

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL TRADE COMMISSION

### 16 CFR Part 462

#### Deceptive or Unfair Earnings Claims

**AGENCY:** Federal Trade Commission.

**ACTION:** Advance notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) is considering proposing a rule to address deceptive or unfair marketing using earnings claims. The Commission is soliciting written comment, data, and arguments concerning the need for such a rulemaking. In addition, the Commission solicits comment on how the Commission can ensure the broadest participation by affected interests in the rulemaking process.

**DATES:** Comments must be received on or before May 10, 2022.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the

**SUPPLEMENTARY INFORMATION** section below. Write “Earnings Claims ANPR, R111003” on your comment, and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Melissa Dickey (202–326–2662), [mdickey@ftc.gov](mailto:mdickey@ftc.gov), or Andrew Hudson (202–326–2213), [ahudson@ftc.gov](mailto:ahudson@ftc.gov), Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Mailstop CC–5201, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** The Commission is publishing this notice pursuant to section 18 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 57a, and the provisions of part 1, subpart B of the Commission’s Rules of Practice, 16 CFR 1.7 through 1.20. The FTC Act authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

#### I. Background

Misleading earnings claims have long been a significant problem for consumers.<sup>1</sup> The use of such claims both deprives consumers of the ability to make informed decisions and unfairly advantages bad actors in the marketplace at the expense of honest businesses. The promise of significant earnings is a powerful inducement to purchase or invest time or money.

The Commission has extensive law enforcement experience challenging misleading earnings claims under section 5 of the FTC Act, 15 U.S.C. 45,<sup>2</sup> resulting in a long line of federal court opinions holding that the use of false, unsubstantiated, or otherwise misleading earnings claims violates Section 5.<sup>3</sup> The Commission has also

issued litigated rulings in a number of cases dealing with misleading earnings claims and has repeatedly determined that such claims violate Section 5.<sup>4</sup>

The cases establish, among other things: (a) Earnings claims are material;<sup>5</sup> (b) representations regarding possible earnings are not mere puffery,<sup>6</sup> and will usually imply that such earnings are typical;<sup>7</sup> (c) the representation that an amount or degree of earnings is likely can be implied, including through testimonials from successful participants and examples of

judgment); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199 (D. Nev. 2011) (summary judgment); *FTC v. Holiday Enterprises*, No. 1:06–cv–2939, 2008 WL 953358 (N.D. Ga. Feb. 5, 2008) (summary judgment); *FTC v. Stefanchik*, No. 04–cv–1852, 2007 WL 1058579 (W.D. Wash. Apr. 3, 2007) (summary judgment); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247 (S.D. Fla. 2007) (summary judgment); *FTC v. Tashman*, 318 F.3d 1273 (11th Cir. 2003) (vacating judgment and finding defendants liable on appeal); *FTC v. Medicor LLC*, 217 F. Supp. 2d 1048 (C.D. Cal. 2002) (summary judgment); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502 (S.D.N.Y. 2000) (final judgment after trial); *FTC v. Minuteman Press, Inc.*, 53 F. Supp. 2d 248 (E.D.N.Y. 1998) (judgment on liability after trial); *FTC v. Wolf*, No. 94–cv–8119, 1996 WL 812940 (S.D. Fla. Jan. 31, 1996) (summary judgment); *FTC v. Nat’l Bus. Consultants, Inc.*, No. 89–cv–1740, 1990 WL 32967 (E.D. La. Mar. 20, 1990) (judgment after trial); *FTC v. U.S. Oil and Gas Corp.*, No. 83–cv–1702, 1987 U.S. Dist. LEXIS 16137 (S.D. Fl. 1987) (summary judgment); *FTC v. Kitco*, 612 F. Supp. 1282 (D. Minn. 1985) (final judgment after trial).

<sup>4</sup> See Notice of Penalty Offense Authority Concerning Money-Making Opportunities, available at <https://www.ftc.gov/MMO-notice>.

<sup>5</sup> *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067–76 (claims of quick and easy substantial income were material); see also, e.g., *FTC v. Noland*, No. 2:20–cv–0047, 2020 WL 954958, \*12–14 (D. Ariz. Feb. 27, 2020); *FTC v. World Patent Mktg.*, No. 17–cv–20848, 2017 WL 3508639, \*11–12 (S.D. Fla. Aug. 16, 2017); *FTC v. Vemma Nutrition Co.*, No. 15–cv–01578, 2015 WL 11118111, \*5 (D. Ariz. Sept. 18, 2015); *Holiday Enterprises*, No. 1:06–cv–2939, 2008 WL 953358, \*6–7; *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 306–08 (S.D.N.Y. 2008).

<sup>6</sup> *Grant Connect*, 827 F. Supp. 2d at 1225–26 (rejecting puffery defense and finding claims that “[r]iches range from a few hundred dollars a month to \$50,000 or more a year!” were deceptive), affirmed in relevant part at 763 F.3d 1094 (9th Cir. 2014); see also, e.g., *FTC v. Febre*, No. 94–cv–3625, 1996 WL 396117, \*2 (N.D. Ill. Jul. 3, 1996); *Noland*, No. 20–cv–00047, 2020 WL 954958, \*12–13; *World Patent*, No. 17–cv–20848, 2017 WL 3508639, \*12.

<sup>7</sup> *Five-Star Auto Club*, 97 F. Supp. 2d at 528 (“[I]t would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical [participant.]”); see also, e.g., *Tashman*, 318 F.3d at 1276; *Febre*, No. 94–cv–3625, 1996 WL 396117, \*2; *National Dynamics Corp.*, 82 FTC 488, 512, 565 (1973) as modified at 85 FTC 1052 (1975).

<sup>1</sup> As discussed further below, consumers encounter such claims in many contexts, including in seeking work, business and other money-making opportunities, education, and more.

<sup>2</sup> See, e.g., Press Release, Federal Trade Commission, Statement on the FTC’s “Operation Income Illusion” sweep (2020), <https://www.ftc.gov/news-events/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners>; Press Release, Federal Trade Commission, Statement on the FTC’s “Operation Lost Opportunity Sweep” (2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-expands-fight-against-deceptive-business-opportunity-schemes>; Press Release, Federal Trade Commission, Statement on the FTC’s “Operation Bottom Dollar” enforcement sweep (2010), <https://www.ftc.gov/news-events/press-releases/2010/02/ftc-cracks-down-con-artists-who-target-jobless-americans>; Press Release, Federal Trade Commission, Statement on the FTC’s “Operation Short Change” enforcement sweep (2009), <https://www.ftc.gov/news-events/press-releases/2009/07/ftc-cracks-down-scammers-trying-take-advantage-economic-downturn>; Press Release, Federal Trade Commission, Statement on the FTC’s “Biz Opp Flop” sweep (2005), <https://www.ftc.gov/news-events/press-releases/2005/02/criminal-and-civil-enforcement-agencies-launch-major-assault>.

