

The FTC Seeks Comments and Signals Changes to Come in New Rulemaking on Earnings Claims

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As we previewed last week [here](#), the FTC [released](#) an Advanced Notice of Proposed Rulemaking (ANPR) on earnings claims as it embarked on a mission to adopt a rule that would give the FTC, in its own words, “an important new tool to return money to consumers injured by deceptive income claims, and to hold bad actors accountable with civil penalties.” Importantly, the ANPR also suggests that the rule could do more than just change the FTC’s enforcement tools and also seek to substantively change the standard that has long been applied in analyzing earnings and lifestyle claims. Interested parties will have 60 days from publication in the Federal Register to submit comments and respond to the FTC’s questions and requests for evidence.

As an *Advanced* Notice of Proposed Rulemaking and not a proposed rule, the ANPR does not offer specific regulations for consideration at this point. Notably, however, the FTC solicited information on a number of specific issues that shed light on possible new areas for regulation. The FTC stated that it is “interested in exploring disclaimers” and posited that “[i]n the Commission’s experience, we have not seen probative evidence that disclaimers effectively cure atypical earnings claims.” The ANPR also questioned “whether some or all entities and individuals making earnings claims should be required to give recipients specific earnings information,” and analogized to existing disclosure documents required under the Franchise and Business Opportunity Rules.

In addition to disclosure issues and atypical claims, the ANPR also seeks input on lifestyle claims and specifically (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.

The ANPR is the first in a series of required steps to promulgate a rule under the FTC’s Magnuson-Moss rulemaking authority. As previously discussed [here](#), while Chair Lina Khan has sought to streamline the rulemaking process by doing away with the requirement for a written staff report and a neutral presiding officer, there are still plenty of hurdles and opportunities for engagement along the way.

One final note: the ANPR was approved 4-0 with Commissioner Wilson issuing a concurring statement that she “remain[s] skeptical of unleashing a tsunami of rulemakings to address common

unfair or deceptive acts and practices” and stating that she would likely ask the Commission to terminate the rulemaking process if legislation was enacted to allow the FTC to obtain monetary redress under Section 13(b) in response to the Supreme Court’s decision in *AMG Capital Management*. With no recent significant movement on 13(b) legislation, at least for now it appears the Commission is united in moving forward on a rule that could have far-reaching effects for direct sellers and others in the gig economy making earnings and lifestyle claims.