FTC Settlement Offers Plenty to Think About Regarding “Up To” Advertising Claims

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I counsel many clients on advertising compliance, and one frequent topic of discussion in that work relates to use of “up to” and “as low as” advertising claims. Companies naturally want to give this information to potential customers because it reflects the best case scenario – the most convincing reason to pick this company over its competitors. One potential concern with these claims, however, is that they will be assessed under the federal regulators’ deception standards. These standards prohibit express or implied representations that are likely to mislead consumers acting reasonably under the circumstances about a material fact. How can we know when an “up to” or “as low as” claim may have run afoul of this test? The FTC offered new guidance for answering this question in a settlement announced on July 2, 2024, with Arise Virtual Solutions, Inc.

Arise Virtual Solutions advertised a work-at-home business opportunity, offering consumers the chance to work as a freelance customer service representative. Arise claimed that consumers could earn up to $18 per hour. The FTC’s complaint against Arise asserted that these earnings claims were unlawfully deceptive because virtually no consumers earned this much. The complaint alleges three separate causes of action arising from Arise’s “up to” claims. They all assert that consumers reasonably interpreted the claims to mean that they were likely to earn $18 per hour. The complaint also claims that Arise violated federal law because it did not have proper substantiation for this “likely to earn” interpretation when it advertised the potential earnings. This indicates that companies making “up to” or “as low as” advertising claims should have support showing that consumers are likely to achieve that best possible outcome.

The FTC’s newest commissioner, Andrew Ferguson, concurred with the decision to accept the settlement in this matter, but he issued a statement assessing this “likely to achieve” standard that the FTC adopted to evaluate Arise’s “up to” earnings claim. He noted that this was at least the third FTC standard for assessing an “up to” claim in advertising, and he was concerned that this issue might benefit from more clarity. Quoting a case from 1983 and citing to many more since then, Commissioner Ferguson explained that the FTC’s enforcement history had long taken the position that “up to” claims were judged by whether “the maximum level of performance claimed can be achieved by an *appreciable number* of consumers.” The FTC has not defined the term “appreciable,” but Commissioner Ferguson reached for his dictionary to say that it refers to a non-negligible amount. Given how the FTC standard has evolved more recently, this “appreciable” standard would have been the easiest one for companies to satisfy.

In 2012, in the context of “up to” claims used to advertise savings from the use of energy-efficient

windows, the FTC required settling defendants to have support showing that all or almost all consumers were likely to achieve the maximum advertised benefit. Later in 2012, the FTC released a study purportedly showing that reasonable consumers interpreted “up to” claims to mean that they would achieve the maximum benefit or that most or about half of consumers would experience that result. The FTC interpreted this study to mean that companies making “up to” advertising claims should be able to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances.

One might think that there is a significant leap between the FTC’s prior “appreciable number” standard and its more recent “likely to achieve” standard. However, it appears that FTC Chair Lina Khan does not see it that way. In response to Commissioner Ferguson’s statement, she issued a statement of her own claiming to be confused by his confusion regarding the FTC’s shifting standard. She saw no lack of clarity to complain about because “up to” claims, like all advertising claims, have always been subject to the FTC’s deception standard. In her view, companies should not struggle to determine whether their “up to” claims are likely to mislead reasonable consumers, even while she pointed out that this analysis is necessarily context-specific.

Chair Khan also pointed to a 1996 FTC case that found that consumers interpreting “up to” earnings claims might reasonably believe that the statements of maximum earnings potential represent typical or average earnings. (Chair Khan’s statement does not explain how an “up to” claim can reasonably be interpreted as presenting the average outcome.)

Consistent with the Chair’s position, the FTC’s settlement with Arise requires the company to have substantiation showing that any earnings claims are typical for consumers similarly situated to those to whom the earnings claim is made. This is another standard by which “up to” claims may be judged under the FTC Act, alongside the “appreciable number” standard, the “all or almost all” standard, and the “likely to achieve” standard. A footnote in Commissioner Ferguson’s statement attempts to interpret the FTC’s 2012 guidance regarding “up to” claims: a consumer should be more likely than not to achieve the advertised performance – yet another articulation of this standard.

It is not realistic to expect the FTC to set quantifiable tests for applying the statutory prohibition on deception. In this case, however, Arise’s cost of getting the standard wrong cost it a $7 million monetary judgment, which the FTC will use to redress consumers. For that reason, companies contemplating “up to” or “as low as” advertising claims should proceed with caution. They need to look carefully at their substantiation supporting their claims, as well as each claim’s wording. They need to consider how the FTC will assess their claims and their support. And they also need to think about which test the FTC will apply to their claims: Will the FTC require that an “appreciable number” of consumers achieve the best advertised result? Or that the best advertised result is “typical or average”? Or that “all or almost all” consumers are “likely to achieve” it? We should expect the FTC to continue bringing deception cases in this area, but the standard the FTC will use to assert a law violation is, unfortunately, a work in progress.

FTC Arise Press Release: https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-takes-action-against-gig-work-company-arise-virtual-solutions-deceiving-consumers-about-pay

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