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## House Votes To Restore FTC Disgorgement Authority

By **Andrew Kragie**

Law360 (July 20, 2021, 8:10 PM EDT) -- A divided House on Tuesday approved a bill that would restore the Federal Trade Commission's power to seek money from scammers and antitrust violators directly in court, moving quickly after the U.S. Supreme Court struck down the FTC's claimed authority to recover ill-gotten gains in federal court.

A 221-205 vote approved the Consumer Protection and Recovery Act, which would give the FTC explicit authorization for disgorgement, demanding restitution for illegal market behavior. All Democrats were joined in support by two Republicans, Reps. Matt Gaetz of Florida and Jeff Van Drew of New Jersey.

The four-page bill known as H.R. 2668 gives statutory permission for disgorgement along with guidelines for calculating the penalties. It allows for both injunctive and monetary relief, including restitution and profit disgorgement. The bill was introduced the same week as a **unanimous April ruling** from the Supreme Court said existing laws do not allow the FTC to seek disgorgement in federal court. The practical impact of the ruling would force the FTC to first conduct a lengthy in-house administrative trial in cases where the agency seeks disgorgement.

The measure's sponsor is Rep. Tony Cárdenas, a California Democrat and senior member of a consumer protection subcommittee.

"Every day, Americans — many seniors, veterans, parents — are being ripped off and cheated out of the little money they have to get by," Cárdenas said in a statement Tuesday. "Today the House passed my legislation to restore the tool that has served as a saving grace for millions of defrauded consumers for over 40 years."

The chairman of the House Energy and Commerce Committee, Rep. Frank Pallone, D-N.J., boosted the bill in a floor speech earlier Tuesday.

"This legislation is essential to protect consumers and honest businesses across the country. It restores a critical tool of the Federal Trade Commission to go to court to get victimized consumers their money back and make lawbreakers return their illegal profits," Pallone said. "Nothing in current law can replace the authorities that the FTC has lost ... This bill ensures consumers are not left holding the bag when bad guys break the law."

The proposal's backers argue disgorgement is crucial to "rein in Big Tech" and combat fraud, including schemes related to COVID-19. In April, Rebecca Kelly Slaughter, then the FTC's acting Democratic chair, said that the high court ruling "deprived the FTC of the strongest tool we had to help consumers when they need it most." The agency has said it is **relying on Congress to act**.

Republicans opposed the bill on several grounds, according to the Energy and Commerce Committee's top Republican, Rep. Cathy McMorris Rodgers of Washington.

"My biggest concern with this legislation [is that] it fails to prioritize due process and ensuring proper analysis," Rodgers said Tuesday on the House floor. "H.R. 2668 grants FTC brand-new authorities ... without the inclusion of guardrails to protect due process."

"This was also a huge missed opportunity to enact a national privacy standard," she added. "Congress has a responsibility to do our job. We cannot have California dictating policy for the other 49 states."

Tuesday's House vote came a few weeks after a coalition of more than 25 state attorneys general **endorsed** the bill, which they called "essential to prevent the severe harm to consumers." The state-level enforcers also urged Congress to make the changes retroactive, saying that the FTC currently has 24 pending actions that rely on 13(b) and seek to return \$2.4 billion to consumers. Most of those attorneys general were Democrats along with Republicans in Alaska, Idaho and New Hampshire.

One Republican said during a recent House hearing that retroactivity was the key issue. The only part of the bill that comes close is a 10-year statute of limitations for equitable relief, said Rep. Kelly Armstrong, R-N.D.

"Retroactivity is not favored by the law. The ex post facto clause espouses this principle in criminal contexts, but we have judicial estoppel, laches, all sorts of various degrees on this," Armstrong said. "And it's based on fairness. Laws produce expectation and reliance," and people adjust accordingly.

**Republicans also signaled concerns** about expanding FTC authority without fully addressing due process concerns. The methods that the agency uses for calculating ill-gotten gains may also be subject to debate.

The broad GOP opposition could signal trouble for the proposal.

Although Democrats control both chambers of Congress and the White House, Republican support remains necessary for enacting most legislation thanks to the Senate filibuster, which effectively requires support from at least 10 GOP senators for most nonbudget legislation.

There is not a Senate version of the House bill, but the upper chamber could take up the House-passed measure.

Spokespeople for Cárdenas and Pallone did not address Law360's questions about the prospects of Senate passage, although Cárdenas' statement said he would "look forward to my colleagues in the Senate taking action on my legislation and sending the clear message that Congress is fighting to help families when they need it most."

An expert previously predicted some version of the proposal could pass both chambers.

"It does seem like there is consensus that Congress needs to act [in] both parties, which suggests that the likelihood of a bill passing seems pretty high," said Steven M. Wernikoff, partner and co-leader of the data, privacy and cybersecurity group at Honigman LLP.

The former FTC enforcement official told Law360 he believes the bill tees up disputes over retroactive use of 13(b) because of the pending enforcement actions.

"Even if this law is enacted, it will be interesting to see how those cases are affected and whether the law would take retroactive effect. It's not addressed specifically in the bill," he said, predicting that it "will be a litigated issue" if retroactivity isn't addressed.

President Joe Biden is likely to sign the bill if it reaches his desk.

"The administration applauds this step to expressly authorize the FTC to seek permanent injunctions and pursue equitable relief for all violations of law enforced by the commission and ensure that the cost of illegal practices falls on bad actors, not consumers targeted by illegal scams," the White House said in a formal statement of administration policy Monday.

--Additional reporting by Christopher Cole and Matthew Perlman. Editing by Jay Jackson Jr.

*Update: This article has been updated with the names of the two Republicans who voted for the bill.*