FINANCIAL PUBLISHERS & MEDIA ALLIANCE

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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Suite CC-5610 (Annex B)
Washington, D.C. 20580

Re: Financial Publishers and Media Alliance's Comments to Advance Notice of Proposed Rulemaking Regarding Deceptive or Unfair Marketing Using Earnings Claims (Docket No. FTC-2022-0020; R111003)

To Whom It May Concern:

The Financial Publishers and Media Alliance ("FPMA") respectfully submits the following comments to the above-referenced Advanced Notice of Proposed Rulemaking ("ANPR"). FPMA is a non-profit trade association whose members include digital media outlets and financial publishers that provide informational products and services to the investment community, such as real-time stock quotes, trading education, stock recommendations, and financial news. FPMA was formed to take an active role in shaping the future of the digital financial publishing and protect individual investors from predatory and misleading marketing practices. FPMA was also formed so financial publishers could collectively engage with the Federal Trade Commission ("FTC") to prevent regulatory overreach that could unfairly target financial publishers and injure consumers.

While FPMA shares the FTC's concern with deceptive earnings claims, the FTC should appreciate the real-world business challenges that financial publishers face if they cannot fairly market that they help people to make money – since this is literally what financial publishers do. Nor is this some type of questionable business activity or dubious "money making opportunity." For decades, traditional print and digital financial publishers have helped investors to understand the markets, make more informed trading decisions, and achieve their financial goals. Although many look exclusively to investment advisors to manage their investment portfolios, a growing number of people have turned to financial publishers for valuable information and guidance as they learn to navigate the markets and manage their own investments. In recent years, efficient, easy to use trading platforms such as Robinhood have led to the democratization of Wall Street, an explosion of retail investing and spurred demand for faster access to reliable information about the markets. To help consumers and to market what they do, financial publishers should be able to share their past successes, how they have succeeded in helping people make money, and why they believe they will continue to succeed in helping people make money.

FPMA submits that the well-developed existing law prohibiting deceptive advertising provides sufficient guidance to market participants about what is prohibited and provides sufficient enforcement authority to the FTC to pursue wrongdoers. By contrast, FPMA has serious concern that an Earnings Claim Rule, as a "one size fits all" type of bright line, will be too rigid in regulating First Amendment protected commercial and non-commercial speech, will not accommodate the type of careful, holistic analysis required when evaluating whether a claim has reasonable basis or may be deceptive, and will unfairly treat financial publishers as no different than "gig economy" employers, "business in a box" marketers, multi-level marketers, or other types of disparate businesses. Unlike other so-called "money-making opportunities," there has long been and always will be the opportunity to make money in the financial markets.

A bright-line, cookie-cutter, "one size fits all," Earnings Claim Rule that overlooks important differences between business types will stifle First Amendment protected speech, deter financial publishers from disseminating truthful and accurate information about what they do, and ultimately deprive consumers of valuable information that helps them to navigate financial markets.

I. THERE IS NO NEED FOR AN EARNINGS CLAIM RULE TO INFORM FINANCIAL PUBLISHERS ABOUT WHAT IS PROHIBITED SINCE THE FTC HAS ALREADY DONE THIS AND EXISTING LAW EXPLAINS THIS.

In its ANPR, the FTC states that an Earnings Claim Rule "may further clarify for businesses what constitutes a deceptive earnings claim and what it means to have substantiation for an earnings claim" and will further "inform market participants of their legal obligations by spelling out prohibitions plainly." FPMA takes issue with this. Rather, it appears that this is a pretext and the real reason the FTC seeks to promulgate an Earnings Claim Rule is because the U.S. Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) makes it more difficult for the FTC to obtain monetary relief. The reality is that, while analysis of what is and is not a deceptive earnings claim is exceptionally nuanced and fact-dependent, the law is very well developed and an Earnings Claim Rule would only interfere with its application.

In view of existing law, there is no need to "clarify for businesses what constitutes a deceptive earnings claim." FPMA and its members understand that the FTC does not want cherry-picked past trade recommendations or testimonials without conspicuous disclosure about what is typical. FPMA and its members likewise understand that the FTC does not want future earnings claims that promise any particular return or rates of return and that any future earnings claims must always have a reasonable basis. These expectations are clear, they are grounded in existing advertising and consumer protection law, and they are already being addressed by the financial publishing community and the FTC.

Section 5 of the FTC Act declares unlawful, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). Pursuant to Section 5 of the FTC Act, the FTC has diligently pursued enforcement action against investor education or financial publishing businesses making alleged deceptive earnings claims. In recent years, these actions include: *FTC v. OTA Franchise Corp. et al*., 8:20-CV-00287 (C.D. Cal.) where defendants were required to pay approximately $10 million and enjoined from making

deceptive earnings claims; *FTC v. Agora Financial, LLC et al.*, 1:19-cv-03100-SAG (D.Md.), where defendants were required to pay over $2 million and enjoined from making deceptive earnings claims; *FTC v. RagingBull.com, LLC, et al*., 1:20-cv-3538 (D.Md.) where the defendants were required to pay $2.425 million and enjoined from making deceptive earnings claims; and most recently *FTC v. Warrior Trading, Inc. et al*, Case No. 3:22-cv-30048 (D. Mass), where defendants were required to pay $3 million and enjoined from making deceptive earnings claims. On December 14, 2020, the FTC also announced "Operation Income Illusion," where the FTC explained it had already brought more than 50 enforcement actions and would bring many more in its mission to "crack[] down on illusory income claims."

