

Q&A With Witnesses

Cantwell: Commissioner, thank you so much and again thank you to the whole Commission for joining us, and I see that you all—well, you're before Congress. Why not take the opportunity to be broad on all the things that are challenging in your day to day function? So we appreciate that. But we really do want to focus in on this issue of disgorgement and to make sure that we really are addressing this appropriately. So I just want to ask all the Commissioners, all of you support the FTC's use of disgorgement?

The Hon. Acting Chair Slaughter: Yes.

The Hon. Noah Phillips: Senator, as I indicated in my opening statement, I think that there are—disgorgement creates kind of a problematic model for us. I think restitution is where we ought to focus for consumer protection.

Cantwell: So you don't like the word but you believe that consumers should be compensated for some of the harm?

Phillips: Yes.

Cantwell: Thank you.

The Hon. Rohit Chopra: Yes, I think when a company violates the law and steals from people or profits from it, the least we should do is make them forfeit that.

Cantwell: Commissioner Wilson?

The Hon. Christine Wilson: Yes, I support monetary redress for consumers.

Cantwell: Okay, great. So the reason I'm saying this is because one thing I want to point out is that if the Supreme Court makes a decision, and we need to do something to further clarify the law, I don't want to spend a lot of time. Now, having seen these COVID cases in my state, and the fraud cases I should say, I don't want to leave a lot of time to go on. I don't want a free reign atmosphere. So Chair Slaughter, how would you-- how do you think we best address that? Would you say you and the Commissioners are pretty much in sync about the solutions there?

Slaughter: Thank you for the question, Madam Chair. Listen, we have a Commission full of smart, engaged people who have different views on a number of perspectives, on a number of topics, but also a fair amount of common ground. And I think we can offer you our individual views, and we can defer to Congress in terms of making the determination, but where I think we all agree, and I will certainly capitalize on what you said, is the need to act quickly. Even while the Supreme Court case is pending, the uncertainty around 13(b) is affecting our work and affecting our cases. It's making it harder and harder for us to get that redress to consumers. It's outright barred in some circuits, and other defendants are just saying, "let's wait and see, we don't want to negotiate, we don't want to get into these conversations." It's making it harder for us to stop illegal conduct, and it's making it harder for us to make your constituents whole when they have been harmed.

So I would certainly urge you to act quickly and act comprehensively, to make sure that we are providing relief to consumers, and as my colleagues have indicated, deterring illegal behavior. Because what we really want is for consumers not to get hurt in the first place.

Cantwell: Exactly, thank you, that's so well said. I've had my own experience with another agency, the Federal Energy Regulatory Commission on the Enron cases, and literally people were not implementing rules against market manipulation. So we gave them a new authority, and they used it and guess what? They better policed the markets. And so I think these are important tools, so I hope, I appreciate the letter from the chamber, but I hope they aren't insinuating the first time COVID authority shouldn't have been passed. I'm assuming, Mr. Phillips, you--Commissioner Philips, you support the first time authority? I don't want to take up too much time but you support that first time authority on COVID penalties that we gave the Commission?

Phillips: I do, I thank you for it. I recently voted for the case where we used it.

Cantwell: Right, so my point is, this kind of strong tool can be a big deterrent in a marketplace where there are so many legitimate actors, and yet there are some bad actors that plague the whole sector. And so I very much--I want to get everybody on the data security rulemaking if I could, does everybody support a data security rulemaking by the FTC? Commissioner Slaughter?

Slaughter: I do, I think it's something we need to explore.

Phillips: I would prefer if Congress would pass a data security statute, but I would support, you know, subject to the metes and bounds of the rule, a rulemaking.

Chopra: Yes, I think we need to codify rules that give clear sense of what's expected, and trigger real consequences for violations.

Cantwell: Thank you. Commissioner Wilson?

Wilson: Yes, I would absolutely support Acting Chair Slaughter moving forward with a Magnuson-Moss rulemaking on consumer privacy, and agree with Commissioner Phillips that having Congress move forward with federal privacy legislation would certainly be the optimal solution as a fallback.

