



May 10, 2022

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

***Re: Earnings Claims ANPR, Matter No. R111003, Docket ID FTC-2022-0020***

Dear Commissioners:

The U.S. Chamber of Commerce (“the Chamber”) respectfully submits these comments in response to the Federal Trade Commission’s (“FTC” or “the Commission”) Advanced Notice of Proposed Rulemaking (“ANPR” or “Proposed Rule”) concerning earnings claims.<sup>1</sup>

The Chamber strongly supports the FTC’s authority to protect consumers against unfair or deceptive earnings claims advertisements. However, the present record does not support the need to enact a new trade regulation that would harm millions of American small businesses. Significant concerns exist that a new rule regarding earnings claims could negatively impact part time, flexible earnings for millions of Americans. FTC should encourage more of these opportunities, not create unwarranted rules that could inhibit them.<sup>2</sup>

***The Benefits of Flexible Earnings Opportunities in 2022***

Technology, particularly the internet and mobile apps, have enabled Americans to enjoy the benefits of flexible earnings environments in opportunities like food and grocery delivery to direct sales. These benefits have been enjoyed by Americans in one way or another for over a hundred years. Companies have offered unprecedented flexibility to workers and unprecedented convenience to consumers. Better still, they have provided an avenue back into the workforce for millions of Americans, such as military spouses, transitioning service members, and ex-offenders who can sometimes have difficulty connecting with the traditional labor market and nine-to-five jobs. They have provided extra income for workers in traditional jobs, served in some ways as an informal safety net, provided mobility to seniors and those with disabilities, and even saved lives by reducing drunk driving.<sup>3</sup> Technology has enabled

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<sup>1</sup> 87 Fed. Reg. 13951 (March 11, 2022) (<https://www.govinfo.gov/content/pkg/FR-2022-03-11/pdf/2022-04679.pdf>).

<sup>2</sup> <https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries>

<sup>3</sup> <https://www.uschamber.com/employment-law/ready-fire-aim-how-state-regulators-are-threatening-the-gig-economy-and-millions-of-workers>

innovations that have expanded flexible earning opportunities to the robust marketplace of opportunities Americans benefit from today. These opportunities have been an economic lifeline to both Americans seeking flexible earnings but also small businesses that relied upon delivery to survive and thrive during the economic downturn caused by the COVID-19 pandemic.

As the Commission examines these opportunities in light of its ANPR, the Chamber encourages it to consider public and private data demonstrating an overwhelmingly high degree of satisfaction among independent workers engaging in flexible work arrangements. These high satisfaction rates fail to support the claim that consumers are being widely misled by unfair or deceptive earnings claims into work opportunities that harm them. For example, the U.S. Bureau of Labor Statistics recently found that nearly 80% of independent contractors preferred their independent work over a traditional job.<sup>4</sup> Similarly, an August 2021 Pew Research Center survey, most Americans engaged in recent independent work opportunities indicated their earnings assignments and pay were fair.<sup>5</sup> Nearly 80 percent of Americans view flexible work opportunities favorably.<sup>6</sup>

In its 11<sup>th</sup> Annual State of Independence Research report, MBO Partners found that 77% of those working in independent opportunities were “very satisfied with their choice – the highest reading in the 11 years of [its] research.”<sup>7</sup> The ADP Research Institute found that “more than 70% of 1099-M workers say they are working independently by their own choice.... Most seem happy with flexible work and place a premium on flexibility as a driving motivation behind their decision, over financial security and benefits.”<sup>8</sup> It further found the average income for employees working for 12 consecutive months is similar, regardless of being a 1099-M worker or a traditional W-2 employee.<sup>9</sup> The U.S. Small Business Administration Office of Advocacy also found that self-employed individuals have a higher median net worth than others.<sup>10</sup>

Upwork’s Freelance Forward Economist Report found that 82% of freelancers overall are satisfied with their work.<sup>11</sup> It further states, “While it is always possible to find those who are unhappy with their working arrangements, on net freelancers believe themselves to be earning more, have the level of flexibility they require, and overall higher satisfaction with their work.”<sup>12</sup>

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<sup>4</sup> U.S. Dept. of Labor, Bureau of Labor Statistics, Contingent and Alternative Employment Relationships (June 2018).

<sup>5</sup> <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>

<sup>6</sup> <https://www.ipsos.com/en-us/news-polls/dsa-consumer-entrepreneurship-study>

<sup>7</sup> <https://www.mbopartners.com/blog/state-of-independence/2021-workforce-planning-data/>

<sup>8</sup> [https://www.prnewswire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-](https://www.prnewswire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-300998593.html?fbclid=IwAR1lc8xnqPFyd6TbK0NyQKfjqZ5N12MDRsiABVgWzJeXdfF3e0T8PLocFg)

[300998593.html?fbclid=IwAR1lc8xnqPFyd6TbK0NyQKfjqZ5N12MDRsiABVgWzJeXdfF3e0T8PLocFg](https://www.prnewswire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-300998593.html?fbclid=IwAR1lc8xnqPFyd6TbK0NyQKfjqZ5N12MDRsiABVgWzJeXdfF3e0T8PLocFg)