<sup>3</sup> See, e.g., *FTC v. John Beck Amazing Profits*, 865 F. Supp. 2d 1052 (C.D. Cal. 2012) (summary

hypothetical or past profits;<sup>8</sup> and (d) earnings claims must be substantiated—that is, the maker must have a reasonable basis for the claim before making it.<sup>9</sup> The well-settled law on deception under section 5 of the FTC Act applies fully to deceptive earnings claims: (a) Liability turns on whether the net impression conveyed by representations—not merely their express terms—is unsubstantiated or otherwise misleading;<sup>10</sup> (b) disclaimers do not bar liability, as they often fail to dispel a misleading impression created by other representations;<sup>11</sup> (c) as a matter of law, good faith or a lack of intent to deceive is not a defense;<sup>12</sup> (d) a company may be liable for bait-and-switch advertising or the use of “misleading door openers,” “even if the truth is subsequently made known;”<sup>13</sup> (e) a principal may be liable for deceptive claims made by its

representatives or other agents;<sup>14</sup> and (f) a company may be liable for providing deceptive marketing materials for others to use on its behalf (sometimes called providing “means and instrumentalities”).<sup>15</sup>

Despite the Commission’s aggressive enforcement program,<sup>16</sup> deceptive earning claims continue to proliferate in the marketplace. The FTC continues to receive widespread reports from consumers and informants of misleading earnings claims. In *AMG Capital Mgmt., LLC v. FTC*<sup>17</sup> the Supreme Court ruled that the Commission may not seek equitable monetary relief under section 13(b) of the FTC Act for violations of the FTC Act or other statutes enforced by the Commission.<sup>18</sup> While the Commission recently issued a Notice of Penalty Offenses concerning earnings claims,<sup>19</sup>

which will permit the Commission to seek civil penalties for misleading earnings claims in some cases, this authority does not provide a basis for the Commission to recover funds to return to injured consumers.

The Commission anticipates that a rule prohibiting the use of misleading earnings claims would enhance deterrence and help the Commission move quickly to stop illegal conduct. Such a rule also may further clarify for businesses what constitutes a deceptive earnings claim and what it means to have substantiation for an earnings claim.

In addition, a rule would enable the Commission to seek monetary relief for consumers harmed by deceptive earnings claims, as well as civil penalties against those who make the deceptive claims. Specifically, section 19 of the FTC Act, 15 U.S.C. 57b, authorizes the Commission to seek “rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages,” among other things, to redress harm caused by violations of FTC rules, such as one prohibiting deceptive earnings claims. And section 5 of the FTC Act, 15 U.S.C. 45(m), allows the Commission to “recover civil penalties” against those who violate such a rule.

The Commission has previously promulgated rules regulating the use of earnings claims in certain industry settings: The Franchise Rule,<sup>20</sup> the Business Opportunity Rule,<sup>21</sup> and the Telemarketing Sales Rule.<sup>22</sup> However, the scope of coverage of these rules is limited. Numerous different types of enterprises that do not clearly fall under the scope of these existing rules continue to use misleading earnings claims to deceive consumers in violation of section 5. The financial consequences of this deception for consumers are significant.<sup>23</sup>

<sup>20</sup> Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR part 436 (2007).

<sup>21</sup> Business Opportunity Rule, 16 CFR part 437 (2012).

<sup>22</sup> Telemarketing Sales Rule, 16 CFR part 310.

<sup>23</sup> See, e.g., *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (filed C.D. Cal. 2020) (alleging consumer harm of over \$370 million); *FTC v. Neora, LLC*, No. 3:20-cv-1979 (filed D.N.J. 2019, transferred N.D. Tex.) (alleging consumer harm of over \$120 million); *FTC v. Mobe, Inc.*, No. 6:18-cv-862, Dkt. No. 257, Renewed Motion for Default Judgment, at 5 (filed M.D. Fla. 2018) (alleging consumer harm of over \$318 million); *FTC v. The Tax Club, Inc.*, No. 13-cv-210 (filed S.D.N.Y. 2016) (alleging consumer harm of over \$200 million). Individual losses can be substantial; for example, tens of thousands of purchasers in the *OTA Franchise* matter each paid over \$10,000 for purported courses on how to make money trading in the financial markets.

<sup>8</sup> *John Beck Amazing Profits*, 865 F. Supp. 2d at 1072 (ads featuring testimonials created impression that “a typical consumer can easily and quickly earn thousands of dollars per week”); see also, e.g., *World Patent*, No. 17-cv-20848, 2017 WL 3508639, \*12; *Macmillan, Inc.*, 96 FTC 208, 301 (1980); *National Dynamics*, 82 FTC at 511–13, 564 and as modified at 85 FTC at 1057; *Universal Credit Acceptance Corp.*, 82 FTC 570, 669, 682–83 (1973); *Von Schrader Mfg.*, 33 FTC 58, 65 (1941).

<sup>9</sup> *Grant Connect*, 827 F. Supp. 2d at 1214, 1226 (“Examples of deceptive conduct violative of the Act include unsubstantiated claims that consumers can make a lot of money using the defendant’s product . . . .”); see also, e.g., *FTC v. Digital Altitude, LLC*, No. 2:18-cv-0729, 2018 WL 1942392, \*7–10 (C.D. Cal. Mar. 9, 2018); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067, 1071–72; *Holiday Enterprises*, No. 1:06-cv-2939, 2008 WL 953358, \*6–7; *Von Schrader*, 33 FTC at 64.

<sup>10</sup> *Vemma*, No. 2:15-cv-01578, 2015 WL 11118111, \*6 (in determining whether marketing made deceptive income claims. “[t]he ‘common-sense net impression’ of representations controls”); see also, e.g., *World Patent*, No. 17-cv-20848, 2017 WL 3508639, \*11–12; *John Beck Amazing Profits*, 865 F. Supp. 2d at 1073; *Med. Billers Network*, 543 F. Supp. 2d at 306–07; *Tashman*, 318 F.3d at 1276; *Febre*, No. 94-cv-3625, 1996 WL 396117, \*4.

<sup>11</sup> *World Patent*, No. 17-cv-20848, 2017 WL 3508639, \*13–14 (rejecting disclaimer defense as they “failed to change the net impression created by Defendants’ salespeople who verbally promised financial gain”); see also, e.g., *Vemma*, No. 2:15-cv-01578, 2015 WL 11118111, \*6; *John Beck Amazing Profits*, 865 F. Supp. 2d at 1072; *Stefanchik*, No. 04-cv-1852, 2007 WL 1058579, \*6; *Minuteman Press*, 53 F. Supp. 2d at 262–63.