On October 26, 2021, several months after the *AMG Capital* decision, the FTC then issued "Notices of Penalty Offenses Concerning Money-Making Opportunities" to over 1,100 businesses that may be promoting "money making opportunities." With this action, the FTC set forth the types of earnings claims it was targeting, identified several past administrative cases in support of the FTC's penalty authority, and informed recipients that they could subject to penalties up to $43,792 (now $46,517) pursuant to 15 U.S.C. § 45(m)(1)(B) and 16 C.F.R. § 1.98(e) for each violation.

Through this activity, the FTC has made very clear what it views to be a deceptive earnings claim and has likewise made very clear that it has ample legal authority to recover from businesses that make deceptive earnings claims. For instance, with the Notices of Penalty Offenses Concerning Money-Making Opportunities, the FTC described:

a. It is an unfair or deceptive trade practice to misrepresent, explicitly or implicitly, that participants will be or are likely to be profitable (i.e., to earn or receive more income through the use of the money-making opportunity than the amount of any purchase price and expenses).
b. It is an unfair or deceptive trade practice to misrepresent, explicitly or implicitly, that a substantial number of participants have made or can make the represented profits or earnings.
c. It is an unfair or deceptive trade practice to represent, explicitly or implicitly, the earnings which may be secured by participants, when the representation is made without knowledge, or with only limited knowledge, of the actual profits or earnings usually and ordinarily received by participants.
d. It is an unfair or deceptive trade practice to misrepresent, explicitly or implicitly, that participants will or are likely to earn any specific amount or percentage.
e. It is an unfair or deceptive trade practice to misrepresent, explicitly or implicitly, that the represented profits or earnings are the ordinary, typical, or average profits or earnings made by participants. This includes by means of the representation of an earnings figure or the attribution of earnings figures to specific participants, both of which impliedly represent that such figures are likely, are earned by a substantial number of participants, or are the typical, ordinary, or average results, absent clear and conspicuous disclosure of the relevant context, such as the time and effort actually expended by participants who made the amount represented, the percentage of participants making the

amount represented, and the amount typically and ordinarily made by participants.

f. It is an unfair or deceptive trade practice to misrepresent the profits or earnings that may be anticipated by a prospective participant by failing to disclose conditions or limitations affecting such income, such as expenses to be borne by the participant.

Most recently, in *FTC v. Warrior Trading, Inc. et al*, Case No. 3:22-cv-30048 (D. Mass), the Stipulated Order for Permanent Injunction, Monetary Judgment and Other Relief ("Stipulated Order") negotiated by the FTC and entered by the district court provided even greater clarity. The Stipulated Order provides:

> "Earnings Claim(s)" means any representation to a consumer, specific or general, about income, financial gains, percentage gains, profit, net profit, gross profit, or return on investment. Earnings Claims include: (1) any chart, table, or mathematical calculation that demonstrates possible results based upon a combination of variables; (2) any statements from which a prospective purchaser can reasonably infer that he or she will earn a minimum level of income (e.g., "earn enough to buy a Porsche," "earn a six-figure income," or "earn your investment back within one year"); and (3) any statements, claims, success stories, endorsements, or testimonials about the performance or profitability of representatives, endorsers, instructors or customers.

The Stipulated Order further provides:

> [Defendants] are enjoined from making any Earnings Claims or assisting others in making any Earnings Claims, expressly or by implication, unless the Earnings Claim is non-misleading, and, at the time such claim is made, Defendants: (1) have a reasonable basis for the claim; (2) have in their possession written materials that substantiate the claim; and (3) make the written substantiation available upon request to the consumer, potential purchaser, or the FTC.

This standard is as clear and precise as it can and should be. FPMA expects that responsible financial publishers can abide by the requirements to not make an earnings claim unless the claim is non-misleading and only if there is a reasonable basis and written substantiation for the claim. An Earnings Claim Rule would add nothing but rigidity, complexity, and confusion.

This does not leave the FTC without authority to obtain monetary relief. The FTC can continue to pursue monetary relief under its notice of penalty offense authority, the Restore Online Shoppers' Confidence Act, the Telemarketing Sales Rule, and the Business Opportunity Rule. If anything, the FTC should use its notice of penalty offense authority to provide meaningful notice to a particular business about the particular advertising at issue, so the business can take prompt action to remedy the advertising at issue or otherwise face enforcement action. Further, the FTC will likely succeed soon in obtaining a legislative fix to address *AMG Capital*, amend Section

13(b) of the FTC Act, and allow the FTC to obtain consumer redress or other monetary relief for violation of Section 5 of the FTC Act.

