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

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

Lyft, Inc., FTC Matter No. 2223028

October 25, 2024

When the Commission acts, it must act within the scope of the authority granted by Congress. I do not support the Commission's settlement with Lyft, Inc., because it exceeds the Commission's limited authority under Section 5(m)(1)(B) of the FTC Act to obtain civil penalties.

Congress authorized the Commission, as part of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975,[1] to seek civil penalties, in certain circumstances, "against parties not themselves subject to an outstanding Commission cease and desist order."[2] To bring an action under Section 5(m)(1)(B), the Commission must satisfy a specific, two-part test as to the defendant's "actual knowledge" of its unfair or deceptive practices. The Commission must demonstrate that: (1) the Commission has previously determined in an adjudicated proceeding that "such" act or practice is unfair or deceptive; and (2) the conduct violates Section 5's prohibition on unfair or deceptive practices.[3] The defendant is entitled to *de novo* review of issues of fact and a court must also review any determination of law made by the Commission in the prior proceeding upon request of any party to such action.[4]

Counts III and IV of the complaint allege that Lyft had the requisite "actual knowledge" with respect to its allegedly deceptive "up to" and "earnings guarantee" claims, because Lyft received a Notice of Penalty Offenses ("NPO") Concerning Money-Making Opportunities,[5] which summarized and enclosed FTC cases concerning money-making opportunities adjudicated

[1] Magnuson-Moss Warranty-FTC Improvement Act. Pub. L. No. 93-637, 88 Stat. 2183 (1975).
[2] David O. Bickartt, *Civil Penalties under Section 5(m) of the Federal Trade Comm'n Act*, 44 U. CHI. L.R. 761, 762 (1977).
[3] Specifically, this section provides:

> (B) If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
> (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

15 U.S.C. § 45(m)(1)(B).
[4] *Id.* § 45(m)(2).
[5] Penalty Offenses Concerning Money-Making Opportunities, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/notices-penalty-offenses/penalty-offenses-concerning-money-making-opportunities (last visited Oct. 1, 2024).

between 1941 and 1980.[6] Part V of the proposed order provides for a $2.1 million civil penalty based on Lyft's alleged violations of Section 5(m)(1)(B).

Strikingly, the complaint is nearly devoid of facts establishing the similarity between Lyft's conduct and the conduct described in the NPO that would establish that Lyft "engage[d] in *such* act or practice," *i.e.*, the act of practice described in at least one of the prior FTC cease and desist orders from 1941 to 1980.[7] The requisite similarity between this matter and any prior order is not self-evident. Indeed, interpretation of and substantiation for "up to" claims is a difficult, fact-intensive issue and, as my colleague Commissioner Ferguson has previously noted (and explains here again), the Commission's substantiation requirements for "up to" claims have shifted meaningfully over time.[8]

Here, as Commissioner Ferguson persuasively explains, Lyft had a reasonable basis for its claims, because an appreciable number of consumers did in fact earn the amount cited in Lyft's "up to" claim.[9] Receipt of a synopsis of many decades-old cases involving earnings claims for different products in different contexts with differing levels of substantiation did not put Lyft on notice that consumers would be deceived by its reasonable claims and that its substantiation would not be quite up to muster under the Commission's current standard. Lyft, in short, did not have "actual knowledge" *either* that its conduct was inconsistent with a prior FTC cease and desist order from decades ago *or* that its conduct was unfair or deceptive.

Chair Khan argues that by expecting the complaint to show some similarity between the misconduct alleged and the NPO, I am imposing "additional requirements" that do not exist in the statute.[10] Not so. Requiring some similarity between a final Commission cease and desist order and the misconduct alleged is necessary to demonstrate that Lyft had the "actual knowledge that *such* act or practice is unfair or deceptive and is unlawful [under a prior cease and desist order]."[11] If the conduct is not similar, the defendant cannot possibly have "actual knowledge" that its conduct was both unlawful *and* contrary to a prior Commission order.