<sup>12</sup> *Five-Star Auto Club*, 97 F. Supp. 2d at 526 (liability for misleading earnings claims under Section 5 did not turn on “intent to defraud or deceive,” or “bad faith”); see also, e.g., *Holiday Enterprises*, No. 1:06-cv-2939, 2008 WL 953358, \*6–7; *Med. Billers Network*, 543 F. Supp. 2d at 304; *Nat’l Bus. Consultants*, No. 89-cv-1740, 1990 WL 32967, \*9; *Wolf*, No. 94-cv-8119, 1996 WL 812940, \*5.

<sup>13</sup> FTC Policy Statement on Deception (October 23, 1984) (appended to *Cliffdale Assoc. Inc.*, 103 FTC 110, 180 & n.37 (1984)); see also, e.g., *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961); *Med. Billers Network*, 543 F. Supp. 2d at 307.

<sup>14</sup> *Med. Billers Network*, 543 F. Supp. 2d at 319–20 (holding seller liable for telemarketer agent’s earnings misrepresentations regardless of telemarketer’s purported independent contractor status); see also, e.g., *Stefanchik*, No. 04-cv-1852, 2007 WL 1058579, \*6; *FTC v. Skybiz.com, Inc.*, No. 01-cv-396, 2001 WL 1673645, \*9 (N.D. Okla. Aug. 31, 2001), *aff’d*, 57 F. App’x 374 (10th Cir. 2003); *Five-Star Auto Club*, 97 F. Supp. 2d at 527; *U.S. Oil and Gas*, No. 83-cv-1702, 1987 U.S. Dist. LEXIS 16137, \*48–49; *Goodman v. FTC*, 244 F.2d 584, 592–593 (9th Cir. 1957).

<sup>15</sup> *Five-Star Auto Club*, 97 F. Supp. 2d at 530 (“[Defendants] violated [the] FTC Act by providing participants with deceptive means and instrumentalities,” specifically, marketing materials that included deceptive earnings claims, explaining that “[a]s a matter of law, ‘those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.’”); see also, e.g., *Vemma*, No. 2:15-cv-01578, 2015 WL 11118111, \*7.

<sup>16</sup> See, e.g., *FTC v. BINT Operations LLC*, No. 4:21-cv-518 (filed E.D. Ark. 2021); *FTC v. Moda Latina BZ Inc.*, No. 2:20-cv-10832 (filed C.D. Cal. 2020); *FTC v. Digital Income System, Inc.*, No. 1:20-cv-24721 (filed S.D. Fla. 2020); *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (filed C.D. Cal. 2020); *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (filed D. Md. 2020); *FTC v. National Web Design, LLC*, No. 2:20-cv-846 (filed D. Utah 2020); *FTC v. Noland*, No. 2:20-cv-0047 (filed D. Ariz. 2020); *FTC v. Position Gurus, LLC*, No. 2:20-cv-710 (filed W.D. Wash. 2020); *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-1165 (filed C.D. Cal. 2019); *FTC v. Zurixx LLC*, No. 2:19-cv-713 (filed D. Utah 2019); *FTC v. Advocate, Int’l, L.P.*, No. 4:19-cv-715 (filed E.D. Tex. 2019); *FTC v. Neora, LLC*, No. 3:20-cv-1979 (filed D.N.J. 2019, transferred N.D. Tex.); *FTC v. Fat Giraffe Mktg. Group LLC*, No. 2:19-cv-613 (filed D. Utah 2019); *FTC v. AWS, LLC*, No. 2:18-cv-442 (filed D. Nev. 2018); *FTC v. Sellers Playbook, Inc.*, No. 18-cv-2207 (filed D. Minn. 2018); *FTC v. Dluca*, No. 0:18-cv-60379 (filed S.D. Fla. 2018); *FTC v. Mobe Ltd.*, No. 6:18-cv-862 (filed M.D. Fla. 2018); *FTC v. Vision Solution Marketing LLC*, No. 2:18-cv-356 (filed D. Utah 2018); *FTC v. Jason Cardiff*, No. 5:18-cv-2104 (filed C.D. Cal. 2018).

<sup>17</sup> *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>18</sup> 15 U.S.C. 53(b).

<sup>19</sup> Penalty Offenses Concerning Multi-Making Opportunities (issued October 2021), available at <https://www.ftc.gov/enforcement/penalty-offenses/money-making-opportunities>.

The Commission believes that initiating a rulemaking to address the use of earnings claims could benefit consumers and could provide useful guidance without burdening businesses. The rule would be designed to deter the use of misleading earnings claims, inform market participants of their legal obligations by spelling out prohibitions plainly, and ensure the Commission can seek monetary relief for consumers deceived by misleading earnings claims.

## II. Objectives and Regulatory Alternatives

The Commission requests input on whether and how it can most effectively use its authority under section 18 of the FTC Act, 15 U.S.C. 57a, to address certain deceptive or unfair acts or practices involving the use of false, unsubstantiated, or otherwise misleading earnings claims.

The Commission is aware that such claims are used by numerous companies and individuals to entice prospective purchasers, job-seekers, investors, or other participants in widely varying contexts. For example, the Commission and other government agencies have alleged that misleading earnings claims have been used to tout offers as diverse as coaching or mentoring,<sup>24</sup> education,<sup>25</sup> work-from-home, “gig” work, and other job opportunities,<sup>26</sup> multi-level marketing opportunities,<sup>27</sup> franchise,<sup>28</sup>

<sup>24</sup> See, e.g., *FTC v. OTA Franchise Corp.*, No. 8:20-cv-287 (filed C.D. Cal. 2020); *FTC v. Ragingbull.com, LLC*, No. 1:20-cv-3538 (filed D. Md. 2020); *FTC v. Zurixx LLC*, No. 2:19-cv-713 (filed D. Utah 2019); *FTC v. Nudge LLC*, No. 2:19-cv-867 (filed D. Utah 2019); *FTC v. Mobe Ltd.*, No. 6:18-cv-862 (filed M.D. Fla. 2018); *FTC v. Digital Altitude*, No. 2:18-cv-0729 (filed C.D. Cal. 2018).

<sup>25</sup> See, e.g., *FTC v. Devry Education Group Inc.*, No. 2:16-cv-579 (filed C.D. Cal. 2016); *Commonwealth of Massachusetts v. ITT Educational Services, Inc.*, No. 16-0411 (filed Mass. Super. Ct. 2016); *State of Colorado v. Center For Excellence in Higher Education, Inc.*, No. 2014-cv-34530 (filed Denver City And County Dist. Ct. 2014); *Macmillan, Inc.*, 96 FTC 208 (1980).

