

The complaint notes that Lyft in 2021 faced a significant shortage of drivers warning internally of a “supply crunch.” To address this shortage, the company launched a marketing campaign aimed at attracting more drivers to the platform and urging current drivers to work longer hours. To do so, Lyft made aggressive claims on social media and elsewhere about how much drivers could earn on the platform. For example, the company targeted New Jersey residents with claims that drivers could earn up to \$34 an hour. In fact, median earnings in New Jersey were only \$25 an hour. Lyft advertised to Atlantans they could earn “up to \$29/hour.” Yet at least four out of five drivers in this region were unable to earn that amount.

As the complaint notes, these disparities were no honest mistake. Lyft carefully tracked drivers’ actual earnings, including how long they were logged in, how much they earned in tips and incentives, and median earnings for a 28-period. Rather than advertising drivers’ typical or median earnings, Lyft systematically advertised what the top fifth of drivers would earn. And the company included tips in this calculation, even though many drivers were likely to believe that the tips they earned would be additional to the hourly earnings advertised by the company.

The complaint alleges that Lyft also relied on an “Earnings Guarantees” promotion that falsely suggested drivers would receive a specific lump-sum bonus if they completed a required number of rides within a specific timeframe. Typical ads for the promotion would guarantee drivers could earn a certain amount if they completed a certain number of rides, such as \$2,200 for 140 rides in their first month of driving. But this promise was illusory. First, the guarantee required only that Lyft cover the difference between what drivers earned and what was guaranteed. Thus, as Lyft acknowledged internally, “the face values [of the ads] are much higher

[events/news/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited-prospective-drivers-exaggerated-earnings](https://www.ftc.gov/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited-prospective-drivers-exaggerated-earnings) In 2021, in an action initiated by Trump-appointed Chair Joe Simons and brought over the finish line by Acting Chair Slaughter, the FTC reached a settlement with Amazon paying more than \$60 million to Amazon Flex drivers whose tips were allegedly illegally withheld. Press Release, Fed. Trade Comm’n, Amazon To Pay \$61.7 Million To Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feit) (11/13/21) (-2.7

than the actual payout.¹⁰ Second, Lyft advertised these guarantees knowing that only about one in five drivers would ultimately qualify for a bonus.

For Lyft, this campaign was a success. As the complaint notes, the company's earnings claims increased leads for new drivers by about 24% and its Earnings Guarantees would spur more drivers to work more hours, while ensuring—by design—that most drivers would not actually receive a payout.¹¹

For drivers, Lyft's campaign was highly misleading. From January 2021 to April 2022, Lyft received tens of thousands of complaints from drivers reporting confusion about the Earnings Guarantees. In one complaint, for example, a driver stated, "That is not right and it's not fair false information on [Lyft's] behalf. . . This is complete false advertisement . . . [Y]our promotion that was offered to me was very misleading. It seemed like if I completed 15 rides I would instantly receive an extra \$125." Another driver complaint to Lyft stated, "I'm going to need Lyft to reference the guarantee thing differently and not put it as you getting this amount for a certain number of rides because it makes it confusing between [earnings guarantees and bonuses]." By no later than May 2021, Lyft employees who directly interact with drivers were escalating drivers' concerns about Earnings Guarantees internally at Lyft. But it was not until months later, in November 2021, that Lyft took any action to revise its Earnings Guarantee. Lyft's revised ads, however, failed to reduce driver confusion, and the company continued to receive thousands of complaints every month.¹²

These complaints along with Lyft's internal data should have put the company on notice that drivers were likely to be misled. The FTC also issued the company a reminder. In October 2021, the Commission sent Lyft a Notice of Penalty Offenses ("NPO") that Notice included a synopsis of the relevant law on deceptive earnings claims, a synopsis that had been voted out unanimously by the Commission.¹³ The Notice stated that it is an unfair or deceptive trade practice to make false, misleading, or deceptive representations concerning the earnings that may be anticipated by a participant in a money-making opportunity. Yet as the complaint notes, Lyft continued making its misleading claims.¹⁴

The order being announced today puts an end to these practices, requires that Lyft: advertise only what typical drivers earn, and clearly disclose the truth about its earnings guarantees,

¹⁰ Complaint at ¶ 33.