FPMA stands ready to work with its members and the FTC to ensure the financial publishing community understands and abides by existing law. An Earnings Claim Rule is not needed to inform market participants about existing law, and the FTC should not pursue an Earnings Claim Rule in an effort to overcome *AMG Capital*. As explained above, existing law provides a sufficient framework to address and inform market participants about what is and is not a deceptive earnings claim. As explained below, an Earnings Claim Rule would only complicate existing law, including by raising serious First Amendment concerns

II. AN EARNINGS CLAIM RULE WOULD LIKELY RUN AFOUL OF THE FIRST AMENDMENT, INCLUDING BY FAILING TO ADDRESS COMMERCIAL VERSUS NON-COMMERCIAL SPEECH OVERLAP AND DISTINCTIONS.

The FTC's ANPR should, but does not, address the serious First Amendment implications of an Earnings Claim Rule. To be sure, financial publishers are in the business of providing speech, whether investor education, observations about the financial markets, or specific stock recommendations. The "product" is "non-commercial" speech, whereas the advertising in an effort to sell the product may be deemed "commercial" speech or both "commercial" and "non-commercial" speech, all of which are protected by the First Amendment. *Va. State Bd. of Pharmacy*, 425 U.S. 748, 761 (1976) (speech "is protected even though it is carried in a form that is 'sold' for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money."). An Earnings Claim Rule would necessarily regulate this speech. But it cannot short-circuit the required First Amendment analysis and an Earnings Claim Rule would likely violate the First Amendment if it fails to exclude non-commercial speech from its ambit.

The First Amendment curtails the government's ability to implement content-based restrictions on speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). These restrictions are disfavored and "presumptively invalid." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Thus, the government bears the burden of demonstrating the constitutionality of a speech-restricting law. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–72 (2011). "When the Government seeks to restrict speech based on its content," such prior restraints "are presumptively invalid," *R.A.V.*, 505 U.S. at 382, and "the Government bears the burden to rebut that presumption," *Playboy Entm't Grp.*, 529 U.S. at 816–17. As the U.S. Supreme Court concluded in *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002), "[i]f the First Amendment means anything, it means that regulating speech must be a last—not a first—resort."

To the extent an Earnings Claim Rule seeks to restrain non-commercial speech, it would need to survive strict scrutiny and would be presumed unconstitutional "absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). The strict scrutiny test applied to non-commercial speech is "a demanding standard," *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011), and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible," *Playboy Entm't Grp.*, 529 U.S. at 818. To the

extent an Earnings Claim Rule seeks to restrain commercial speech, it would need to survive intermediate scrutiny which examines if the speech concerns lawful activity and is not misleading, whether the asserted governmental interest is substantial, whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980).

A challenge with an Earnings Claim Rule, a challenge which arises with special force in the financial publishing context, is that the speech at issue may have both non-commercial and commercial elements. For instance, in 2011, a financial publisher may have had the foresight to predict the growth of bitcoin. In a webinar, an experienced, knowledgeable trader with the financial publisher could have stated: "We are now studying a new investing opportunity known as 'cryptocurrency.' We predict that one cryptocurrency will see spectacular growth over the next several months and years, with early investors able to make a fortune. You want this to be you. Our newsletter 'Crypto Opportunities' will tell you exactly what this cryptocurrency is and how you can buy it. You can learn this and subscribe to our newsletter now for just $59 per month." The financial publisher's newsletter could have then repeated these very same earnings claims and also educated subscribers about bitcoin which started at $0.30 per bitcoin in January 2011 and rose to $31.50 by June 2011.

Applying an Earnings Claim Rule, or even existing law, it is not hard to imagine the FTC contending that the financial publisher's webinar as well as the newsletter made deceptive earnings claims. However, the newsletter would constitute non-commercial speech entitled to the highest First Amendment protection, and the webinar would constitute commercial and non-commercial speech likewise entitled to First Amendment protection. It is not hard to imagine the FTC having concerns about the speech, but it is also hard to imagine how an Earnings Claim Rule would accommodate the First Amendment concerns.

An opinion issued March 2, 2020 in *FTC v. Agora Financial, LLC et al.*, 1:19-cv-03100-SAG (D.Md.) addressed these very concerns. The FTC sued Agora over its advertising to promote a book called "The Doctors' Guide" focused on Diabetes prevention and its advertising to promote a book called "Congress' Secret" focused on obtaining government money. The district court recognized that the ultimate product being advertised for sale was speech and specifically non-commercial speech. Given this, the district court declined to enjoin Agora's advertising to the extent that the advertising was intertwined with or an adjunct to the content of each book. The district court relied on *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988), where the U.S. Supreme Court explained, "[r]egulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech...and for the reality that without solicitation the flow of such information and advocacy would likely cease.'" Thus, the district court explained: "The more limited question within the FTC's consumer protection purview, then, is whether Defendants' advertising, or commercial speech, misrepresents their product. In other words, do the advertisements accurately represent the content of [Agora's book], such that consumers can make an informed decision about whether they want to purchase the book?" To the extent that the

advertising accurately represented the content found in the book, this portion of the advertising was not enjoined.