<sup>26</sup> See, e.g., *Amazon.com, Inc.*, FTC Docket No. C-4746 (filed 2021); *FTC v. Moda Latina BZ Inc.*, No. 2:20-cv-10832 (filed C.D. Cal. 2020); *FTC v. Fat Giraffe Mktg. Group LLC*, No. 2:19-cv-63 (filed D. Utah 2019); *FTC v. Uber Technologies, Inc.*, No. 3:17-cv-0261 (filed N.D. Cal. 2017); *Encyclopaedia Britannica, Inc., et al.*, 87 FTC 421, 450, 486-88, 531-32 (1976); *Abel Allan Goodman Trading As Weavers Guild*, 52 FTC 982, 988 (1956), order affirmed 244 F.2d 584 (9th Cir. 1957).

<sup>27</sup> See, e.g., *FTC v. Noland*, No. 2:20-cv-0047 (filed D. Ariz. 2020); *FTC v. Neora, LLC*, No. 3:20-cv-1979 (filed D.N.J. 2019, transferred N.D. Tex.); *FTC v. Advocare, Int'l, L.P.*, No. 4:19-cv-715 (filed E.D. Tex. 2019); *FTC v. Herbalife Int'l of America, Inc.*, No. 2:16-cv-5217 (filed C.D. Cal. 2016); *FTC v. Vemma Nutrition Co.*, No. 2:15-cv-01578 (filed D. Ariz. 2015).

<sup>28</sup> See, e.g., *United States v. We The People Forms and Service Centers USA, Inc.*, No. 04-cv-10075 (filed C.D. Cal. 2004); *FTC v. Government Careers Network, Inc., et al.*, No. 01-cv-2286 (filed S.D.N.Y. 2001); *FTC v. Minuteman Press, Inc.*, No. 93-cv-

e-commerce<sup>29</sup> or other business opportunities,<sup>30</sup> chain referral schemes,<sup>31</sup> and other investment opportunities,<sup>32</sup> as well as other types of business or money-making opportunities.<sup>33</sup> The Commission requests that commenters provide other information or evidence on the prevalence of these practices in these same contexts as well as any others.

The Commission also is interested in exploring disclaimers: Specifically, whether a disclaimer can be sufficient to correct a misleading impression from an atypical earnings claim,<sup>34</sup> and, if so, what features such a disclaimer must have, and in what contexts will it suffice. In the Commission’s experience, we have not seen probative evidence that disclaimers effectively cure atypical earnings claims. In Commission

2496 (filed E.D.N.Y. 1993); *FTC v. National Business Consultants*, No. 89-cv-1740 (filed E.D. La. 1987).

<sup>29</sup> See, e.g., *FTC v. National Web Design, LLC*, No. 2:20-cv-846 (filed D. Utah 2020); *FTC v. AWS, LLC*, No. 2:18-cv-442 (filed D. Nev. 2018); *FTC v. Sellers Playbook, Inc.*, No. 18-cv-2207 (filed D. Minn. 2018); *FTC v. Advertising Strategies, LLC*, No. 2:16-cv-3353 (filed D. Ariz. 2016); *FTC v. The Online Entrepreneur, Inc.*, No. 8:12-cv-2500 (filed M.D. Fla. 2012).

<sup>30</sup> See, e.g., *FTC v. Digital Income System, Inc.*, No. 1:20-cv-24721 (filed S.D. Fla. 2020); *FTC v. 8 Figure Dream Lifestyle LLC*, No. 8:19-cv-1165 (filed C.D. Cal. 2019); *FTC v. Money Now Funding, LLC*, No. 2:13-cv-1583 (filed D. Ariz. 2013); *FTC v. American Business Builders, LLC*, No. 2:12-cv-2368 (filed D. Ariz. 2012); *United States v. The Zaken Corp.*, No. 2:12-cv-9631 (filed C.D. Cal. 2012); *FTC v. Universal Advertising, Inc.*, No. 1:06-cv-152 (filed D. Utah 2006).

<sup>31</sup> See, e.g., *FTC v. BINT Operations LLC*, No. 4:21-cv-518 (filed E.D. Ark. 2021); *FTC v. Dluca*, No. 0:18-cv-60379 (filed S.D. Fla. 2018); *FTC v. Evans*, No. 4:03-cv-178 (E.D. Tex. 2003); *FTC v. Lightfoot*, No. C 3-02-145 (filed S.D. Ohio 2002); *FTC v. Bigsmart.com LLC*, No. 01-cv-466 (filed D. Ariz. 2001); *FTC v. Cano*, No. 97-cv-7947 (filed C.D. Cal. 1997).

<sup>32</sup> See, e.g., *SEC v. Senderov*, No. 19-cv-5242 (filed E.D. Wa. 2019); *SEC v. Peterson*, No. 19-cv-8334 (filed C.D. Cal. 2019); *In re Spectrum Concepts LLC*, SEC No. 3-16358 (filed SEC 2015); *In re Pankaj Kumar Srivastava*, SEC No. 3-1267 (filed SEC 2014); *SEC v. Butts*, No. 13-23115 (filed S.D. Fla. 2013); *SEC v. Shavers*, No. 4:13-cv-416 (filed E.D. Tex. 2013).

<sup>33</sup> See, e.g., *FTC v. Position Gurus, LLC*, No. 2:20-cv-710 (filed W.D. Wash. 2020) (marketing and other business-related services); *FTC v. Montano*, No. 6:17-cv-2203 (filed M.D. Fla. 2017) (“automatic money systems” and “secret codes”); *FTC v. World Patent Mktg.*, No. 17-cv-20848 (filed S.D. Fla. 2017) (invention promotion); *FTC v. Blue Saguaro Marketing, LLC*, No. 2:16-cv-3406 (filed D. Ariz. 2016) (grant scheme).

<sup>34</sup> An atypical earnings claim is a representation, express or implied, regarding profit, earnings, or other financial gain, that does not reflect the experience of the typical purchaser, employee, independent contractor, or other participant engaged in the money-making opportunity at issue. Such claims often convey the message that the represented earnings are typical—this is deceptive. See notes 5 & 6, *supra*; FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”), 16 CFR 255.2(b).

enforcement actions where defendants have argued that disclaimers or disclosures cured any deceptive earnings claims, courts have repeatedly found otherwise.<sup>35</sup> Further, research by the Commission has found that even clear and prominent disclaimers of “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results,” are not sufficient to dispel the implication that a testimonial depicts typical results.<sup>36</sup> Yet, some companies continue to use disclaimers with such language. Based on the foregoing, the Commission seeks comment, information, and evidence on whether a disclaimer can be sufficient to correct an otherwise misleading impression created by earnings claims, and, if so, whether and how the issue should be addressed in a rule.