¹¹ Complaint at ¶¶ 30-39. This promotion vividly illustrates how the asymmetry of information between gig workers and platforms advantages platforms. An individual driver knows most how much they earn, and even this can be difficult to predict ex ante. The complaint alleges that Lyft did not clearly disclose to them, for example, that working additional hours to be eligible for this promotion is unlikely to yield them any additional compensation. Lyft exploited this fact, designing the promotion to minimize payout while maximizing the number of drivers who work extra hours. Our order is designed to put an end to this gamesmanship.

¹² Complaint at ¶ 29.

¹³ Complaint at ¶ 34.

¹⁴ Complaint at ¶¶ 40-46.

¹⁵ Press Release, Fed. Trade Comm'n, FTC Puts Businesses on Notice that False Money Claims Could Lead to Big Penalties (Oct. 26, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties>.

¹⁶ Complaint at ¶ 47-52.

and provide notice to its drivers about the settlement. Lyft is also required to pay a \$2.1 million civil penalty.

Commissioners Holyoak and Ferguson take issue with this relief, for two stated reasons. First, they contend that the Commission has exceeded its authority by seeking civil penalties after serving Lyft with the NPO. Second, Commissioner Ferguson contends that Lyft's ads touting earnings that at least 80% of drivers would not actually receive cannot have deceived drivers because these ads included the phrase "up to," and that any ~~whom~~ ~~may~~ have been misled by these ads were being unreasonable. ~~Their~~ ~~arguments~~ are contrary to the FTC Act and would undermine the authority Congress has granted the Commission to ~~protect~~ ~~Americans~~ from unfair or deceptive practices.

I.

Three years ago, the Commission unanimously approved issuing a Notice of Penalty Offenses detailing long ~~condemned~~ ~~deceptive~~ practices around ~~making~~ ~~opportunities~~. This bipartisan support was unsurprising. Section 5(m)(1)(B) is not a new authority, and the FTC's approach to enforcing it is not novel either. What was new is ~~the~~ ~~Supreme~~ ~~Court~~ decision announcing that Section 13(b) of the FTC Act did not authorize equitable relief.¹⁷ The Court's opinion cited other FTC Act provisions that unlock monetary relief, including Section 5(m)(1)(B).¹⁸ Unremarkably,

by the Commission in the credit-lending NPO did not contain findings that the conduct at issue were unfair or deceptive.²⁵ Here, by contrast, the NPO sent to Lyft referenced final Commission cease and desist orders holding that practices Lyft allegedly engaged in were unfair or deceptive, and fairly put Lyft on notice that its advertising practices were deceptive.

It is true that the money-making claims the Commission challenged in the past were made in different industries and through different channels than those claims being challenged in this ad iond.47 -f 11 -0 0 c 0.004 Tw [(p)-4 (r)-1 (act)- (c)6 (ac)-6 (ces)(ac)e.47 -f 12 -0 0 w ()Tj [(i—2

Commissioner Ferguson also critiques a consumer study that the Commission made public back in 2012 on “up to” energy-saving claims by windows manufacturers.³³ The study—made in an entirely different context—does not implicate the analysis of Lyft’s “up to” claims. Still, Commissioner Ferguson explains why he believed that study was flawed and uses it as a basis for dismissing the use of empirical studies and subordinating them to his own view of whether a claim is truly ambiguous.

In a case where copy testing is deemed necessary and relevant, experts in the field weigh in on the appropriate design and methodology, based on the specific advertising and questions at issue. This includes the test conditions, specific choices about controls, and other parameters. In his critique of the Bristol Windows study, Commissioner Ferguson concludes that ~~results~~ are nonsensical because different versions of the ads did not produce any statistically significant differences. But that does not render the results nonsensical. Different words and presentations may very well lead to the same overall net impression. In fact, that is precisely the point. An advertiser who seeks to follow the law needs to ensure that whatever choice of words they use, the final net impression