This pleading deficiency is troubling not only for the outcome of this case but also for the Commission's approach to monetary settlements more broadly. Before the Supreme Court's

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[6] Compl. ¶¶ 66-73.
[7] 15 U.S.C. § 45(m)(1)(B) (emphasis added).
[8] Concurring Statement of Comm'r Andrew N. Ferguson, *Arise Virtual Solutions, Inc.*, FTC Matter No. 2223046, 2-4 (July 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/arise-ferguson-statement-07-01-2024.pdf; Dissenting Statement of Comm'r Andrew N. Ferguson, *Lyft, Inc.*, FTC Matter No. 2223028, 3-4 (Oct. 24, 2024) [hereinafter "Ferguson Lyft Statement"].
[9] Ferguson Lyft Statement at 4-6.
[10] Statement of Chair Lina M. Khan, *Lyft, Inc.*, FTC Matter No. 2223028, 5 (Oct. 24, 2024) [hereinafter "Khan Lyft Statement"]. Chair Khan relies on the unpublished 1983 district court decision in *FTC v. Sears, Roebuck & Co.*, No. 81-A-503, 1983 WL 1889 (D. Colo. Oct. 18, 1983). *Sears* acknowledged that the purpose of Section 5(m)(1)(B) was "to deter the same type of acts and practices as those determined to be unlawful in a prior proceeding." *Id.* at *4. While *Sears* questioned the specificity required in those prior Commission orders, *id.* at *3, that was a different question from whether *Sears* had actual knowledge that its acts or practices were similar to those found to be unlawful. Indeed, *Sears* denied summary judgment because facts relating to Sears' "knowledge of the law" still remained to be developed. *Id.* at *6.
[11] 15 U.S.C. § 45(m)(1)(B) (emphasis added).

decision in *AMG*,[12] the Commission did not routinely allege violations of Section 5(m)(1)(B), preferring to obtain equitable monetary relief for consumer redress under Section 13(b) of the FTC Act. *AMG*, which held the language of Section 13(b) does not authorize the Commission to obtain equitable monetary relief,[13] changed Section 5(m)(1)(B)'s appeal. Following *AMG*, the Commission sent NPOs to thousands[14] of companies on a range of topics,[15] and began to allege violations of Section 5(m)(1)(B) based on the receipt of these notices in numerous complaints—without any apparent attempt to link the defendant's conduct to that of the prior FTC case.[16]

I agree that we should evaluate using every tool that Congress has given us to protect consumers. As Chair Khan notes, three years ago, the Commission unanimously approved issuing the NPO at issue here.[17] And for good reason: providing information to businesses about the Commission's law enforcement effort is always valuable. But unanimous support for sending notices does not entail unanimous support for *imposing civil penalties* based solely on receipt of that notice, no matter the dissimilarity between the practices described in the notice and those of the defendant. Our unanimous desire to obtain money does not justify the current Majority's decision to transform a limited tool requiring a fact-specific demonstration of "actual knowledge" into what is in effect a cross-market rulemaking.

Where Congress has given the FTC rulemaking authority—including in the very statute creating Section 5(m)(1)(B), which also created Section 18—it has done so with important procedural guardrails that forestall nondelegation concerns that might otherwise exist.[18] For

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[12] *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021).
[13] *Id.* at 70.
[14] *See, e.g.*, Fed. Trade Comm'n, Press Release, *FTC Puts Businesses on Notice That False Money-Making 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 (noting that the FTC sent the notice to more than 1,100 businesses); Fed. Trade Comm'n, Press Release, *FTC Warns Almost 700 Marketing Companies That They Could Face Civil Penalties if They Can't Back Up Their Product Claims* (Apr. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-warns-almost-700-marketing-companies-they-could-face-civil-penalties-if-they-cant-back-their; Fed. Trade Comm'n, Press Release, *FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements* (Oct. 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements (more than 700 companies).
[15] Notices of Penalty Offenses, Fed. Trade Comm'n (collecting Notices on Misuse of Information Collected in Confidential Contexts, Money-Making Opportunities, Substantiation, Endorsements, Education), https://www.ftc.gov/enforcement/penalty-offenses (last visited Sept. 23, 2024).
[16] I have been at the Commission for about six months. During that time, the Commission has already announced numerous settlements including alleged violations of Section 5(m)(1)(B) based on receipt of an NPO. *See, e.g.*, Compl., *FTC v. Care.com*, No. 1:24-cv-987 (W.D. Tex. Aug. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/carecomcomplaint.pdf (Count V); Compl., *FTC v. NRRM, LLC*, No. 4:24-cv-1055 (E.D. Mo. July 31, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/NRRM-dba-Carshield-Complaint.pdf (Count VII); Compl., *FTC v. Arise Virtual Sols., Inc.*, No. 24-cv-61152 (S.D. Fla. July 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/arise_complaint.pdf (Count VII). I have voted in support of these cases because there were other appropriate bases for monetary relief in the orders, such as violations of the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405 (*Care.com*) or the Commission's Business Opportunity Rule, 16 C.F.R. Part 437 (*Arise*), or the Telemarketing Sales Rule, 16 C.F.R. Part 310 (*Carshield*).
[17] Khan Lyft Statement at 3.
[18] *Cf.* Dissenting Statement of Comm'r Andrew N. Ferguson, *In re Non-Compete Clause Rule*, FTC Matter No. P201200, at 20-22 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf (describing nondelegation doctrine).