The Commission also wishes to explore in this rulemaking whether some or all entities and individuals making earnings claims should be required to give recipients specific earnings information. The Franchise and Business Opportunity Rules require companies that make earnings claims to furnish prospective members with a disclosure document that includes information about earnings.<sup>37</sup> Should similar provisions be implemented in an earnings claim rule? How would it effectively prevent or curb deception regarding earnings? If so, what information should such a disclosure include? What would be the benefit to consumers and the burden to business of such a disclosure requirement? Given the wide variety of commercial contexts in which earnings claims may be used, should a disclosure requirement apply to only certain types of entities and individuals or in certain contexts, or should its application be limited in some other way? For example, should

<sup>35</sup> *World Patent Mktg.*, No. 17-cv-20848, 2017 WL 3508639, \*13-14 (even if disclaimers were seen, “they failed to change the net impression created by Defendants’ salespeople who verbally promised financial gain”); *Vemma*, No. 2:15-cv-01578, 2015 WL 1118111, at \*6-7 (disclaimers of “results not typical” not sufficient, as “consumer may [still] reasonably believe that a statement of unusual earning potential represents typical earnings”); *Medicor*, 217 F. Supp. 2d at 1053-54 (“consumers could reasonably believe that the statements of earnings potential represent typical or average earnings” despite disclaimer); *Minuteman Press*, 53 F. Supp. 2d at 262-63 (written disclaimers contradicting oral earnings claims not sufficient, as “a reasonable consumer could legitimately conclude that he or she was being furnished important specific earnings information, *subrosa*, to assist in the decision-making process notwithstanding the general disclaimers in the [contract]”).

<sup>36</sup> Endorsement Guide 16 CFR 255.2(b) n. 105.

<sup>37</sup> 16 CFR 436.2 and 436.5(u); 16 CFR 437.2.

its coverage exclude job postings and help wanted ads? Should it apply only to those whose claims cite atypical earnings figures? Or should it be limited on some other basis?

Relatedly, the Commission is interested in exploring whether a rule should address the use of real or purported earnings data or statistics from an industry or professional field in the promotion of money-making opportunities.<sup>38</sup> In the Commission's experience, some such uses are misleading. These seemingly objective figures may create the impression that the depicted level of sales or earnings is typical in the industry or field, or for the opportunity being advertised, and by implication, that the prospective purchaser, employee, or other participant will achieve similar results.<sup>39</sup> The Commission seeks comment on whether a prohibition on such misleading "industry" earnings claims should be included in a rule, and if so, what the proper scope of its coverage should be.

The Commission also seeks comment on whether and how a rule can most effectively provide clarity on the substantiation a company must possess before making an earnings claim, and whether those who make earnings claims should be required to keep records to demonstrate how they have substantiated the claims. In the Commission's experience, numerous companies have taken positions that appear to misunderstand the substantiation obligation. For example, the Commission is aware that, historically, some multi-level marketing companies have made earnings claims to potential distributors without knowing what expenses their distributors incur. But earnings claims that reflect gross income and omit material expenses are misleading.<sup>40</sup>

<sup>38</sup> For example, the Business Opportunity Rule bars business opportunity sellers from disseminating industry financial information to prospective purchasers unless they have substantiation that the information "reflects, or does not exceed, the typical or ordinary" experience of purchasers. 16 CFR 437.4(c).

<sup>39</sup> *FTC v. Zurix*, No. 2:19-cv-0713, (filed D. Utah 2019), Second Amended Complaint, Dkt. 219, para. 62 & 88 (earnings claims included national averages drawn from industry sources); Dkt. 12-15 (p.7) (same); Dkt. 12-48 (p.35) (same); *Med. Billers Network*, 543 F. Supp. 2d at 305-06 (earnings claims based on industry statistics deceptively implied that participants in defendants' opportunity would make the depicted amounts); *cf.* FTC Endorsement Guides, 16 CFR 255.2(b) (representations of individual consumers' experiences "will likely be interpreted as representing that the . . . experience is representative of what consumers will generally achieve").

<sup>40</sup> *Febre*, No. 94-cv-3625, 1996 WL 396117, \*3-5 (finding ads with earnings claims deceptive

Before making an earnings claim, a business must have a reasonable basis for the claim<sup>41</sup>—that means both gross income and expenses incurred in generating that income. As another example, entities and individuals often argue before the Commission that earnings claims made in testimonials are substantiated if the testimonialist provides evidence that he or she attained the results described in the testimonial. But confirming that a testimonialist is accurately describing their own experience does not substantiate a key message that such representations usually convey—that prospective participants can expect similar results.<sup>42</sup> Given the frequency with which these and other similar issues arise, the Commission is considering how a rule might provide clarity on the matter. How should a rule define the evidence necessary to meet the substantiation requirement? Also, should a rule impose a recordkeeping requirement for substantiation evidence? Such requirements ensure that the Commission can obtain the evidence necessary to evaluate a company's claims that its earnings representations are substantiated.<sup>43</sup> If

because they failed to disclose expenses); *Encyclopaedia Britannica*, 87 FTC at 445-50, 486-87, 505, 510, 532. *See also Med. Billers Network*, 543 F. Supp. 2d at 315 (failure to disclose costs necessary to earn income with product was a deceptive telemarketing practice and violated the Telemarketing Sales Rule); *Southwest Sunsites, Inc., et al.*, 105 FTC 7, 99-102 (1985) (claims about potential use of property were deceptive because they implied the property was a good investment but failed to disclose substantial expenses that rendered the proposed uses uneconomical), *aff'd* 785 F.2d 1431, 1438 (9th Cir. 1986).

<sup>41</sup> *See, e.g., Grant Connect*, 827 F. Supp. 2d at 1225-1226 (defendants "cannot fabricate a number [in an earnings claim] and then fall back on the defense that they would not have access to the documentation to support that claim"); *Holiday Enterprises*, No. 1:06-cv-2939, 2008 WL 953358, at \*6-7 (granting summary judgement to FTC in part because "defendants had no substantiation for [their earnings] claims").

<sup>42</sup> *World Patent Mktg.*, No. 17-cv-20848, 2017 WL 3508639, \*12 ("success stories" in ads implied purchasers would see similar results); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1072-73 (ad with "numerous testimonials" conveyed impression that "a typical consumer" would "earn thousands of dollars per week"); *Cliffdale Assocs., Inc.*, 103 FTC 110, 171-72 (1984) ("[b]y printing the testimonials, respondents implicitly made performance claims" that were deceptive; "irrespective of the veracity of the individual consumer testimonials, respondents' use of the testimonials to make underlying claims that were false and deceptive was, itself, deceptive"); *Macmillan*, 96 FTC at 301 ("testimonials . . . implied that the success portrayed therein was ordinary and typical"). *See also* FTC Endorsement Guides, 16 CFR 255.2(b) (testimonials "will likely be interpreted as representing that the . . . experience is representative of what consumers will generally achieve").

