

August. 14, 2023

By Regular & Electronic Mail

Hon. April J. Tabor
Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., NW
Suite CC-5610
Washington, DC 20580

Re: FTC Collaboration Act of 2021 Study
Project No. P238400

Dear Secretary Tabor:

The Attorneys General of Connecticut, Illinois, New Hampshire, Tennessee, and 25 other state attorneys general submit these comments in response to the Federal Trade Commission's ("FTC") Notice¹ concerning the FTC Collaboration Act of 2021. We believe that the FTC and states share many of the same interests in protecting consumers and the marketplace from unfair and/or deceptive conduct, and we welcome this opportunity to discuss our mutual concerns and the opportunity for future collaboration.

I. INTRODUCTION

We are the chief consumer protection officials in our respective states. As such, we are at the forefront of combatting illegal trade practices occurring on a local, statewide, and national scale. Our offices are often the first point of contact for victimized consumers. We often act when it is not economically feasible for private parties to do so, as well as when circumstances do not favor action on a federal level. The states, the FTC, and other federal partners have worked in concert for decades to benefit businesses and individual consumers. Historically, this cooperation has cut through partisan division. We believe exploring ways to further this collaboration under appropriate circumstances is in everyone's interest.

II. THE STATE ATTORNEYS GENERAL AND CONSUMER PROTECTION

¹ Request for Public Comments, Federal Register Documents No. 2023-12507.

A. VARIATIONS IN STATE CONSUMER PROTECTION LAWS

The states have, by virtue of their well-established police powers, long played a critical role in protecting consumers from unscrupulous conduct. By the 1960s, many states began to codify and expand their authority through the adoption of laws prohibiting a wide variety of unfair or deceptive business practices. All fifty states, along with the District of Columbia, Puerto Rico, Guam, and the US Virgin Islands, would eventually adopt statutes prohibiting unfair and deceptive acts and practices or UDAP laws. Several states, by statute, rely on the FTC for interpretation of the state statute.

The nature of the protections afforded consumers varies from jurisdiction to jurisdiction. Many states, for example, not only prohibit the use of deception, but they also prohibit unfair trade practices. In several states, the definition of consumer includes business and individual citizens, while others limit the applicability of their UDAP law to transactions for personal, household or family purposes.

B. MULTISTATE COLLABORATION AND ENFORCEMENT

The variation in states' UDAP laws notwithstanding, state attorneys general frequently collaborate on multistate investigations and enforcement actions. These initiatives are typically bipartisan, can be regional or national in scope, and often involve meaningful consumer impact. Multistate cooperation offers significant advantages to the people of our states. For one thing, these cases allow our offices to share resources and expertise. States also work in concert in matters where other agencies or private litigants cannot play an effective role. Further, there are matters where our offices work collectively and across disciplines to address violations that extend beyond the traditional consumer protection sphere.

III. FTC/STATE COLLABORATION

A. ADVANTAGES TO THE STATES FROM INCREASED COOPERATION

1. Access to additional expertise

State attorneys general have benefited significantly from the FTC's expertise and resources. These helpful resources buttress and strengthen collaboration between the states and the FTC. State attorneys general have also benefitted from the FTC's national reach, which facilitates cross-border enforcement.

For example, Attorneys General from California, Illinois, North Carolina, and Ohio worked with an FTC economist in *United States of America and the States of California, Illinois, North Carolina, and Ohio v. Dish Network, L.L.C.* (3:09-cv-03073)(U.S. Dist. Ct., C.D. Ill.) The states and the FTC alleged that Dish had placed or caused their agents to place millions of telemarketing calls in violation of the Telemarketing and Consumer Fraud and Abuse Prevention Act and the Telephone Consumer Protection Act, regulations implementing these laws, and related state statutes. The plaintiffs combined resources and utilized an FTC expert witness to analyze millions of call detail records which was critical to successfully proving the government's case. The court found that Dish had violated federal and state telemarketing and related laws and awarded the plaintiffs \$280 million.ⁱ

This is merely one example of the success the states and the FTC have had when working together to benefit American consumers and ethical businesses. For additional examples, see the attached list of successful joint actions.