<sup>9</sup> *Id.*

<sup>10</sup> <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/17095726/Small-Business-Facts-Business-Owner-Wealth.pdf>

<sup>11</sup> <https://www.upwork.com/research/freelance-forward-2021>

<sup>12</sup> *Id.*

### ***Current Data Does Not Demonstrate the Need for a New Trade Rule***

Before the Commission can issue a new trade rule, the FTC Act requires the Commission to demonstrate the prevalence of an unfair or deceptive trade practice.<sup>13</sup> Only in cases where the Commission has issued cease and desist orders of a practice at issue or where “any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices” may a practice be considered prevalent.<sup>14</sup>

The ANPR contains no evidence that there are widespread patterns of unfair or deceptive practices in the market that would justify saddling the economy with imposing burdensome regulation. The Commission’s ANPR predominantly relies upon dated examples of cases from a decade or more ago to justify the need for new rule. That fails to appreciate that in the last ten years, technology has changed to help level the playing field to enable reasonable consumers to understand the benefits, risks, and veracity of earnings claims.

The vast amount of information accessible by consumers on the Internet and through social media—both favorable and critical—and the prevalence of well-funded, well-informed consumer advocate groups, has resulted in a public that is much better informed about the limitations and benefits associated with both independent earnings opportunities. Moreover, there is hardly a person in the entire country who has not either directly, or through a friend, coworker, or a member, encounter these opportunities and has access to trusted sources of information and opinions. These opportunities are not like those of a franchise or a security, which involve significant investment and extraordinary risk. They are typically entry-level opportunities with a low-cost and correspondingly low-risk profile.

Without evidence of widespread patterns of unfair or deceptive acts or practices, the rulemaking creates the impression that the intent is more about ensuring a new avenue for monetary relief under Section 19 for isolated cases than it is about addressing pervasively bad market practices. That is neither the standard by which the Commission is authorized to engage in rulemaking, nor is it a precedent the Commission should set. We agree that Congress should restore reasonable equitable monetary authority to the Commission for Section 13 actions following the Supreme Court’s holding in *AMG Capital Management, LLC v. FTC*. But that standard must and should be set statutorily and not bypassed through rulemaking based on unsubstantiated complaints and without current and concrete evidence showing a widespread harmful practices<sup>15</sup> The ANPR explains that “a rule would enable the Commission to seek monetary relief,”<sup>16</sup> and Commissioner’s Slaughter’s Statement likewise acknowledged “[p]ursuing rule violations would also reopen an avenue to return stolen money to

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<sup>13</sup> 15 U.S.C. S 57a(b)(3).

<sup>14</sup> 15 U.S.C. S 57a(b)(3)(A)-(B).

<sup>15</sup> See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>16</sup> 87 Fed. Reg. 13952.

consumers—something we can no longer do under section 13(b) until Congress steps in to fix it.”<sup>17</sup>

Although the Chamber agrees that Congress should enact reasonable equitable remedies for the FTC to pursue against bad faith actors, the Commission should undertake this kind of broad, economy-wide rulemaking only in response to identified widespread unfair and deceptive practices in the market—not in the service of a narrow goal of unlocking remedies. The Commission states that it “continues to receive widespread reports from consumers and informants of misleading earnings claims.”<sup>18</sup> In order to justify a rulemaking on earnings claims, the Commission should release statistics on the number of individuals claiming violations and the number of alleged violators in an economy where at least 59 million adults are participating in flexible opportunities.<sup>19</sup> Another helpful statistic to show widespread harmful practices would be for the Commission to disclose the number of cases the Commission brought under Section 13(b) to obtain equitable remedies and the amount of money it returned over the last 10 years to consumers for unfair and deceptive earnings claims.

Without substantial evidence of widespread unfair and deceptive earnings claims and requisite harm to consumers, the Commission should refrain from a new industry-wide rulemaking on earnings claims.

### ***Earnings Claims are Widely Used Across the Entire Economy***

When examining the need to further regulate earnings claims advertisements the Commission should carefully consider how such regulation impacts the entire economy. It is a fundamental aspect of any developed marketplace for workers and businesses to be concerned with potential earnings that various (money-making) opportunities offer.<sup>20</sup> For example, many highly-skilled individuals often enter into occupations that rely upon trained sales persons or professionals to deliver everyday products or services to consumers and businesses.<sup>21</sup> The competitive marketplace for these types of roles often requires businesses to publish earnings claims information in their career marketing materials to inform potential recruits and applicants. The ANPR fails to offer any substantial evidence or appreciation for the extensive nature of earnings claims throughout the economy, which must be weighed when promulgating a trade regulation rule on the matter. In addition, the ANPR did not adequately show possible regulatory alternatives under consideration by the Commission, as required by Section 18.

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<sup>17</sup> *Id.* At 13957.

<sup>18</sup> *Id.* At 13952.