This was the right result. Absent such First Amendment protection, someone could author a book such as "How You Can Make a Fortune in Foreign Currency Trading" but be prohibited from ever advertising the book to consumers even if the advertising accurately represented the content found in the book. The courts have grappled with these First Amendment issues for decades, with thoughtful, extended analysis across countless opinions. No matter how carefully drafted, an Earnings Claim Rule could not possibly address these First Amendment concerns and the reality that commercial and non-commercial speech often overlap.

III. AN EARNINGS CLAIM RULE THAT TAKES A "ONE SIZE FITS ALL" APPROACH WOULD WRONGLY BURDEN FINANCIAL PUBLISHERS, VIOLATE THEIR FIRST AMENDMENT RIGHTS, AND HURT CONSUMERS.

In its ANPR, as with "Operation Income Illusion" and the "Notices of Penalty Offenses Concerning Money-Making Opportunities" in the past, the FTC appears to lump together a diverse array of disparate businesses under a broad category of businesses who promote money making opportunities. However, these businesses are very different, what they sell is different, the likelihood of making money is different, and the demographic and understanding of their consumers are different. An Earnings Claim Rule that fails to recognize these distinctions, and instead takes a rigid, "one size fits all" approach, has the potential to devastate the ability of financial publishers to advertise what they do – providing information and recommendations to help people make money in the markets.

There is a world of difference between a business-in-a-box or multi-level marketer who promises people that they can "get rich quick" working just a few hours a week and a responsible financial publisher who predicts that certain tech stocks available in a newsletter for sale are likely to see substantial growth. Most Americans invest some money during their lifetimes whether in publicly-traded stocks, mutual funds, 401ks, or elsewhere. People have historically made exponentially far more money investing in the markets as compared to work-from-home business opportunities or multi-level marketing. The demographics of the typical consumers are also different. People who do their own trading are typically well educated, motivated to learn and digest information, and understand that the financial markets have qualities that can be analyzed and predicted and likewise have qualities that can be uncertain and unpredictable. Further, FPMA recognizes that all financial publishers are not the same and thus should not be treated the same. A successful trader with a long track record of success should be permitted to share his success, perhaps mention his last vacation, and explain that he thinks he will make others more successful in their trading. A complete novice should not.

These differences are important. What may be an aggressive earnings claim if made by one type of business may not be an aggressive earnings claim if made by another type of business. With advertising by one type of business, a claim may leave consumers with the net impression that they are certain to make money. With advertising by another type of business, a similar claim may leave consumers with the net impression that they will simply be in a better position to make

money. For this same reason, what may be inadequate substantiation if offered by one type of business may be more than adequate substantiation if offered by another type of business. An Earnings Claim Rule that imposes identical bright lines across widely disparate businesses would be a mistake.

For financial publishers, these differences are important especially since the product being advertised for sale is speech, typically in the form of generalized trading advice and trade recommendations. If true, a financial publisher should be able to share that their recommendations have made people money in the past and that they believe their recommendations will make people money in the future. And a financial publisher should be able to share that they are good at what they do – helping people to make money – without fear of violating an Earnings Claim Rule and facing potentially devastating FTC enforcement action.

Further, if an Earnings Claim Rule imposed rigid, "one size fits all" assumptions about net impression or rigid, "one size fits all" requirements for disclosing typicality, it would wrongly treat people in the financial publishing industry different than those in other occupations. Many lawyers have law firm biographies that highlight their past case wins but not losses; yet, the FTC has not proposed a "Case Success Claims Rule" or asserted that potential clients will have the net impression that the lawyer only wins cases. This is likely because the FTC has never considered this to even be an issue or instead because the FTC has simply applied common sense and determined that consumers will not have this impression. In the same way, if a person in the financial publishing industry truthfully shares that they recommended buying Tesla, Amazon, or Zoom in their early stages, the FTC should have the same reaction. The fact that financial publishers help people to make money should not be held against them as they have the same First Amendment rights as any other person in any other occupation.

FPMA cannot envision an Earnings Claim Rule that would fairly include financial publishers, while simultaneously imposing bright-line rules that would apply to financial publishers as well as all variety of other so-called "money making opportunity" businesses. Whether an earnings claim is deceptive is an extremely fact dependent determination. It turns on the type of business making the claim, the other statements made in conjunction with the claim, the nature of the claim in the context of the type of product being offered for sale, the level and type of substantiation underlying the claim, the experience and background of the business making the claim, and the sophistication and background of the consumers who receive the claim. The existing law prohibiting deceptive advertising is far better suited to address these considerations.

