



## U.S. Department of Justice

### Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Cathy McMorris Rodgers  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congresswoman McMorris Rodgers:

This letter responds to your letter to the Attorney General, dated May 17, 2021, requesting that the Department of Justice (Department) provide information concerning H.R. 2668, the “Consumer Protection and Recovery Act.” You have asked for the Department’s position on this bill, however, as the bill does not affect any of the Department’s enforcement authorities, we are unable to provide an official statement of the Department’s position on this bill. In the interest of being responsive to your request, we are pleased to provide general comments about the issues you raise. We are sending an identical response to Congressman Bilirakis who joined in your letter.

As a matter of civil enforcement policy, the Department generally supports the authority of enforcement agencies to seek monetary relief as an equitable means of remedying deceptive, fraudulent, or anticompetitive conduct by depriving wrongdoers of ill-gotten gains and restoring funds to harmed consumers. As Acting Chair Slaughter explained during her April 27 testimony before your committee, legislation would be needed to address legal challenges to the Federal Trade Commission’s (FTC’s) authority to protect consumers and competition.

As you know, wrong-doers take the risk of breaking the law precisely because of the financial incentive posed by ill-gotten gains. For this reason, courts acting in equity have long granted remedies that restore victims and deprive defendants of the benefits of their acts. H.R. 2668 would restore the FTC’s ability, upon proving a violation of law, to seek such remedies from an Article III court.

The Department interprets the enforcement authorities provided in H.R. 2668 to apply in antitrust cases only when those cases are brought by the FTC under § 13(b). Meanwhile, the Department’s antitrust disgorgement authority does not involve § 13(b). Rather, in Sherman Act cases, the Department’s disgorgement authority comes from 15 U.S.C. § 4. *See United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. 2011) (holding that “disgorgement is available to remedy a Sherman Act violation” and authorizing \$12 million disgorgement following Sherman

Act Section 1 violation).<sup>1</sup> 15 U.S.C. § 4 authorizes the United States “to institute proceedings in equity to prevent and restrain such violations [of the antitrust laws],” *id.*, and includes remedial measures that “depriv[e] the antitrust defendants of the benefits of their conspiracy.” *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948). *See also* 15 U.S.C. § 25 (similar authorization for Clayton Act violations).

Antitrust statutory authorities have long allowed for enforcers to act against prior conduct that violated the antitrust laws—indeed, prior to the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, merger enforcement was often retrospective. Although pre-merger review and enforcement remains the preferred approach, the Department has sought relief after the consummation of an unlawful transaction where appropriate. *See United States v. Bazaarvoice, Inc.*, No.13-cv-00133 (N.D. Cal. Jan. 8, 2014) (finding consummated merger unlawful and ultimately ordering divestiture under Section 7 of the Clayton Act).

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

JOSEPH  
GAETA

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Date: 2021.05.21  
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Joe Gaeta  
Deputy Assistant Attorney General

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<sup>1</sup> Under this authority, the Department has sought court-ordered disgorgement of ill-gotten gains when appropriate in its antitrust cases. *See* Final Judgment, *United States v. Morgan Stanley*, available at <https://www.justice.gov/atr/case-document/final-judgment-137> (disgorgement of electricity profits from Section 1 violation); Final Judgment, *United States v. Twin America*, available at <https://www.justice.gov/atr/case/us-and-state-new-york-v-twin-america-llc-et-al> (disgorgement of tour bus profits from joint venture unlawful under Section 7 of the Clayton Act and Section 1 of the Sherman Act); Final Judgment, *United States v. Flakeboard*, available at <https://www.justice.gov/atr/case-document/final-judgment-87> (disgorgement of profits from particleboard mill closure in violation of Section 1 of the Sherman Act and Section 7A of the Clayton Act).



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The Honorable Gus Bilirakis  
U.S. House of Representatives  
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Joe Gaeta  
Deputy Assistant Attorney General

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