<sup>43</sup> For example, the Business Opportunity Rule requires retention of substantiation documents for

the rule includes a recordkeeping requirement, what must be kept? In what form? For how long? What would be the costs of such a requirement, and are there ways to streamline the requirement to minimize the costs on businesses?

Additionally, the Commission seeks comments on whether, if at all, lifestyle claims should be addressed by a rule. Lifestyle claims are claims that participating in a money-making opportunity will lead to a material change in lifestyle—such as getting to go on expensive vacations, quitting your job, or buying a luxury car. These claims are being used frequently on online advertisements and social media. And the Commission has initiated several enforcement actions that involved deceptive lifestyle claims.<sup>44</sup> The Commission, however, has never comprehensively analyzed such claims, instead addressing them on a case-by-case basis.<sup>45</sup> Comment, evidence, and information is therefore sought on (a) whether and what lifestyle claims are deceptive; (b) the benefits to businesses and consumers from receiving guidance on this topic; and (c) what evidence a company must have before making a lifestyle claim to substantiate it.

Finally, the Commission seeks comment on, among other things, the costs and benefits of a rule that would address the above practices, and on alternatives to such a rulemaking, such as the publication of additional consumer and business education. In their replies, commenters should provide any available evidence and data that supports their position, such as empirical data, consumer perception studies, and consumer complaints.

### III. Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of potential rulemaking in this area. The Commission requests that commenters also submit any relevant factual data

three years after an earnings claim is made. 16 CFR 437.7. The Franchise Rule and Business Opportunity Rules both require that substantiation materials be made available to consumers upon request, thereby implicitly requiring retention of substantiation documents. 16 CFR 436.9(d); 16 CFR 437.6(f).

<sup>44</sup> *See, e.g., FTC v. Neora, LLC*, No. 3:20-cv-1979 (filed D.N.J. 2019, transferred N.D. Tex.); *FTC v. Advocare, Int'l, L.P.*, No. 4:19-cv-715 (filed E.D. Tex. 2019); *FTC v. Herbalife Int'l of America, Inc.*, No. 2:16-cv-5217 (filed C.D. Cal. 2016); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-cv-578 (filed N.D. Ill. 2013).

<sup>45</sup> The Business Opportunity Rule's definition of earnings claims includes lifestyle claims, but only if they imply a certain minimum level of earnings. 16 CFR 437.1(f).

upon which their comments are based. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

#### Questions

1. How widespread is the use of false, unsubstantiated, or otherwise misleading earnings claims by entities or individuals in connection with the offer or sale of a good or service, participation in a job or other work opportunity, or in a business, investment, or other money-making opportunity? Is the practice prevalent among those who make earnings claims? Are there certain business contexts or industries in which the practice is prevalent, or certain business contexts or industries in which it is not? For example, are deceptive earnings claims prevalent among all businesses that offer work or employment, or just among those in certain industries?<sup>46</sup> If so, describe the relevant industry or business context and the basis for your position. Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. Provide all evidence that supports your answer.

2. Are there circumstances in which the practices described in Question 1, above, would not be deceptive or unfair? If so, what are those circumstances? Should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not? Provide all evidence that supports your answer.

3. Do the practices described in Question 1, above, cause injury to consumers, and if so, how much? Do such practices cause injury to other businesses by unfairly disadvantaging them? Provide any evidence that quantifies or estimates these injuries if possible, including the size of the discrepancy between misleading earnings claims and actual earnings. Provide all evidence that supports your answer.

4. Do the practices described in Question 1, above, disproportionately target or affect certain groups, including communities of color or other historically underserved communities?

If so, why and how? Provide all evidence that supports your answer.

5. Please provide any evidence concerning consumer perception of, or experience with, earnings claims that is relevant to the practices described in Question 1, above.

6. Is there a need for new regulatory provisions to prevent the practices described in Question 1, above? If yes, why? If no, why not? What evidence supports your answer?

7. How should a rule addressing the practices described in Question 1, above, be crafted to maximize the benefits to consumers while minimizing the costs to businesses? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

8. Should the Commission consider additional consumer, employee, independent contractor, and business education to reduce harm to consumers associated with the practices described in Question 1, above? If so, what should such education materials include, and how should the Commission communicate that information to consumers and businesses?

9. What alternatives to regulations should the Commission consider to address the practices described in Question 1, above? Would those alternatives obviate the need for regulation? If so, why? If not, why not? What evidence supports your answer?

10. Should a rule addressing the practices described in Question 1, above, define or describe the substantiation required to make an earnings claim? Why or why not? If so, how should it do so? Should a rule adopt the Business Opportunity Rule's language of "a reasonable basis" for a claim at the time the claim is made, or should it use some other definition? If the latter, what? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

11. Should a rule addressing the practices described in Question 1, above, require the preservation or documentation of substantiation? Why or why not? If so, what types of recordkeeping requirements should be required? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to

consumers, and the costs to businesses, and in particular small businesses.

12. What requirements, if any, should a rule impose to address earnings claims made by agents or others interacting with prospective purchasers, employees, independent contractors, or participants on a company's behalf, to address the potential use of misleading claims? How can the Commission ensure that companies effectively monitor the actions of such agents or other persons? Should a rule addressing the practices described in Question 1, above, impose affirmative requirements on companies regarding earnings claims made by their agents or others acting with them or on their behalf? Why or why not? If so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

13. Are there circumstances in which disclaimers or disclosures can effectively dispel a misleading impression regarding earnings or profits, or prevent such an impression? If so, describe such circumstances in detail, including all necessary aspects of such disclaimer or disclosure, such as language, format, or the context in which it is presented. Provide all evidence that supports your answer, or that otherwise addresses the effectiveness of disclaimers or disclosures.

14. In the cases the Commission has brought, we have repeatedly seen circumstances where earnings claims convey the impression that the represented earnings are typical. Are there circumstances where they do not? If so, describe such circumstances in detail. Provide all evidence that supports your answer.

15. How should the rule address disclaimers? Are there any circumstances in which a rule should require a disclaimer, such as with atypical earnings claims? Why or why not? If so, describe such circumstances in detail. How should a rule define or describe such disclaimer? Should the rule address conduct that may minimize the effectiveness of any disclaimer, and if so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

16. Based on the Commission's enforcement experience, representations of an expensive or otherwise desirable lifestyle—such as images of or references to mansions, yachts, luxury

<sup>46</sup> See, e.g., *Amazon.com, Inc.*, FTC Docket No. C-4746 (filed 2021); *FTC v. Uber Technologies, Inc.*, No. 3:17-cv-0261 (N.D. Cal. filed 2017); *Encyclopaedia Britannica*, 87 FTC at 450, 486–88, 531–32; *Abel Allan Goodman*, 52 FTC at 988, order affirmed 244 F.2d 584 (9th Cir. 1957).

goods or automobiles, exotic or otherwise desirable vacations, or even just having more free time—convey the impression that a money-making opportunity can or will provide participants sufficient income to afford a similar lifestyle. Under what circumstances, if any, do such representations not convey such an impression? Describe such circumstances in detail. Provide all evidence that supports your answer.

