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

STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the Business Opportunity Rule
Commission File No. P924214*

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When companies egregiously defraud consumers, workers, and small businesses, they should, at a minimum, redress their victims and forfeit their financial gains. Last month, the Supreme Court ruled that the Federal Trade Commission cannot seek restitution or disgorgement from lawbreaking firms through Section 13(b) of the FTC Act. However, Section 13(b) is not the FTC's only tool. It is long overdue for Commissioners to take steps to use other authorities that allow the agency to make victims whole and that deter misconduct in the first instance.

Unfortunately, many of our predecessors serving on the Commission largely ignored decades of directives and authorities that Congress provided to protect consumers, workers, and honest businesses. Across multiple administrations, Commissioners failed to take even the most basic steps to trigger sanctions for egregious fraud.¹ For example, if Commissioners would simply restate in our consumer protection rules which types of business practices are clearly unlawful, violators would be liable not only for victim restitution but also for civil penalties and damages.²

Today, the Commission is announcing that it will be reviewing the Business Opportunity Rule.³ This rule was intended to ensure that would-be entrepreneurs are not cheated through deceptive earnings claims and other forms of fraud, and it allows the Commission to seek civil penalties, damages, and other relief against violators. However, prior Commissioners voted to exempt multilevel marketers from the rule's requirements.⁴ In addition, because Commissioners have

¹ For example, shortly after NAFTA was passed, Congress authorized the FTC to seek civil penalties against companies that abuse the Made in USA label. However, for more than a quarter-century, the Commission ignored this authority, opting instead to pursue no-money, no-fault settlements that did little to deter fraud. This policy resulted in egregious Made in USA violations, even by firms that the FTC warned. *See* Statement of Commissioner Rohit Chopra In the Matter of Chemence, Inc., Fed. Trade Comm'n File No. X160032 (Dec. 21, 2020), <https://www.ftc.gov/public-statements/2020/12/statement-commissioner-rohit-chopra-matter-chemence>.

² *See* 15 U.S.C. § 57b. *See also* Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers, Fed. Trade Comm'n File No. P144400 (Oct. 19, 2020), <https://www.ftc.gov/public-statements/2020/10/statement-commissioner-rohit-chopra-regarding-report-congress-protecting>; Prepared Remarks of Commissioner Rohit Chopra at Truth in Advertising's Event on the FTC's Remedial Authority (Jan. 11, 2021), <https://www.ftc.gov/public-statements/2021/01/prepared-remarks-commissioner-rohit-chopra-truth-advertising-event-0>.

³ 16 C.F.R. Part 437.

⁴ *See* Final Rule, Business Opportunity Rule, 76 Fed. Reg. 76816, 76818 (codified at 16 C.F.R. Part 437) (Dec. 8, 2011).

failed to implement this sensible safeguard, gig economy platforms that lie to workers about earnings have been able to escape paying penalties.⁵

There is no dispute that lying about earnings claims and other related practices is unlawful.⁶ By formally codifying these prohibitions into rules like the Business Opportunity Rule, the Commission can seek restitution and penalties against multilevel marketers, gig economy platforms, and others who cheat workers and entrepreneurs through false earnings claims, without imposing any new obligations on honest businesses.⁷ Particularly given the loss of the Commission's authority under Section 13(b), it is critical that Commissioners comprehensively review our consumer protection rules and amend them to incorporate widely accepted precedent and prohibitions. This will allow the FTC to make victims whole, and will help turn the page on the agency's perceived powerlessness.⁸

⁵ For example, the FTC recently charged Amazon with stealing its delivery drivers' tips. Through its equitable authorities, the agency was able to return these allegedly stolen tips to Amazon's victims. However, because the Commission has failed for decades to codify prohibitions on income misrepresentations, Amazon was not required to pay any penalty above the tips it pocketed. *See* Statement of Commissioner Rohit Chopra Regarding the Deception of Delivery Drivers by Amazon.com, Fed. Trade Comm'n File No. 1923123 (Feb. 2, 2021), <https://www.ftc.gov/public-statements/2021/02/statement-commissioner-rohit-chopra-regarding-deception-delivery-drivers>; *See also* Press Release, Fed. Trade Comm'n, Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>.

⁶ The Commission has issued orders regarding deceptive earnings claims across many industries, including in for-profit education and multilevel marketing. *See, e.g., In the Matter of E. Detective Acad., Inc., et al.*, 78 F.T.C. 1428, 1461 (1971) (finding it was deceptive for a for-profit school to make false earnings claims); *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1134 (1975) (finding it was deceptive for a multilevel marketer to make false earnings claims).

⁷ In its current form, the Business Opportunity Rule requires disclosures to prospective workers and entrepreneurs in certain contexts. Although these disclosures may not be necessary in all instances, there is no basis to exempt firms from the basic requirement that earnings claims be truthful.

⁸ Another tool that the Commission has long ignored is its Penalty Offense Authority, codified in Section 5(m)(1)(B) of the FTC Act. *See* 15 U.S.C § 45(m)(1)(B). The Commission should act swiftly to trigger civil penalties for for-profit school fraud, fake reviews, and other abuses. *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.