotten profits or other monetary recoveries through court orders or agreements by the defendants in a number of cases, and 3M is donating all of those monetary recoveries to COVID-19 related relief charities.

3M believes that making pandemic profiteers pay and eliminating the profitability of their unlawful schemes are important to stopping and deterring counterfeiting and other unlawful behavior. Injunctive relief alone may stop the unlawful activities of a defendant, but if that bad actor is able to keep the ill-gotten profits from its unlawful activities, by the time it is stopped, the scheme may have generated significant profits. Unfortunately, an injunction alone may be viewed as just a cost of doing business. Absent disgorgement of profits, would-be counterfeiters may be tempted to seek to obtain and keep profits from selling counterfeit products for as long as they can until they are caught and stopped.

Thus, 3M believes that disgorgement is important to deter bad actors by making it clear to them that fraud, counterfeiting and price gouging do not pay. Disgorgement is a key point of leverage in 3M's enforcement efforts, as many of the fraudulent entities do not otherwise have a valid business, so often the main recoverable assets are their ill-gotten gains.

Disgorgement of profits sends a powerful message to wrongdoers. 3M has widely publicized its enforcement efforts, including the monetary recoveries 3M has received and donated. Publicizing that disgorgement is a remedy 3M has sought and obtained helps deter would-be fraudsters by making clear 3M's resolve not only to find and stop their unlawful behavior, but also to make sure they do not reap financial benefits from their pandemic profiteering and exploitation of healthcare workers and others seeking authentic 3M respirators.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO
CYNTHIA ALEXANDER

Counterfeit good commercial activity. Online retail platforms have dealt with a barrage of fraudulent goods—such as personal protective equipment, vaccines, vaccine cards, and others—throughout the COVID-19 pandemic. While the FDA, Centers for Disease Control, and other agencies shared information to help consumers

identify and avoid fake products, online retail marketplaces are also responsible for detecting and removing such content from their sites.

Question 1. What role have online retailers played in identifying and ending counterfeit good commercial activity?

Answer. In my role as an Assistant Attorney General in Washington, I typically learn about counterfeit and fraudulent commercial activity when online retailers have *not* prevented it, and thus can speak to their role in ending such activity only in the context of enforcement efforts. For example, in 2019, the Washington Attorney General found that dozens of schools supplies sold on Amazon's online marketplace had illegal levels of lead and cadmium. To resolve the investigation without a lawsuit, Amazon entered into an agreement to block the sale of children's school supplies and jewelry on the platform without lab reports and other proof that the products are not toxic. While consumer protection enforcement agencies can play a role in ensuring online retailers take responsibility for counterfeit and fraudulent products sold on their platforms, the online retailers usually have (or can readily obtain) the data to be in the best position to combat the sale of such goods on their platforms.

Question 2. What recommendations do you have for Congress regarding ways to address counterfeit good commercial activity on online platforms and marketplaces?

Answer. I do not have specific recommendations, but my personal opinion (and not necessarily that of my office) is that because online retail platforms are best positioned to prevent the sale of counterfeit and fraudulent goods on their platforms (and indeed typically profit from such sales), they should be accountable when products offered or sold on their platforms are counterfeit, fraudulent, banned, mislabeled or otherwise unsafe.

Question 3. When the FTC secures civil penalties under the COVID-19 Consumer Protection Act, will the Commission provide financial relief to consumers, such as refunds for scams and deceptive products?

Answer. I will have to defer to the FTC on the proper scope of its authority.