17. Should a rule addressing the practices described in Question 1, above, address the use of “lifestyle” claims of the type described in Question 15? Why or why not? If so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

18. Should a rule addressing the practices described in Question 1, above, exempt from its coverage businesses or individuals that are subject to the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule? Why or why not? If so, how and to what extent? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

19. If a rule addressing the practices described in Question 1, above, is adopted, should the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule be amended? Why or why not? If so, how and to what extent?

20. Should a rule addressing the practices described in Question 1, above, exempt from its coverage any other businesses or individuals? Why or why not? If so, how and to what extent? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

21. Should a rule addressing the practices described in Question 1, above, include an example earnings disclosure statement that would not be mandatory, but would provide guidance for companies on how to make a lawful earnings claim? Why or why not? If so, what should be contained in the example statement? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies

the benefits to consumers, and the costs to businesses.

22. Should a rule addressing the practices described in Question 1, above, require that an earnings claim disclosure document be provided to consumers prior to purchase, prior to accepting an offer for work, or at any other time? Why or why not? If so, how should the rule define or describe the required disclosure, the time(s) at which it must be provided, the manner in which it must be provided (so it cannot be hidden or obscured by other paperwork), the languages in which it must be provided, and who must provide it? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

23. How prevalent is the deceptive or misleading use of real or purported industry earnings data or statistics in the promotion of money-making opportunities? Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. Provide all evidence that supports your answer.

24. Do the practices described in Question 21, above, cause injury to consumers, and if so, how, and how much? Provide any evidence that quantifies or estimates that injury if possible, including any non-financial or indirect injuries to consumers, and including the size of the discrepancy between misleading earnings claims and actual earnings. Provide all evidence that supports your answer.

25. Should a rule addressing the practices described in Question 1, above, include a provision concerning the use of real or purported industry earnings data or statistics? Why or why not? If so, how? Should the coverage of such a provision be limited? If so, how and why? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

26. Do existing laws and regulations covering false, unsubstantiated, or otherwise misleading earnings claims affect businesses, particularly small businesses? If so, how? Provide all evidence that supports your answer.

27. Are there other commercial acts or practices involving earnings claims that are deceptive or unfair that should be addressed in the proposed rulemaking? If so, describe the practices. How widespread are the practices? Provide all evidence that supports your answer,

and please answer Questions 2–9 with respect to the practices.

28. Do current or impending changes in technology or market practices affect the need for rulemaking? If so, describe the changes and how they affect whether and how a rulemaking should proceed. Provide all evidence that supports your answer.

#### IV. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before May 10, 2022. Write “Earnings Claims ANPR, R111003” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Earnings Claims Rulemaking, R111003” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health

information. In addition, your comment should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential”—as provided in section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](http://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before May 10, 2022. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**April J. Tabor,**  
Secretary.

### **Statement of Commissioner Rebecca Kelly Slaughter Regarding Advance Notice of Proposed Rulemaking on the Use of Earnings Claims**

Unfair and deceptive earnings claims underpin some of the worst and most financially ruinous scams Americans face. Pyramid schemes, phony investments, and multi-level-marketing all exploit people’s hopes—for financial stability, for a chance to improve their lives—with false promises. These scammers often take advantage of

national and financial crises to exploit the newly vulnerable. And unfortunately, we’ve seen that in the Covid-19 pandemic as well. The extent of these scams is astounding. In a 2020 law enforcement crackdown the FTC pursued over a billion dollars lost to these schemes.<sup>1</sup>

Combating these schemes illuminates something important about the agency’s authority and our mission, too. Section 5’s requirement that earnings claims are honest and substantiated reflects an underappreciated obligation of the FTC: To protect Americans as workers and not simply as the consumers of products and services. Markets cannot function effectively without honest and transparent pricing. That is just as true for the labor market as it is for consumer goods. False or misleading earnings claims robs people of their investments, their time, and the fair value of their labor. It is also worth remembering: Individuals who put their savings into the stock market—often wealthier individuals—can rely on the SEC to police misrepresentations about earnings claims with respect to those investments. But less wealthy folks who may pour their life savings into promised business opportunities deserve the protection of the federal government as well; that is why we must aggressively police misleading earnings claims.

Two of our recent enforcement actions demonstrate how this kind of exploitation works in practice. Last year the FTC settled with the owners and operators of *Moda Latina*.<sup>2</sup> The company primarily targeted Latinas with Spanish-language ads that made false promises of significant earnings reselling luxury products. *Moda Latina*’s marketing campaign specifically targeted Latina consumers interested in starting work-at-home businesses.<sup>3</sup> It seems like none of the women targeted in this scheme made money but were instead cheated out of their time and funds to buy useless goods. These kinds of false claims crowd out honest opportunities for people to start businesses, making life even more

precarious for vulnerable workers and would-be entrepreneurs.

I’m also deeply concerned about the effect of the over-promises of the gig economy on workers and the labor market. Last year, the FTC settled with Amazon over our charges that it robbed its Amazon Flex drivers the full amount of tips it promised to them.<sup>4</sup> These gig-economy workers signed up as drivers to deliver goods and groceries order through Amazon based on an advertised hourly rate and the promise of receiving “100% of tips” they earned while completing deliveries. After people had already signed up to work for the company, Amazon secretly changed its payment scheme and ceased giving drivers their tips while still representing that it did so to these workers and to consumers. In settlement the agency recovered \$61.7 million from Amazon, the full amount of the tips the agency believe Amazon withheld from them. By misrepresenting these drivers’ take-home pay Amazon distorted both the gig-driver labor market and the consumer home delivery market in what I believe we can fairly surmise was an unlawful bid to increase its market share and lower its labor costs.

Effective enforcement of Section 5’s consumer protection obligations helps make these markets for labor functional, fair, and competitive. That’s why I’m eager to begin a rulemaking inquiry on earnings claims. I’m proud of the decades of enforcement actions the agency has undertaken to protect against these unfair and deceptive practices. But case by case enforcement has left gaps unscrupulous actors can exploit.

Starting this inquiry means we can now gather evidence on how best to protect against these scams and begin to think about how a possible trade regulation rule could help level the playing field between workers and those that employ them. Pursuing rule violations would also reopen an avenue to return stolen money to consumers—something we can no longer do under section 13(b) until Congress steps in to fix it.