2. The *AMG* decision negatively impacts effective collaboration between the states and the FTC

The Supreme Court's *AMG Capital Management, LLC v. Federal Trade Commission* decision, which held that Section 13(b) of the FTC Act did not provide the FTC authority to obtain consumer restitution, has negatively impacted the agency's ability to obtain consumer redress. Though the states have broad authority under their UDAP laws, it is not uniform, and there are instances where a state's laws do not reach certain deceptive or unfair conduct. For example, some state laws have limited reach into certain subject areas such as insurance, real estate, and banking. Similarly, some state UDAP laws do not include the concept of unfairness. The Federal Trade Act does not have these same limitations, and the FTC can step in to help protect citizens of these states from certain deceptive and unfair practices. The *AMG* decision's limitation on the FTC's authority risks depriving consumers of restitution in such instances, negatively impacting consumer protection.

Additionally, though collaboration between state attorneys general and the FTC often takes the form of collaboration against the same target(s), this is not always the case. Sometimes state attorneys general and the FTC focus enforcement efforts on similar but different targets, thereby maximizing enforcement resources and protecting the maximum number of consumers. Where one party of the collaboration cannot obtain restitution for harmed consumers, this type of collaborative enforcement can become less effective.

The states have also been negatively impacted by the loss of the FTC's resources to deliver restitution to their residents. The FTC has maintained an Office of Claims and Refunds that does the work of locating consumers who are owed a refund/restitution and getting the consumers their money. This is work that must be done in any matter involving consumer restitution, but many state attorneys general do not have the capacity to do this work and, therefore, must hire third-party settlement administrators. The potential loss of the FTC as a resource to do the work of delivering restitution to harmed consumers is a potentially significant loss to the states and to the collaboration between the states and the FTC.

B. ADVANTAGES TO THE FTC FROM INCREASED COOPERATION

The FTC has also benefitted significantly from meaningful collaboration with state attorneys general. Collaboration has allowed the FTC to take advantage of the broader array of remedies available under state consumer protection laws and access state investigative resources, witnesses, and expertise.

1. The ability to invoke the broader remedies available under state UDAP laws

Although the FTC can obtain meaningful injunctive relief utilizing its statutory authority, state attorneys often have the ability to seek a broader array of remedies that can provide additional relief to consumers. Most state attorneys general can seek and recover restitution, which is critical to consumers victims, many of whom have suffered significant financial losses.

The authority to seek restitution enables state attorneys general to offset these losses and ensure wrongdoers are responsible for making consumers whole.

In addition to the ability to seek restitution, many state attorneys general may also be able to seek disgorgement and criminal penalties. By working together, the FTC and state attorneys general can ensure that the public is protected from ongoing harm and that victims benefit from the widest possible array of legal remedies to hold wrongdoers accountable for their actions and prevent harm to future consumers.

2. Access to the states' familiarity and expertise with issues directly impacting consumers

The FTC similarly benefits from state attorneys' general locally-based investigative resources. State investigators have significant familiarity with and connection to their local populations. These connections give them an advantage when identifying, locating, and interviewing witnesses. State investigators have typically spent their careers developing a close network of relationships that allow them to assist the Commission in locating reluctant or hard-to-find witnesses who may reside in areas that are not easily accessible to those unfamiliar with the state.

3. Access to state investigative resources, especially with respect to witness identification and interviews

The FTC similarly benefits from state attorneys' general access to local victims. In cases of widespread consumer harm that are of interest to the FTC, the ability to identify and access large numbers of victims can significantly improve its ability to establish and prove that injunctive relief is necessary to prevent reasonably foreseeable injury to consumers throughout the United States. State attorneys general are often on the front line of receiving complaints against businesses located within their state or from residents of their state who have been victimized by unfair or deceptive practices. By collaborating with the state attorneys general, the FTC can access the high volume of complaints and supporting documentation typically provided to state agencies.

C. EXAMPLES OF SUCCESSFUL FEDERAL/STATE COLLABORATION

1. Consumer Sentinel

Consumer complaints play a critical role for state attorneys general. Resolving consumer complaints without an enforcement action is often the best remedy for all parties. However, consumer complaints are sometimes the best indication that an investigation may be necessary. Consumer Sentinel is helpful to the states. Consumer Sentinel gathers complaints from various sources and often contains information that a state attorney general may not already have. Additionally, Consumer Sentinel helps show national trends for educational purposes. Consumer Sentinel is a cooperative effort with the states. Many states provide state-specific information to Consumer Sentinel, which makes it a more accurate and useful tool for all that utilize it.

2. Working together to educate consumers is often the best way to avoid scams

The states and the FTC both work to educate consumers about avoiding common scams and tricks that consumers should be aware of. The FTC and individual states routinely partner to educate consumers. When this information is needed to be delivered on a national scale, the best way to protect consumers is to work together. The FTC has an expansive library of well-drafted consumer education materials that states can use to help get critical information to consumers in order to prevent them from being taken advantage of.

