

FTC Proposes Rulemaking to Enhance Its Ability to Seek Civil Penalties for Deceptive Earnings Claims

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A year after the Supreme Court's *AMG Capital* decision put a halt to the Federal Trade Commission's (FTC) power to seek monetary relief under Section 13(b) of the FTC Act, the Commission is deploying new tools to seek such relief. The FTC's new rulemaking initiative seeking monetary penalties for misleading earnings claims makes clear the FTC is not going to just accept the *AMG Capital* decision without a fight.

The FTC's post-AMG Capital efforts

In April 2021, the Supreme Court issued its *AMG Capital* decision and rejected the FTC's authority to obtain monetary relief under Section 13(b), drastically limiting the FTC's power to obtain monetary consumer redress. Shortly after the *AMG Capital* decision, the FTC asked Congress to amend the FTC Act to grant the FTC authority to obtain monetary relief under Section 13(b). While it waits for legislative action, the FTC has announced several initiatives designed to enhance the agency's ability to obtain monetary relief, including "developing both unfair methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices."¹

On February 17, 2022, the FTC held a virtual open meeting and unanimously voted to issue an Advanced Notice of Proposed Rulemaking (ANPR) Concerning Deceptive Earnings Claims in the Federal Register, which was ultimately issued on March 11, 2022.² The ANPR did not propose the text of the rules and instead proposed questions for public comment. However, the questions and the FTC's commentary are a good indication of what the FTC's interests are and what the new rules may ultimately look like. Specifically, the questions and commentary show the FTC's interest in regulating the use of disclaimers, requiring companies to provide actual earnings data to recruits, limiting the use of testimonials, and providing specific guidance regarding the substantiation needed to make an earnings claim. The ANPR public comment period **closes in just three weeks, on May 10, 2022.**

The FTC is not being coy about identifying the targets of this proposed rulemaking. In her opening statement, FTC Chair Lina Khan named "multilevel marketing schemes that lure in aspiring entrepreneurs, false marketing from for-profit schools targeted at hopeful students, or deceptive representations from gig' platforms that draw workers" as targets of the proposed rules.³

What this means

Currently, the proposed rules are broad and amorphous. However, if promulgated, the rules would strengthen the FTC's ability to obtain monetary redress against direct selling companies by opening the door to civil penalties in addition to ordinary money damages.

Under Section 5 of the FTC Act, the FTC can ordinarily obtain monetary damages for violations in the forms of restitution for victims and disgorgement of ill-gotten gains, after satisfying the administrative procedures. Under Section 5(m)(1)(A) of the FTC Act, however, the FTC can tack on **up to \$46,517** in civil penalties for **each knowing violation** of FTC rules.^[1] By promulgating rules, the FTC can place its targets on constructive notice of whether certain conduct constitutes a violation. Thus, knowledge can be imputed to companies despite actual awareness, particularly companies that regularly deal with FTC compliance and can be expected to know FTC rules, like direct-selling companies. As the FTC continues to search for other means of executing its authority after *AMG Capital*, it is likely to continue to propose additional rules to bring specific conduct within reach of the civil penalties provided by Section 5(m)(1)(A) by putting companies on constructive notice.

Notably, the FTC does not necessarily need its proposed final rule to cause problems for direct sellers when it finds misleading claims. The FTC can still initiate an action and argue that a direct seller committed a practice that it knew to be unfair or deceptive based on prior FTC orders or warning letters. And despite *AMG Capital*, the FTC can still inflict significant pain on its targets through injunctive relief under Section 13(b) and/or administrative proceedings under Section 5. The FTC's proposed final rule would simply strengthen the FTC's claims for additional civil penalties.

What you can do

A final rule will likely take well over a year to finalize, as the procedures for FTC rulemaking are cumbersome. Direct-selling companies, however, should **consider taking action now** by submitting comments, suggestions, and concerns to the FTC before May 10, 2022. Public comments will help shape the new rules, carve out exceptions for conduct that is not deceptive or unfair, or dissuade the FTC from pursuing the rules altogether. If you wish to engage in the public comment process, you can file a comment online or mail a comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

In addition to commenting on the proposed rules, it is important to take steps now to prevent the FTC from targeting your company, its executives, and top distributors. Audit your compliance function to ensure it is finding, resolving, and punishing misleading product and earnings claims quickly and efficiently. Winston has extensive experience with such audits and would be happy to help your company reduce its risk of becoming the FTC's next target.

^[1] See FTC, Statement of Regulatory Priorities 1 (Dec. 10, 2021), available at https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

^[2] Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951 (proposed Mar. 11, 2022) (to be codified at 16 C.F.R. 462), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-11/pdf/2022-04679.pdf>.

^[3] FTC, Remarks of Chair Lina M. Khan Regarding the Advance Notice of Proposed Rulemaking on Earnings Claims Commission File No. R111003 1 (Feb. 17, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/r111003khanremarksearningsclaimsanprm_0.pdf.

^[4] FTC, *FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2022* (Jan. 6, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2022>.

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