IV. FPMA'S RESPONSES TO PARTICULAR REQUESTS FOR COMMENT

The text of the ANPR is quoted in *italics*, followed by FPMA's comments.

1. How widespread is the use of false, unsubstantiated, or otherwise misleading earnings claims by entities or individuals in connection with the offer or sale of a good or service, participation in a job or other work opportunity, or in a business, investment, or other money-making opportunity? Is the practice prevalent among those who make earnings claims? Are there certain business contexts or industries in which the practice is prevalent, or certain business contexts or industries

in which it is not? For example, are deceptive earnings claims prevalent among all businesses that offer work or employment, or just among those in certain industries?

If so, describe the relevant industry or business context and the basis for your position. Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. Provide all evidence that supports your answer.

FPMA has not observed widespread use of false, unsubstantiated, or otherwise misleading earnings claims among responsible financial publishers. These businesses do not typically market themselves as "get rich quick" moneymaking opportunities. Rather, responsible financial publishers emphasize that investing is an inherently risky endeavor that can only be mitigated by access to truthful and reliable market information and trading strategies. Likewise, their subscribers typically understand that the financial markets can be volatile and that predictions are predictions, rather than promises or guarantees.

The challenge becomes how a financial publisher can effectively market themselves without marketing that they are good at helping people make money. As emphasized above, FPMA is concerned that an Earnings Claim Rule would unfairly lump financial publishers together with other so called "money-making opportunities" and unfairly restrict financial publishers from explaining to consumers the information, tools, and strategies that they have developed to make money in the markets. As emphasized above, existing advertising law is better suited for determining when such claims are or are not deceptive.

2. Are there circumstances in which the practices described in Question 1, above, would not be deceptive or unfair? If so, what are those circumstances? Should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not? Provide all evidence that supports your answer.

For the reasons addressed above, the FTC should recognize that financial publishing is different than other so-called "money making opportunities." While the FTC seems to perceive earnings claims about the predicted performance of the financial markets as highly suspect, the FTC must recognize that knowledgeable, experienced traders have dedicated their lives to understanding and making money in the markets and that responsible financial publishers make money by providing valuable information, tools and strategies to consumers. This is true even if a prediction appears bold or does not come to be.

3. Do the practices described in Question 1, above, cause injury to consumers, and if so, how much? Do such practices cause injury to other businesses by unfairly disadvantaging them? Provide any evidence that quantifies or estimates these injuries if possible, including the size of the discrepancy between misleading earnings claims and actual earnings. Provide all evidence that supports your answer.

FPMA agrees that that the use of false, unsubstantiated, or otherwise misleading earnings claims causes injury to consumers. However, FPMA has observed that, in increasing numbers, financial publishers are substantiating earnings claims by disclosing to consumers the full track record of

past trading programs. Also, financial publishers have increasingly emphasized to consumers that trading is inherently risky, that past results are not indicative of future success, and that consumers should not trade with money that they cannot afford to lose. Additionally, FPMA has observed that since *FTC v. Ragingbull.com, LLC, et al.*, many financial publishers with high customer satisfaction and A+ BBB ratings have further improved their refund policies to provide dissatisfied customers with full refunds.

4. Do the practices described in Question 1, above, disproportionately target or affect certain groups, including communities of color or other historically underserved communities? If so, why and how? Provide all evidence that supports your answer.

FPMA has no information with which to respond to Question 4.

5. Please provide any evidence concerning consumer perception of, or experience with, earnings claims that is relevant to the practices described in Question 1, above.

In the ANPR, the FTC explains that disclaimers are often ineffective in avoiding a deceptive earnings claim and that earnings claims that are literally true are often nevertheless deceptive based on the net impression to the consumer. FPMA understands the FTC's position, but submits that the FTC may be viewing financial publishing marketing copy differently than actual consumers. That is, the disclaimer that the FTC views as ineffective may not be ineffective to a consumer and the deceptive net impression the FTC perceives may not actually be what consumers perceive. This is especially true with financial publishing since its consumers are sophisticated, they typically know that predictions are predictions, and they typically know the markets are volatile. Rather than initiating enforcement based on the FTC's assumption that a business' disclaimer was not effective or the FTC's assumption that a claim was deceptive in view of the net impression, the FTC should look to objective and reliable consumer survey evidence.

6. Is there a need for new regulatory provisions to prevent the practices described in Question 1, above? If yes, why? If no, why not? What evidence supports your answer?

As explained above, FPMA submits that new regulatory provisions are not needed. Rather, the well-developed existing law prohibiting deceptive earnings claims provides sufficient guidance to market participants about what is prohibited and provides sufficient enforcement power to the FTC to pursue wrongdoers. As explained above, an Earnings Claim Rule could not possibly accommodate the complex, holistic, and nuanced analysis required under the First Amendment when proscribing speech. Further, the FTC should not seek to promulgate an Earnings Claim Rule in an effort to overcome *AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341 (2021).

