Concurring Statement of Commissioner Christine S. Wilson

Advanced Notice of Proposed Rulemaking Concerning Earnings Claims
Matter No. R111003
February 17, 2022

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 the Federal Register Notice, 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*.[1] 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.[2] Consumer losses related to deceptively marketed investment seminars are even higher, exceeding $16,000.[3] 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.[4] Despite decades of aggressive enforcement and extensive consumer and business education efforts, deceptive earnings claims persist.

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[1] *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

[2] 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/ Income%20scams%3A%20big%20promises%2C%20big%20losses%20/incomescams.final_.correctlink.pdf.

[3] *Id.*

[4] Trade Regulation Rule on the Use of Earnings Claims, FR . *See also* Notice of Penalty Offense Authority Concerning Money-Making Opportunities, *available at* https://www.ftc.gov/MMO-notice.

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.