<sup>19</sup> <https://www.zippia.com/advice/gig-economy-statistics/>

<sup>20</sup> *See e.g.*, <https://www.cnbc.com/2018/07/30/10-industries-where-recent-grads-can-earn-six-figures.html>

<sup>21</sup> *E.g.*, Healthcare and pharmaceutical sales, software technology, real estate, financial services and insurance, telecommunications, energy supply, architecture and engineering, transportation, etc.

## ***The Commission Should Avoid Harmful Unintended Consequences That Hinder Good Faith Actors***

The Chamber agrees that the Commission should follow the required procedural safeguards imposed by Section 18 of the FTC Act. The business community agrees with Commissioner Wilson who expressed concerns about recent process changes for rulemakings at the agency and whether they will lead to a failure to “identify unintended consequences of proposed rules, particularly those that could harm small businesses and marginalized communities.”<sup>22</sup> It is for this reason that the Chamber urges the Commission to consider alternatives to overly burdensome restrictions on businesses, particularly smaller ones, that are legitimately working to reach new earners. Indeed, both Section 18 and the Regulatory Flexibility Act require the Commission to assess the proposed rule’s impact on small businesses and consumers. The ANPR would force all companies, including small businesses, to bear the brunt of burdensome recordkeeping requirements, for example, yet those costs were not adequately discussed in the notice.

The FTC’s proposed aggressive record-keeping requirements and near wholesale rejection of disclaimers lack evidentiary support and would place substantial burdens on constitutionally protected commercial speech that could prevent businesses from making a large variety of truthful claims. The ANPR could create confusion given the Commission’s history of guidance on disclaimers only to declare them ineffective.

Any rulemaking should refrain from impairing the rights of companies and their earnings partners to express legitimate testimonials, especially when it comes to issues of work flexibility and lifestyle. Testimonials allow legitimate companies to provide concrete illustrations of earnings opportunities, to inform the public about the types of non-traditional opportunities that are available, and connect with new partners.

### *General v. Atypical Claims*

The FTC’s ANPR takes a dim view of the value of testimonials “specifically whether a disclaimer can be sufficient to correct a misleading impression, from atypical earnings claims,” because the FTC has not—at this early stage of the rulemaking process—seen “probative evidence that disclaimers effectively cure atypical earnings claims.”<sup>23</sup> But rather than propose a targeted rulemaking to address the types of problematic disclaimers that the Commissioner has encountered, the sweeping recordkeeping and substantiation requirements proposed in the ANPR would saddle industries that have been a lifeline in the economy.

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[https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf)

<sup>23</sup> 87 Fed. Reg. 13953.

To better tailor the proposed rule to the perceived harm, the substantiation requirement should be confined to testimonials that are prone to being inappropriately generalized across a population. For example, claims by earners stating that they make a certain dollar amount per day could be at risk of inappropriately generalizing claims. On the other hand, no substantiation is needed for claims that describe obviously individualized experiences. In those cases, a clear notice provides fair notice to consumers. The consumer will understand from the context and disclaimer that the testimonial does not represent a generalized statement about the average earner experience.

### *Lifestyle Claims*

The Commission seeks comment on “whether, if at all, lifestyle claims should be addressed by a rule” and includes examples like “getting to go on expensive vacations, quitting your job, or buying a luxury car.”<sup>24</sup> More troubling still is the Commission’s suggestion that it would be improper to suggest merely that an earnings opportunity could offer the chance at “more free time.” Whether a claim like that could ever be legally deceptive would, at best, depend on the particular circumstances of an individual case. Imposing a broad substantiation requirement on lifestyle claims like these – or, worse still, suggesting that they are categorically improper – imposes heavy restraints on businesses seeking to offer new earnings opportunities.

### **Conclusion**

The Chamber agrees that consumers should be protected against fraudulent and deceptive practices and that Congress should provide a clear equitable redress process to make consumers whole in these cases in addition remedies already provides in Section 19 of the FTC Act.<sup>25</sup>

At the same time, Congress has imposed important procedural and substantive limitations on the Commission’s rulemaking powers to prevent broad and sweeping economic regulations without evidence of widespread unfair and deceptive practices. FTC must consider alternatives and should examine unintended consequences. To meet the requirements of section 18 of the FTC Act, the Commission should itself provide concrete data to substantiate that there is a widespread prevalence of unfair and deceptive practices and then only adopt a rule tailored to those practices—rather than impose burdensome recordkeeping and substantiation requirements for earnings claims.

We look forward to working with you in a manner that protects consumers and due process.

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<sup>24</sup> *Id.* At 13954.

<sup>25</sup> [https://www.uschamber.com/assets/documents/211215\\_ConsumerProtection-andDueProcessAct\\_Sen.-Lee.pdf](https://www.uschamber.com/assets/documents/211215_ConsumerProtection-andDueProcessAct_Sen.-Lee.pdf).

Sincerely,

A handwritten signature in black ink that reads "Jordan Crenshaw". The signature is written in a cursive style with a long horizontal flourish at the end.

Jordan Crenshaw  
Vice President  
Chamber Technology Engagement Center  
U.S. Chamber of Commerce