7. How should a rule addressing the practices described in Question 1, above, be crafted to maximize the benefits to consumers while minimizing the costs to businesses? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

Yes, although again FPMA submits that new regulatory provisions are not needed. FPMA does not believe that a rule addressing the practices described in Question 1 are able to be crafted in a way that maximizes the benefits to consumers while minimizing the costs to businesses. Instead, the FTC should issue guidance to industry that reflects the unique business realities of particular industries and invest in consumer education and training programs that will assist consumers when evaluating earnings claims so that they can make informed purchasing decisions. *See also* Comments to Questions 8-10.

8. Should the Commission consider additional consumer, employee, independent contractor, and business education to reduce harm to consumers associated with the practices described in Question 1, above? If so, what should such education materials include, and how should the Commission communicate that information to consumers and businesses?

FPMA believes that the FTC should develop additional education and training materials for consumers and industry. The consumer training and education materials should focus on how to evaluate earnings claims and the questions necessary to make informed purchasing decisions. In addition to issuing guidance to industry similar to the Endorsement and Testimonial Guides (see Comment to Question 10), the FTC should develop training and educational materials concerning how it believes the success of a product or service should be conveyed to consumers. FPMA believes that a comprehensive training and education program will reduce the likelihood of harm to consumers by assisting with voluntary compliance and providing consumers the tools necessary to identify potentially deceptive or unsubstantiated earnings claims. FPMA would welcome the opportunity to discuss these issues with the FTC.

9. What alternatives to regulations should the Commission consider to address the practices described in Question 1, above? Would those alternatives obviate the need for regulation? If so, why? If not, why not? What evidence supports your answer?

FPMA believes that the FTC should continue to encourage self-regulation throughout various industries, as self-regulation could obviate the need for formal regulation. Additionally, the FTC should issue guidance to industry explaining the FTC's current enforcement priorities and provide detailed examples of earnings claims that the FTC believes are deceptive. The FTC should pay particular attention to the different kinds of industries that may use earnings claims in marketing copy. Thus, any guidance should provide information and examples relevant to specific industries. FPMA would welcome the opportunity to discuss these issues with the FTC.

10. Should a rule addressing the practices described in Question 1, above, define or describe the substantiation required to make an earnings claim? Why or why not? If so, how should it do so? Should a rule adopt the Business Opportunity Rule's language of "a reasonable basis" for a claim at the time the claim is made, or should it use some other definition? If the latter, what? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

FPMA does not believe that the FTC should define or describe the substantiation required to make an earnings claim in a trade regulation rule because such methods of substantiation are extremely diverse. However, FPMA does believe that it would be beneficial for the FTC to issue guidance concerning how businesses can substantiate earnings claims. Any guidance document should detail the FTC's thinking on the use of backtesting to substantiate trading recommendations and strategies and how backtesting information should be disclosed to consumers. Similarly, the FTC should issue guidance on the use of hypothetical trading examples in marketing materials. FPMA would welcome the opportunity to discuss these issues with the FTC.

11. Should a rule addressing the practices described in Question 1, above, require the preservation or documentation of substantiation? Why or why not? If so, what types of recordkeeping requirements should be required? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

FPMA does not believe that detailed recordkeeping requirements are necessary. The existing law prohibit deceptive advertising already requires that a business have a reasonable basis for making a particular claim. Moreover, a business must have the substantiation to support a claim before making the claim. Additional regulation in this area is unnecessary.

12. What requirements, if any, should a rule impose to address earnings claims made by agents or others interacting with prospective purchasers, employees, independent contractors, or participants on a company's behalf, to address the potential use of misleading claims? How can the Commission ensure that companies effectively monitor the actions of such agents or other persons? Should a rule addressing the practices described in Question 1, above, impose affirmative requirements on companies regarding earnings claims made by their agents or others acting with them or on their behalf? Why or why not? If so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

FPMA does not believe that any new rule imposed to address earnings claims made by agents or others interacting with a prospective purchaser on a company's behalf is necessary to address the potential use of misleading claims. Here again, FPMA believes that, in terms of financial publishers, the companies themselves should be working to address the potential use of misleading claims with their employees and that companies are incentivized to do this because they are liable under established doctrines of respondeat superior.

13. Are there circumstances in which disclaimers or disclosures can effectively dispel a misleading impression regarding earnings or profits, or prevent such an impression? If so, describe such circumstances in detail, including all necessary aspects of such disclaimer or disclosure, such as language, format, or the context in which it is presented. Provide all evidence that supports your answer, or that otherwise addresses the effectiveness of disclaimers or disclosures.

FPMA believes that clear and conspicuous disclaimers or disclosures are effective at dispelling a misleading impression regarding earnings or profits, or preventing such an impression in the first place. FPMA believes that many financial publishers have been effectively implementing two forms of conspicuous disclaimers in their ad copy. The first is the so-called "legal" disclaimer, which tends to appear as a block text disclaimer stating, among other things, that the earnings presented in the ad-copy are truthful, but that trading is inherently risky and that past performance is not indicative of future results. This disclaimer mirrors language mandated by the Securities and Exchange Commission. Second, financial publishers have been employing "plain language" disclaimers, which tend to appear proximately near earnings claims. This type of disclaimer informs consumers that specific showcased performance claims are atypical by using plain language to introduce a product's "top" or "best" results.

