



Office of Commissioner
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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

claims—a question on which the Commission appears to have articulated at least three inconsistent standards.

The meaning of “up to” claims is highly contextual. Consider some examples. The first is a claim that a particular truck can “tow up to 12,000 pounds.” A reasonable person would read such a claim as promising that the truck can safely and re-60 Tc 0.0y alp t w la sf000 pound

Today's order requires Arise to provide substantiation to showing that future "up to" claims are "*typical* for consumers similarly situated to those to whom the Claim is made."²² I am unclear on whether this substantiation requirement is different from "likely to achieve."

Substantiation of "up to" claims raises questions beyond the quantum of substantiation required to comply with Section 5. For example, we must determine which subset of consumer outcomes is relevant for measuring the typicality of the promised performance. Some "up to" earnings claims, for example, might reasonably be premised on some level of diligence, competence, or commitment by consumers who use the product or service, such that measuring an hourly earnings claim against the results of agents who worked only for a single hour or whose work performance was unusually poor might be unreasonable. It would similarly be odd to measure product-performance claims against the performance experienced by consumers who unreasonably misused the product. (If that misuse were the responsibility of the seller's poor design or instructions, however, then relying on those results may not be unreasonable.) Finally, we would have to determine whether an "up to" claim would be substantiated if a relatively small number of consumers achieved the maximum figure, but a much larger proportion got very close.

I do not today take a position on these perplexing questions, nor on the Commission's shifting answers.²³ I write only to ensure that my vote in favor of this complaint and stipulated order is not interpreted as having done so.

²² Stipulated Order at 6 (emphasis added).

²³ The Chair's statement observes that in 1975, the Commission alleged that a claim that workers "earn up to \$350" was deceptive because "few" individuals actually earned that amount.