A recent example can be found in a crackdown on illegal telemarketing calls. In addition to law enforcement actions, the states and FTC announced a variety of educational materials aimed at helping consumers block unwanted telemarketing calls. The FTC also announced a new

educational webpage that includes examples of real illegal robocalls and steps people can take to avoid robocall scams. Working together to educate consumers on a nationwide level is important. Other examples of cooperation are attached in an appendix to these comments.

IV. CONCLUSION

The co-sponsoring states of Connecticut, Illinois, New Hampshire, and Tennessee, joined by the undersigned states, appreciate the opportunity to comment on Federal Trade Commission's ("FTC") Notice concerning the FTC Collaboration Act of 2021. Continued future collaboration among states and the FTC will benefit consumers and the marketplace. We look forward to future opportunities to discuss these important issues.

The four co-sponsors of this letter, the attorneys general of Connecticut, Illinois, New Hampshire and Tennessee, are joined by the undersigned attorneys general across the U.S. states and its territories.

Respectfully,



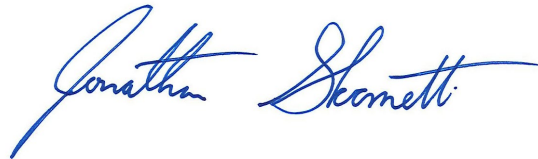
William Tong
Connecticut Attorney General



Kwame Raoul
Illinois Attorney General



John M. Formella
New Hampshire Attorney General



Jonathan Skrmetti
Tennessee Attorney General



Kris Mayes
Arizona Attorney General



Rob Bonta
California Attorney General

Phil Weiser
Colorado Attorney General

Kathleen Jennings
Delaware Attorney General

Brian Schwalb
District of Columbia Attorney General

Ashley Moody
Florida Attorney General

Aaron M. Frey
Maine Attorney General

Anthony G. Brown
Maryland Attorney General

Andrea Joy Campbell
Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Aaron D. Ford
Nevada Attorney General

Matthew J. Platkin
New Jersey Attorney General

Raúl Torrez
New Mexico Attorney General



Letitia James
New York Attorney General



Josh Stein
North Carolina Attorney General



Dave Yost
Ohio Attorney General



Gentner Drummond
Oklahoma Attorney General



Ellen F. Rosenblum
Oregon Attorney General



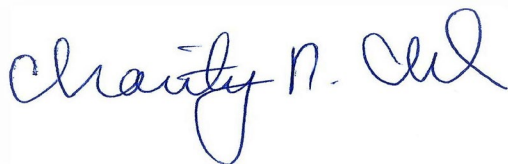
Michelle Henry
Pennsylvania Attorney General



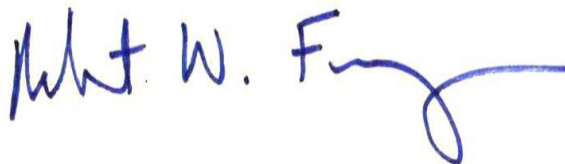
Peter F. Neronha
Rhode Island Attorney General



Marty Jackley
South Dakota Attorney General



Charity Clark
Vermont Attorney General



Robert W. Ferguson
Washington Attorney General



Joshua L. Kaul
Wisconsin Attorney General

ⁱ Another example of the states benefiting from FTC expertise is *Fed. Trade Comm'n v. Herbalife Int'l of Am, Inc.* (2:16-cv-05217) (U.S. Dist. Ct., C.D. CA). In this case, the Illinois Attorney General benefited from the expertise of an FTC economist in its parallel investigation into the multi-level marketing company Herbalife. The FTC and Illinois jointly investigated allegations that Herbalife distributors were making inflated, misleading, and unsubstantiated income earnings claims and that the company's multi-level marketing structure resulted in participants earning more income through the recruitment of distributors than through the sale of Herbalife's products to consumers. During the investigation, an FTC economist provided a detailed report that evaluated both Herbalife's marketing structure and the company's sales and income data for participants in that structure and supported plaintiff's allegations. Negotiating in tandem, the FTC and Illinois resolved their investigations with a consent judgment for the FTC and an Assurance of Voluntary Compliance for Illinois. The agreements required that Herbalife reform its business model and also provided \$200 million in nationwide restitution and an additional \$3 million for Illinois consumers.