14. In the cases the Commission has brought, we have repeatedly seen circumstances where earnings claims convey the impression that the represented earnings are typical. Are there circumstances where they do not? If so, describe such circumstances in detail. Provide all evidence that supports your answer.

FPMA believes that responsible financial publishers have effectively used "legal" and "plain language" disclaimers, proximately near earnings claims, to convey that certain past stock recommendations, trade alerts, or testimonials that concern higher than typical or ordinary success are in fact expressly identified as such. See Comment to Question 13.

15. How should the rule address disclaimers? Are there any circumstances in which a rule should require a disclaimer, such as with atypical earnings claims? Why or why not? If so, describe such circumstances in detail. How should a rule define or describe such disclaimer? Should the rule address conduct that may minimize the effectiveness of any disclaimer, and if so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

While FPMA believes that disclaimers can effectively convey the impression that displayed earnings claims are atypical (see Comment to Questions 13 and 14), it does not believe that the FTC should include a rule requiring the use of disclaimers because whether or not a disclaimer is useful or necessary is fact-specific. If the FTC adopts such a rule, it is almost certain that businesses will begin to include disclaimers around claims that do not convey atypical results. The rule would run the risk of compelling speech and would undoubtedly run into First Amendment challenges.

16. Based on the Commission's enforcement experience, representations of an expensive or otherwise desirable lifestyle—such as images of or references to mansions, yachts, luxury goods or automobiles, exotic or otherwise desirable vacations, or even just having more free time—convey the impression that a money-making opportunity can or will provide participants sufficient income to afford a similar lifestyle. Under what circumstances, if any, do such representations

not convey such an impression? Describe such circumstances in detail. Provide all evidence that supports your answer.

FPMA believes that these claims are nuanced, fact-specific, and not susceptible to a "one size fits all" rule. An important goal of advertising is to be interesting, colorful, and ultimately engaging with the reader. The use of colorful visuals helps toward this. In the context of financial publishing and investing in the financial markets, the reality is also that countless successful traders including countless retail investors do in fact live in mansions, have yachts, own luxury goods, enjoy exotic or desirable vacations, and have more free time because of their investment success. At the same time, FPMA believes the most effective marketing used by financial publishers does not rely on this type of information but rather focuses on the information, tools, and strategies used to succeed as an investor.

17. Should a rule addressing the practices described in Question 1, above, address the use of "lifestyle" claims of the type described in Question 15? Why or why not? If so, how? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

FPMA directs the FTC to its comment to Question 16.

18. Should a rule addressing the practices described in Question 1, above, exempt from its coverage businesses or individuals that are subject to the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule? Why or why not? If so, how and to what extent? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

FPMA does not believe the FTC should implement a rule addressing the practices described in Question 1, at least with respect to financial publishers. However, without knowing what rule the FTC would implement, FPMA cannot say whether the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule should be amended.

19. If a rule addressing the practices described in Question 1, above, is adopted, should the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule be amended? Why or why not? If so, how and to what extent?

FPMA does not believe the FTC should implement a rule addressing the practices described in Question 1, at least with respect to financial publishers. However, without knowing what rule the FTC would implement, FPMA cannot say whether the Business Opportunity Rule, the Franchise Rule, or the Telemarketing Sales Rule should be amended.

20. Should a rule addressing the practices described in Question 1, above, exempt from its coverage any other businesses or individuals? Why or why not? If so, how and to what extent? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence

that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

An Earnings Claim Rule should exempt financial publishers from its coverage. There is too great a risk that their First Amendment protected speech will be chilled, as they will fear making true and accurate claims that they have helped and expect to continue helping people to make money investing in the financial markets. This is what financial publishers do, it is legitimate business activity, and they should be able to market themselves. The FTC can continue to pursue financial publishers it believes have made deceptive earnings claims under existing law. But an Earnings Claim Rule that treats financial publishers as no different than other so-called "money making opportunities" has the potential to stifle all marketing by financial publishers. The FTC would likely not consider a rule restricting lawyers from saying they get good results litigating for clients, a rule restricting fitness trainers from saying they help people become healthier and more fit, or a rule restricting landscapers from saying that they help homeowners to have more attractive lawns. So too the FTC should not promulgate a rule that targets financial publishers, simply because they are in the business of helping people make money.

21. Should a rule addressing the practices described in Question 1, above, include an example earnings disclosure statement that would not be mandatory, but would provide guidance for companies on how to make a lawful earnings claim? Why or why not? If so, what should be contained in the example statement? What are the benefits to consumers, and costs to businesses from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

FPMA does not believe that the FTC should implement a rule addressing the practices described in Question 1, at least with respect to financial publishers. However, if the FTC were to implement such a rule, FPMA believes that it would be beneficial to businesses for the FTC to include a non-mandatory, exemplar earnings disclosure statement. This would provide guidance to businesses as to the FTC's expectations in this regard.