Cantwell: Yeah, I was asking about data security. Listen, Senator Wicker and I are doing our best to solve a lot of very thorny problems of the information age. I guarantee you it's bigger than both of us, it's going to take a lot of effort to get the context. I actually don't think the policies are that hard, it's just the context, right? The context. Just as we did moving quickly on COVID, because everybody came to an agreement. "Oh, this is absurd, to allow people to go around and market this in the middle of a pandemic." Right? Wo we all came together. That was pretty easy. In the privacy case, the information age is playing out. No doubt. But so, Commissioner, I was asking actually about data security, as opposed to the larger privacy context. Are you for a rulemaking by the FTC, with or without Congress's help, for data security?

Wilson: Yes I would support that.

Cantwell: Thank you. Senator wicker.

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Wicker: If we got in advance, as we usually do with other Commissions and with other panels, a real sense of the differences of opinion—and I won't ask you to rule on that, because I don't know that we can, but to me it would be helpful if Commissioners would submit the real testimony that they're going to give so that we have a chance to go over that and try to be prepared for the give and take.

Cantwell: I thank you, Senator Wicker, for that observation. And I think I'm understanding your point, or at least I should say that my interests are to move quickly if the Supreme Court does act on this case, because you can have lots of things struck down for a variety of reasons, doesn't mean you still don't believe in the authority. That's why I've asked the Commissioners whether they all believe in this authority, they do, the question is what's the legal framework for it? And yeah I think it's astounding that Facebook has paid \$5 billion in fines, but that's based on previous orders by the FTC that they then violated and in other instances of the law that were violation.

So yes, I think we have to be clear, you know, what we're talking about as it relates to 13(b), the right legal framework if we need...but to me, the case law is there and very relevant. This has been a tool that has been used for decades. We certainly don't want to throw it out. I have anxiety over the fact that we could have disagreement about this so yes, I agree that getting the Commission to at least look at language if we ended up having to propose it instead of them coming up with it, which you know you can't say that is really their function, they should be doing rulemaking, in my opinion. So yes they could also give us fixes to 13(b), but if they don't, I guarantee you we will propose something and ask them for their input and yes, we should have it in advance of having a formal discussion so I agree with your main point there. So I do think that this is very important and very timely.

Q&A Round 2

Cantwell: We will definitely have more time with the Commission on those issues in the future, so I thank all my colleagues for participating today. I don't know if we have anybody else but while we're doing I guess a last call with our colleagues to see if there is anybody else who is interested in making a question, I just want to clarify a couple things from the hearing first.

We did give the Commission anti manipulation authority, you do have that authority for wholesale markets. When we gave you that authority, we thought you would do a better job of releasing the impacts of gas prices in certain market segments of the United States, which seemed to have perpetually high prices. But so as people talked about price gouging today, what do we think the differences--or authority that you have that you haven't used, and an authority on price gouging? Can somebody elaborate?

Chopra: So with respect to the energy market manipulation rule, that covers I believe wholesale markets, the FERC's authority has some--there's a parallelism to that. Most of our work has actually been in the retail gas area, we have limited authority on price gouging, and unlike the states, we don't have a general authority on price gouging. T really at the state level, but I agree. I think we need to be thinking hard about what our future footprint is in the energy markets to make sure that consumers have choice and energy is affordable.

Cantwell: Well, as I mentioned, this has been a very successful tool for FERC, as it relates to its market-based authority for the FTC. I think what happened to us, one summer we had the highest gas prices in

the nation in Spokane, Washington. We were like, why do we have highest gas prices in the nation? It made no sense. And we asked the FTC to track that supply chain of why, because a lot of people--in the Puget Sound area, we have high gas prices, because one of the issues is all our oil is from the Alaska market. It's an isolated market, and you can have issues with that, so it's not as effective as a more robust market. In this case though, Spokane wasn't getting oil from Alaska, so the FTC, we asked you to do a report. So all I'm saying is, to me, we're still here today with lots of issues about price gouging and a manipulation authority, I would hope you would look at that and just, we can get clarity in the future about what else we need.

So with that, I don't think we have anybody else in the queue, so the record will remain open for two weeks. I thank all of the Commissioners for being here, you can see we had a robust session of questions from our colleagues on a variety of topics, but clearly 13(b) is most pressing, so we hope that we will resolve that issue one way or another. And so, the authority will continue to rest with the FTC to take aggressive action.