



From Enforcement to Rulemaking: Evaluating the FTC’s Approach to Deceptive Earnings Claims

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Companies, such as gig economy firms and for-profit colleges, sometimes solicit consumers by promising a certain income or lifestyle. According to the Consumer Federation of America, “these promises frequently turn out to be false and unsubstantiated.”¹ In response to this problem, in May 2022, the Federal Trade Commission (FTC) issued an Advance Notice of Proposed Rulemaking (ANPRM) Regarding Deceptive or Unfair Marketing Using Earnings Claims. In this rulemaking, the FTC proposes to consider claims that apply to coaching or mentoring, investment, multi-level marketing, franchises, for-profit colleges, and gig economy opportunities. The FTC states that the purpose of such a rule is to “further clarify for businesses what constitutes a deceptive earnings claim and what it means to have substantiation for an earnings claim,” as well as to further inform businesses of their legal obligations.² The rule would also “enable the Commission to seek monetary relief for consumers harmed by deceptive earnings claims.”³

The FTC has a long history of enforcement actions—in the form of adjudication—against firms that make unfair and deceptive earnings claims. It also has provided extensive guidance concerning practices that it considers unfair and deceptive.⁴ While a rule could make it easier to seek and obtain monetary relief, rulemaking, especially given the commission’s current membership, can result in more onerous rules that inhibit innovation and entrepreneurship in firms’ communications about earnings opportunities. Rather than completing the proposed rulemaking process, the FTC would be better off addressing deceptive claims by combining its penalty offense authority with continued adjudication.

ENFORCING GUIDELINES WITH ADJUDICATION

The FTC has issued guidelines about what statements constitute deceptive claims by for-profit colleges, firms offering business opportunities, firms offering investment opportunities and advice, and firms offering coaching or mentoring.⁵ Among these are guidelines concerning money-making opportunities for which the FTC considers it unfair or deceptive for firms to

- misrepresent the amount a person can expect to earn;
- inform participants that they can expect a specified amount of earnings, without the firm having sufficient knowledge of past participant earnings;
- present information about earnings of specific groups, or of typical ordinary or average participants, without clear and conspicuous disclosure of the relevant context;
- misrepresent profits or earnings by failing to disclose conditions or limitations, such as expenses to be borne by each participant;
- misrepresent other relevant facts about an opportunity, such as the number of prospective participants, participant screening, the amount of experience needed for success, and claims that purchasing the opportunity is low risk or risk free; and
- misrepresent the position being offered or the amount or type of training to be provided.⁶

It has been the FTC's practice to enforce these guidelines by adjudicating cases rather than issuing legislative rules about unfair or deceptive practices. For example, in several cases involving accusations about deceptive claims involving investor education and financial publishing businesses, the FTC has required defendants to pay amounts as much as \$10 million. In a case against Uber, the FTC obtained a settlement of \$20 million. It obtained a much larger settlement in a case against Amazon. But a problem with continuing to rely on case-by-case adjudication is that, as the result of the 2021 Supreme Court decision in *AMG v. FTC*, the FTC can no longer collect restitution when it brings its first case against a firm under section 13(b) and determines that the firm has engaged in unfair or deceptive acts or practices (UDAP).⁷ Before this decision, the threat of monetary relief likely played an important role in deterring unfair or deceptive practices.

ENFORCEMENT BY LEGISLATIVE RULEMAKING

The FTC has two kinds of rulemaking authority: nonlegislative and legislative. Nonlegislative rules, such as the guidelines listed above, are “interpretive rules and general statements of policy with respect to unfair or deceptive practices.”⁸ The FTC has posted numerous documents that provide guidance to the public about nonlegislative standards that it enforces through adjudication in cases involving unfair or deceptive acts or practices.

The 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act empowers the commission to enact legislative rules, “which define with specificity acts or practices which

are unfair or deceptive.”⁹ Such rules are legally binding on the agency and the public.¹⁰ Before such legislative rules can be issued, the FTC must follow strict procedures, which include providing for a public notice, a public comment period, and an informal hearing. It also is required to “provide advanced notice of proposed rulemaking to Congress, consider regulatory alternatives” and determine “that the allegedly unfair or deceptive activity is ‘prevalent.’”¹¹

The FTC has issued legislative rules affecting certain industries and has a good track record in enforcing those rules. The commission promulgated the Franchise Rule in 1978 and the Business Opportunity Rule in 2012. In the Business Opportunity Rule, the FTC strikes a balance between “not putting unnecessary burdens on businesses where fraud is not as likely to occur” and limiting the time and expense required for compliance by those firms that are subject to it.¹² The Franchise Rule requires franchisors to disclose to potential franchisees “information indicating the risk of future opportunism by the franchisor.”¹³ Although many franchisors opposed the rule when it was first adopted, today they seem to view it favorably, especially in comparison to more stringent legislation that has been proposed by various states.¹⁴

Opponents of an earnings claim rule express concern that it “will be too rigid in regulating first amendment protected commercial and non-commercial speech.”¹⁵ The commission argues that the rules may make it easier to determine whether a particular earnings claim is deceptive. But clarifying the rules may also make them more rigid, hindering the ability of some businesses to communicate the unique features of the opportunities they are offering.¹⁶ In its ANPRM the commission seems to disparage the use of testimonials, lifestyle claims, or claims about earnings that are atypical, even if such claims are accompanied by disclaimers.¹⁷