22. Should a rule addressing the practices described in Question 1, above, require that an earnings claim disclosure document be provided to consumers prior to purchase, prior to accepting an offer for work, or at any other time? Why or why not? If so, how should the rule define or describe the required disclosure, the time(s) at which it must be provided, the manner in which it must be provided (so it cannot be hidden or obscured by other paperwork), the languages in which it must be provided, and who must provide it? What are the benefits to consumers, and costs to businesses, and in particular small businesses, from such a rule? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses, and in particular small businesses.

FPMA does not believe that the FTC should implement a rule addressing the practices described in Question 1, especially as to financial publishers. FPMA further believes that the requirement of an earnings claim disclosure document, as described above, would not be practical or workable in the context of financial publishing. This again illustrates FPMA's concern that a "one size fits

all" Earnings Claim Rule, treating very dissimilar businesses as if they are similar, would be a mistake.

23. How prevalent is the deceptive or misleading use of real or purported industry earnings data or statistics in the promotion of money-making opportunities? Provide any evidence, such as empirical data, consumer perception studies, or consumer complaints, that demonstrates the extent of such practices. Provide all evidence that supports your answer.

FPMA does not believe use of deceptive or misleading use of real or purported industry earnings data or statistics is prevalent among financial publishers.

24. Do the practices described in Question 21, above, cause injury to consumers, and if so, how, and how much? Provide any evidence that quantifies or estimates that injury if possible, including any non-financial or indirect injuries to consumers, and including the size of the discrepancy between misleading earnings claims and actual earnings. Provide all evidence that supports your answer.

FPMA believes the reference to "Question 21" may have been a typographical error intended to refer to Question 1. FMPA believes the best evidence of injury to consumers is consumer complaints, as well as BBB ratings. It appears that the FTC often focuses more on its perception of marketing claims than on evidence of actual consumer injury in evaluating whether or not to pursue enforcement actions. FMPA believes the FTC should place greater emphasis on consumer complaints, or the absence of consumer complaints, in evaluating whether or not to pursue enforcement action against a financial publisher.

25. Should a rule addressing the practices described in Question 1, above, include a provision concerning the use of real or purported industry earnings data or statistics? Why or why not? If so, how? Should the coverage of such a provision be limited? If so, how and why? Provide all evidence that supports your answer, including any evidence that quantifies the benefits to consumers, and the costs to businesses.

FPMA does not believe that an Earnings Claim Rule is needed. FPMA also does not believe a provision is needed concerning the use of real or purported industry earnings data or statistics. In the case of financial publishers, often a new product is released that does not have a true industry track record, only because it is a new product. However, financial publishers will often develop products which are back tested over previous markets to test theories in the market.

26. Do existing laws and regulations covering false, unsubstantiated, or otherwise misleading earnings claims affect businesses, particularly small businesses? If so, how? Provide all evidence that supports your answer.

Yes. Especially since Operation Income Illusion, FPMA's members and other responsible financial publishers have rededicated their focus on ensuring that earnings claims are not misleading and have reasonable basis and substantiation. These businesses are committed to complying with Section 5 of the FTC Act, existing advertising law, and the guidance contained in

past FTC consent orders consistent with First Amendment rights. If an additional rule were added to the mix, it would affect business even more and potentially inhibit financial publishers from truthfully and accurately marketing what they do.

27. Are there other commercial acts or practices involving earnings claims that are deceptive or unfair that should be addressed in the proposed rulemaking? If so, describe the practices. How widespread are the practices? Provide all evidence that supports your answer, and please answer Questions 2-9 with respect to the practices.

FPMA has no information with which to respond to Question 27.

28. Do current or impending changes in technology or market practices affect the need for rulemaking? If so, describe the changes and how they affect whether and how a rulemaking should proceed. Provide all evidence that supports your answer.

FPMA has no information with which to respond to Question 28.

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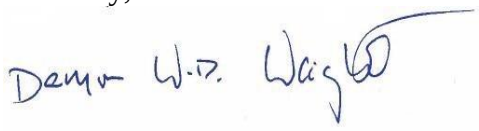
FPMA supports the FTC's interest in helping business and helping consumers. With Operation Income Illusion and the FTC's other recent enforcement actions and initiatives, responsible financial publishers have educated themselves and taken affirmative steps to ensure compliance with Section 5 of the FTC Act. FPMA's fear is that an Earnings Claim Rule would treat financial publishers as no different than other disparate types of businesses, would restrict financial publishers from fairly sharing that they have helped and expect to continue helping people make money in the financial markets, and would thus chill First Amendment protected speech. This would not serve the interests of consumers. FPMA welcomes the opportunity to discuss these issues with the FTC.

Sincerely,



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