example, for certain rulemakings, such as the rule implementing the Children's Online Privacy Protection Act,[19] the Commission must follow the notice-and-comment requirements of the Administrative Procedure Act.[20] For other rulemakings, the Commission must obey the requirements of Section 18 of the FTC Act,[21] which mandates, among other things, that the unfair or deceptive acts or practices are "prevalent," hearings be conducted under certain circumstances, and that the Commission issue certain public notices along with a statement or basis and purpose that contains numerous items, including a statement of the economic effect of the rule.[22] These "guardrails" are crucial to maintaining the balance of authority between the Legislative and Executive Branches that the Constitution requires.[23] If the Commission can issue a *de facto* market-wide rulemaking via Section 5(m)(1)(B) without these safeguards, the specter of an unconstitutional legislative delegation arises.[24]

No matter whether we dislike the fact, the Commission has limited authority to obtain money for first-time violations of Section 5 of the FTC Act.[25] I support legislation that would grant the FTC authority under Section 13(b) to obtain redress or disgorgement (with whatever guardrails Congress deems fit) because I believe that would benefit consumers. And I support the Commission's use of civil penalty authority *where Congress has granted it*, such as with respect to the Telemarketing Sales Rule[26] or the COPPA Rule[27]—or under Section 5(m)(1)(B), where the Commission can and does in fact appropriately allege the specific, two-part "actual knowledge" the statute requires.

But I do not believe the Commission should be compensating for its lack of authority by issuing "Notices of Penalty Offenses" to thousands of companies and then seeking civil penalties without demonstrating how the mere receipt of a stock notice summarizing archaic cases transmutes into the specific, two-part "actual knowledge" that Section 5(m)(1)(B) requires. Indeed, I fear that this equivalent of rulemaking will backfire, making Congress far less willing to entrust the Commission with any new authority. In the short term, the Commission may be able to use Section 5(m)(1)(B) to eke out settlements with press releases touting the Commission's victory in

[19] 16 C.F.R. Part 312, implementing 15 U.S.C. § 6501 et seq.
[20] 5 U.S.C. §§ 551–559.
[21] 15 U.S.C. § 57a.
[22] *Id.* § 57a(b)–(d).
[23] *See* Dissenting Statement of Comm'r Melissa Holyoak Joined by Comm'r Andrew N. Ferguson, *In re Non-Compete Clause Rule*, FTC Matter No. P201200, at 1, 5-6 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.
[24] Based on the Commission's reading of its NPO authority, it is unclear to me how there is an "intelligible principle" that "provide[s] sufficiently definite standards" to "guide[] executive discretion to accord with Article I." *Gundy v. United States*, 588 U.S.128, 136 (2019) (plurality op.).
[25] *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[N]o matter how important, conspicuous, and controversial the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").
[26] *See, e.g.*, *FTC v. BlueSnap, Inc.*, No. 1:24-cv-01898 (N.D. Ga. May 1, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/bluesnap (obtaining civil penalties pursuant to 15 U.S.C. § 6102(c)).
[27] *FTC v. NGL Labs, Inc.*, No. 2:24-cv-5753 (C.D. Cal. July 9, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/ngl (obtaining civil penalties pursuant to 15 U.S.C. § 6502(c)).

obtaining money once again. In the long term, however, I fear that the Commission is deeply undermining its authority and legitimacy in both Congress and the courts.[28]

[28] A mere two weeks ago, the Commission publicly released the new Hart-Scott-Rodino Rule (Rule). The Rule, after years in the works, *unanimously* excluded the so-called "labor-related questions" in the updated form. Voting in favor of the Rule means that Chair Khan also publicly favored a rule that removed the labor-related questions in the form. While she now may have received two weeks of public criticism for agreeing to such removal, she cannot run away from her own vote. I stand by my vote, especially the removal of the "labor-related questions," for all the reasons I explained in my statement. Chair Khan also asserts that I am "hostile to the FTC working with federal enforcement partners at the National Labor Relations Board and the Department of Labor." Again, it was Chair Khan who herself unilaterally entered and later *rescinded* the August 28, 2024 Memorandum of Understanding ("MOU") with DOL, NLRB, and DOJ. I am not opposed to working with any and all agencies within the U.S. Government. But realizing those synergies is best achieved when the Commission works together.