The FTC has recently reformed the rulemaking process under the Magnuson-Moss Act with the intention of streamlining it.¹⁸ This includes reforming the FTC’s internal Rules of Practice, such as removing the requirement that a Notice of Proposed Rulemaking (NPRM) “state the reasons for a rule ‘with particularity.’”¹⁹ This requirement could have been interpreted to require greater evidence gathering before issuing an NPRM. And evidence gathered earlier in the rulemaking process is likely to be taken more seriously than evidence gathered after some commissioners have already made up their minds.²⁰ More generally, the reforms removed safeguards, such as the requirement that the chief administrative law judge serve as an independent presiding officer, which had assured “objective management of the rulemaking process.”²¹ Critics argue that the FTC’s steps to simplify and hasten the rulemaking process have sacrificed “public input, objectivity and a full evidentiary record.”²²

By enacting and enforcing trade regulation rules, the FTC could enable those harmed by unfair or deceptive earnings claims to obtain compensation. The threat of monetary penalties would also give firms an incentive to avoid breaking the rules. But rulemaking is time consuming and resource intensive. Critics of rulemaking point out that a simpler approach would be for the FTC to rely on its penalty offense authority—in addition to adjudication—to obtain monetary relief from firms it finds guilty of making unfair earnings claims.

THE POWER OF PENALTY OFFENSE AUTHORITY

When the FTC sends notices to parties stating that “the Commission has condemned certain practices in a litigated final order,” these practices can be considered “penalty offenses” and the FTC can seek civil penalties from parties that engage in them.²³

The FTC may be able to collect a substantial penalty (\$50,120 in 2023) for every false or deceptive claim. The penalty offense authority can have a strong deterrent effect because the maximum penalty can be assessed for each day that the firm violates a rule. Thus, the penalty can greatly exceed a firm’s gains from unfair or deceptive claims, which may be necessary to provide optimal deterrence when the likelihood of detecting wrongdoing is small.²⁴ In 2022, the FTC assessed a penalty of \$1.7 million in a settlement with WealthPress based on allegations that the company made “outlandish and false claims” deceiving consumers about its investment advisory services.²⁵ Recently the FTC has issued notices of penalty offenses concerning money-making opportunities and a variety of other topics.²⁶

There is some uncertainty about the efficacy of using the penalty offense authority in earnings claims cases. If the authority is challenged in a particular case, the courts would be likely to rule against the FTC if it is too difficult to demonstrate that the current claim is sufficiently like conduct in the prior proceeding(s), which forms the basis of the FTC’s claim.²⁷ The penalty offense authority includes strong due process protections for the defendants, such as the requirement that the parties must have had actual knowledge of the commission’s prior determination that a specific practice similar to the one they engaged in was unlawful.²⁸ Nevertheless, it has been used effectively in several cases. Because civil penalties are available, and firms are notified in advance of the offenses that are subject to penalty, firms are more likely to comply, and the need is reduced “to bring enforcement actions for similar conduct over and over again.”²⁹ In the early years after the commission gained this authority, most firms that received notice complied voluntarily.³⁰

CONCLUSION

Rulemaking is time consuming. The FTC has recently been engaged in several instances of rulemaking, very few of which are likely to be finalized before Chair Lina Khan’s current term is over. Rather than engaging in rulemaking, the FTC would be better off deploying its resources in a more cost-effective way, such as combatting mass-market consumer fraud.³¹ The FTC has already published clear guidelines concerning earnings claims based on decisions in previous cases. By giving notice of its intention to use its penalty offense authority to enforce guidelines consistent with final orders it has issued, the FTC can increase incentives of firms to provide earning claims that do not mislead the public.

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NOTES

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3. FTC Deceptive or Unfair Earnings Claims, 16 C.F.R. § 462, (Mar. 11, 2002), at 13952.
4. See Federal Trade Commission (FTC), "Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct in the Education Marketplace" (2021).
5. FTC, "Penalty Offenses Concerning Education"; "Selling a Work-at-Home or Other Business Opportunity? Revised Rule May Apply to You," Federal Trade Commission, November 2011, last accessed February 2024, <https://www.ftc.gov/business-guidance/resources/selling-work-home-or-other-business-opportunity-revised-rule-may-apply-you-1>.
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7. Larissa Bergin, "AMG v. FTC: What's Next for Equitable Monetary Relief," *Journal of Health Care Compliance*, (May-June 2021).
8. 15 U.S.C. § 57a(a)(1)(A).
9. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193 (1975) (codified as amended at 15 U.S.C. §§ 45-46, 49-52, 56-57c, 2301-2312 (2012)).
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11. Davis, 801.
12. Beata Krakus, "The New FTC Business Opportunity Rule Makes Waves: Impact on Franchise Systems," *Franchising World* 44 (2012): 21.
13. Uri Benoliel and Jenny Buchan, "Optimism Bias and the Inefficiency of the FTC Franchise Rule," *DePaul Business and Commercial Law Journal* 13, no. 3 (2015): 413.
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15. Wright, 2.

16. In a phone conversation, Bill MacCleod helped me better understand that specific restrictions on how an earnings claim may be stated could interfere with the communication process, since restrictive rules likely interfere with communicating idiosyncratic aspects of a business or investment opportunity.
17. 16 C.F.R. at 13953-954.
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22. Federal Trade Commission, "Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures," July 9, 2021.
23. Rohit Chopra and Samuel Levine, "The Case for Resurrecting the FTC Acts' Penalty Offense Authority," *University of Pennsylvania Law Review* 170 (2021): 71-123.
24. Chopra and Levine, 99-100.
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