I want to thank everyone that helped bring this ANPR to the Commission today, in particular Melissa Dickey, Andrew Hudson and Kati Daffan in DMP. I’d also like to thank Elisa Jillson, the CTD for the Bureau, Kenny Wright in the Office of the General Counsel, Jason Adler and Guy Ward from the MWRO, and David Givens, Douglas

<sup>1</sup> Press Release, Federal Trade Commission, As Scammers Leverage Pandemic Fears, FTC and Law Enforcement Partners Crack Down on Deceptive Income Schemes Nationwide, December 14, 2020, <https://www.ftc.gov/newsevents/press-releases/2020/12/scammers-leverage-pandemic-fears-ftc-law-enforcement-partners>.

<sup>2</sup> Press Release, Federal Trade Commission, Operators of Bous Income Scam Targeting Latinas Face FTC Settlement, March 2, 2021, <https://www.ftc.gov/news-events/press-releases/2021/03/operators-bogus-income-scam-targeting-latinas-face-ftc-settlement>.

<sup>3</sup> *FTC v. Moda Latina BZ Inc.*, No. 2:20-cv-10832 (filed C.D. Cal. 2020), [https://www.ftc.gov/system/files/documents/cases/001\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/001_complaint.pdf).

<sup>4</sup> Press Release, Federal Trade Commission, Amazon to Pay \$61.7 Million to Settle FTC Charges it Withheld Some Customer Tips from Amazon Flex Drivers, February 2, 2021, <https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some>.

Smith, and Yan Lau, in the Bureau of Economics for all their work.

### Concurring Statement of Commissioner Christine S. Wilson on Advance Notice of Proposed Rulemaking Concerning Earnings Claims

Today, the Commission issues an Advance Notice of Proposed Rulemaking (“ANPRM”) to commence proceedings to address the use of false, unsubstantiated, or otherwise misleading earnings claims. As explained in this **Federal Register** document, despite the Commission’s aggressive enforcement efforts for decades to combat deceptive earnings claims, false claims about income opportunities continue to proliferate. While I remain skeptical of unleashing a tsunami of rulemakings to address common unfair or deceptive acts or practices, I do not oppose seeking comment on today’s ANPRM.

We contemplate this rule against the backdrop of *AMG Capital Mgmt., LLC v. FTC*.<sup>1</sup> The Supreme Court’s recent decision in *AMG* limits the Commission’s authority to use section 13(b) of the FTC Act to obtain monetary relief for consumers harmed by misleading earnings claims. While a rule would not prevent fraudsters from engaging in deceptive earnings claims, it would enhance the FTC’s ability to strip them of their ill-gotten gains and return that money to consumers. But for *AMG*, I would be skeptical about the need for rules regarding conduct frequently targeted by the FTC’s extensive fraud program. That said, a 13(b) fix would be preferable to having the FTC pursue a cornucopia of rules. And if a 13(b) fix is enacted during the pendency of this rulemaking, I likely would ask the Commission to terminate the process.

In the wake of *AMG*, the exploration of a potential Earnings Claims rule is appropriate for two reasons. First, whether false earnings claims are made by frauds or legitimate businesses, no benefit accrues to consumers or competition. In fact, a 2020 FTC Data Spotlight about “income scams” stated that the median loss associated with business and work-at-home opportunities is \$3,000.<sup>2</sup> Consumer losses related to deceptively marketed investment seminars are even higher, exceeding \$16,000.<sup>3</sup> For decades, the

Commission has challenged deceptive earnings claims in connection with coaching and mentoring schemes, multi-level marketing (“MLM”) arrangements, and work-from-home or other business opportunity scams, to name a few.<sup>4</sup> Despite decades of aggressive enforcement and extensive consumer and business education efforts, deceptive earnings claims persist.

Second, consumers cannot analyze the costs and benefits of investing significant resources to pursue coaching, training, MLM, or educational opportunities without accurate representations from sellers. But the true value of these opportunities is best assessed by the entities offering them. In other words, we see significant information asymmetries between consumers and the entities that make earnings claims. The monetary value of an opportunity is likely the central, material claim that consumers consider before spending hundreds, thousands, or even tens of thousands of dollars on financial-improvement opportunities. This ANPRM seeks information on how to ensure that when disclosures are made, they are substantiated.

For these reasons, I do not oppose an ANPRM that explores ways to incentivize establishing a reasonable basis for earnings claims.

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2022–0085]

RIN 1625–AA00

### Temporary Safety Zone; Tugs Champion, Valerie B, Nancy Anne and Barges Kokosing I, Kokosing III, Kokosing IV Operating in the Straits of Mackinac, MI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for the navigable water within a 500-yard radius of several tugs and barges in the Straits of Mackinac. The safety zone is needed to protect personnel, vessels, and the marine environment from the potential hazards created by the work,

survey, and inspection conducted within the Straits of Mackinac. Entry of vessels or persons into the zone is prohibited unless specifically authorized by the Captain of the Port Sault Sainte Marie or their designated representative. Due to the lengthy duration of this safety zone, the Coast Guard is accepting and reviewing public comments until March 31, 2022. While this document is effective beginning April 15, 2022, the Coast Guard reserves the right to modify the safety zone if an issue is raised by the public comments that requires such a modification. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before April 11, 2022.

**ADDRESSES:** You may submit comments identified by docket number USCG–2022–0085 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LT Deaven S. Palenzuela, Sector Sault Sainte Marie Waterways Management Division, U.S. Coast Guard at (906) 635–3223 or email [ssmprevention@uscg.mil](mailto:ssmprevention@uscg.mil).

### SUPPLEMENTARY INFORMATION:

#### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

#### II. Background, Purpose, and Legal Basis

On February 3, 2022, the Project Manager of Kokosing Industrial notified the Coast Guard that they are contracted by American Transmission Company (ATC) for the purpose of protecting their new 138kV submarine power cables installed in the Straits of Mackinac RNA in 2021. Pursuant to 33 CFR 165.944, Kokosing sent the Coast Guard a letter notifying their 2022 project proposal and request to anchor and work inside the regulated navigation area (RNA) within one nautical mile of submerged pipeline/cable.

The Captain of the Port Sault Sainte Marie (COTP) has determined that potential hazards associated with the work, survey, and inspection of underwater infrastructure within the

<sup>1</sup> *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>2</sup> Emma Fletcher, *Income scams: big promises, big losses*, FTC Consumer Protection Data Spotlight (Dec. 10, 2020), available at [https://www.ftc.gov/system/files/attachments/blog\\_posts/%20scams%3A%20big%20promises%2C%20big%20losses%20final\\_correctlink.pdf](https://www.ftc.gov/system/files/attachments/blog_posts/%20scams%3A%20big%20promises%2C%20big%20losses%20final_correctlink.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> See Section I of **SUPPLEMENTARY INFORMATION**, *supra*. See also Notice of Penalty Offense Authority Concerning Money-Making Opportunities, available at <https://www.ftc.gov/MMO-notice>.